IN THE KINGSTON UPON THAMES COUNTY COURT

CASE No. KT903476

BETWEEN

MICHELLE JANE STRINGER

Claimant

and

SIMON COPLEY

Defendant

REASONS OF HIS HONOUR JUDGE MICHAEL COOK FOR HIS JUDGMENT OF 17 MAY 2002

This is an appeal by the Claimant against a detailed assessment of her costs pursuant to an order of 5 December 2000. The appeal is about four discrete issues in respect of which permission to appeal was refused by the District Judge but granted by another Circuit Judge. A disadvantage of costs appeals being governed by CPR Rule 52 is that the former procedure of obtaining the written reasons of the costs officer for his decisions on points in issue has gone, which means that unless the parties make verbatim notes of each of the cost officer's decisions during the course of the assessment, it is necessary to incur the expense of obtaining a transcript of the entire hearing. I have had the advantage of such a transcript on this appeal.

Hourly Rates

Although proceedings were not issued until July 1999 the work covered by the costs to be assessed commenced shortly after July 1996, the date of the road traffic accident which gave rise to these proceedings. Prior to the introduction of the CPR on 26

April 1999, it was the practice of the Surrey Courts in routine cases, such as this, to have a composite expense rate to cover all levels of fee earner, to which was to be added the appropriate mark-up for care skill and attention, usually 50%. The first ground of appeal is that although the District Judge was supplied with details of the routine hourly expense rates allowed by the Surrey Courts during the relevant periods in the litigation before 26 April 1999, he did not apply them. Neither did he apply the recommended hourly rates, which include mark-up, applicable after 26 April 1999. The relevant expense rates being allowed in the Surrey Courts were £75 in 1996 and 1997 and £80 in 1999, prior to 26 April, to which was to be added an appropriate profit mark-up. It appears that no work was done in 1998. The Claimant's bill was based on the normal routine rates with the usual 50% mark-up, resulting in hourly rates of £112.50 and £120.00 during the relevant years. The Defendant conceded £100 per hour for all three years. However, the District Judge allowed only £80 for 1996, £85 to 1997 and £95 for pre-26 April 1999 without any additional mark-up. The amounts allowed were not only considerably less than those claimed and conceded, they bore no discernable relationship to the prevailing composite routine expense rates prevailing in the Surrey Courts at the relevant time, and included virtually no profit mark-up. The District Judge did not explain how he arrived at his figures. In the circumstances I found that the District Judge was wrong in applying the rates that he did, and I substituted the rates contended for by the Claimant. The District Judge found that the appropriate level of fee earner was Grade 2 (now Grade B) for

which the recommended routine hourly rate for the Surrey Courts after 26 April 1999 was £120, and I substituted this figure for the £110 allowed by the District Judge.

Witness Statements

Item 15 of the Bill was:

"Attending the Claimant and the Claimant's cousin (passenger) to take statements and preparation and drafting of the same.
Total time expended: 4 hours 30 minutes £519.75
£ 90.96 VAT".

This work had not in fact been done by a fee earner in the firm of solicitors acting for the Claimant, but by the Litigation Support Agency whom the solicitors had instructed. The Litigation Support Agency had charged the solicitors £250 plus VAT not only for doing the work included in item 15 of the Bill but also for attending at the scene of the accident, preparing a plan and taking photographs (including the cost of the film and processing of about £10) and preparing a locus report (a charge for none of which work, I observe, appears to have been included in the between-the-parties bill). The District Judge was not informed how the time engaged of 4 hours 30 minutes was calculated, and neither have I. The Litigation Support Agency supplied a breakdown of the estimated time spent on the work in item 15, including travelling to Kent from High Wycombe, showing a total in excess of five hours. The actual calculations were not considered by the District Judge, because he disallowed the item in its entirety, and on this appeal I have been simply

invited by the parties to say whether or not the District Judge was wrong to do so.

From the transcript of the hearing it appears that the view of the District Judge was that the charges of the Litigation Support Agency should be treated as a disbursement (although he did not in fact do so) and that the solicitors were not entitled to charge on the basis that the work had been done by a fee earner in their firm. He compared the employment of a support agency with going to a doctor privately, saying "You pay out a fee. What is the fee paid?". However when the Defendants, as the paying party said they were prepared to pay £50 in respect of item 15, the District Judge responded that that seemed rather hard, and he allowed £75. How the District Judge arrived at that figure and whether it was intended to represent a fee or a disbursement is fortunately no concern of mine, because the issue I am called upon to resolve is simply that of principle: were the solicitors entitled to treat the work done by their agents as though it had been done by their own fee earner and charge on this basis?

On the face of it, the District Judge's reaction was understandable - why should a solicitor make a profit out of someone else's work? The answer is that solicitors, as with most commercial enterprises, professional or otherwise, are doing it all the time. They make a profit out of those whom they employ. Otherwise what would be the point or purpose of having employees? Most firms of solicitors employ qualified or unqualified fee

earners for whose work they make an hourly charge to their clients, usually calculated on the cost of the fee earner to the firm, including his share of the overheads, together with an appropriate profit margin. It is a practice which has long been recommended and supported by the Law Society in its publication "The Expense of Time". An increasing number of solicitors, rather than incur the overheads and liabilities of employing fee earners, use outside agencies, as, of course, do many other businesses, to do work for them, but they nevertheless treat that work (for which they are ultimately responsible) as though it had been done within the firm. An historic example of this philosophy is for a firm of solicitors to pay counsel for his advice out of their own pockets, but to charge the client as though the solicitors themselves had given the advice. Another example is enshrined in paragraph 4.16(6) of the Costs Practice Direction which provides: "Agency charges as between a principal solicitor and his agent will be dealt with on the principle that such charges, where appropriate, form part of the principal solicitor's charges". The various threads of this philosophy were drawn together in the judgment of Mrs Justice Hale in *Smith Graham (a firm) v The Lord Chancellor's Department* QBD [1999] NLJR 1443 when she held that a retired police officer not employed by the firm of solicitors who instructed him to carry out investigative work for them was not excluded from the definition of fee earner. She rejected the contention of the Defendant that the police officer as an independent contractor should be treated as a disbursement and not a fee earner. That case concerned the assessment of costs under a legal aid

certificate in criminal proceedings, but the principle and philosophy are of equal application to privately funded civil work. Accordingly, I found the District Judge was wrong to have disallowed this item and restored it in full, the amount not being disputed.

Medical Agency Fee

In routine personal injury cases, where a medical report is required, it has become a common practice to instruct a medical agency to arrange a medical examination of the Claimant, to undertake the collation and obtaining of relevant medical reports, to arrange the appointment with the medical expert and the Claimant, deal with any cancellations or rearrangements, and to deliver the resultant medical report to the solicitors. Because of the specialisation, experience and expertise of the medical agency they are able to do this administrative work, at least as efficiently, expeditiously and economically as most firms of solicitors using their own fee earners. In the present case there were two medical reports on the Claimant, each obtained through a different medical agency. The first was item 22 on the bill for which an invoice was rendered by Medico-Legal Appointments Limited for £140 in respect of the report of Dr Davies. The second medical examination was arranged by Medplan Medico-Legal Reports for which their charge for supplying a report from Mr Muftah was £375 and appeared as item 35 in the bill. The District Judge allowed the charge of Medplan at item 35 in full, but cavilled at that of Medico-Legal Appointments Limited at item 22. On the face of it the only difference

between the two invoices was that Medico-Legal Appointments condescended to particularity, while Medplan did not. The invoice of Medico-Legal Appointments revealed that the total of £140 comprised £90 Dr Davies' fee together with a fee of the agency of £42.55, which with VAT of £7.45 conveniently rounded up to £50 and a total of £140. According to the transcript the District Judge's initial reaction was "It is the usual story, is it not? I [have] never allowed it in the past". This appeal has been conducted on the assumption by both parties that by those words the District Judge meant that he was disallowing the agency's fee on principle and it is on principle that I am invited to make a finding. From the transcript, it is not clear whether or not the District Judge did in fact disallow item 22 on principle. As I have said, he allowed item 35, to which the same principle applies, in full. He also may have distinguished between the two agencies because in his judgment he says "Muftah asked for the GP's notes" whilst in respect of Dr Davies the District Judge recorded "All they did is give the name". In any event, both parties wish me to make a decision on principle, and I am satisfied that there is no principle which precludes the fees of a medical agency being recoverable between the parties, provided it is demonstrated that their charges do not exceed the reasonable and proportionate costs of the work if it had been done by the solicitors. In view of my finding, both parties accepted that this item should be restored in full.

There are however two matters that concern me. First, although the District Judge allowed the charge of Medplan in full, neither

he, nor I, nor the paying party know how much of the sum of £375 was the doctor's fee and how much were the charges of Medplan. To demonstrate the point by taking an extreme, if the doctor's fee were only £75 and Medplan's charges £300, the total of £375 would undoubtedly be unreasonable and disproportionate. It does therefore seem to me important that, whilst there is much to commend the use of medical agencies, it is important that their invoices (or 'fee notes') should distinguish between the medical fee and their own charges, the latter being sufficiently particularised to enable the cost officer to be satisfied they do not exceed the reasonable and proportionate cost of the solicitors doing the work. My second, and lesser, concern is that the invoice of Medico-Legal Appointments for £140 had concealed in it an element of VAT and I have doubts as to whether their account delivered in this way either amounts to a VAT invoice or is an appropriate way of dealing with VAT. The Medplan invoice made no mention of VAT, but perhaps this is because they are not registered for VAT.

I add as a postscript that in view of my finding in respect of the Litigation Support Agency, it would appear that the fees of medical support agencies could also be treated as though the work had been done by the solicitors and charged accordingly.

Proportionality

The last ground of appeal is that the District Judge was wrong in his approach to the application of the requirement for proportionality, which resulted in him reducing the costs he

would otherwise have allowed by some £300 plus VAT. In the present turbulent and controversial costs climate I would hesitate long before saying that anyone was wrong - or, indeed, right! - in their approach to proportionality, certainly before I had the temerity to overturn them on appeal. It is not, of course, a question of whether to substitute my discretion for that of the District Judge, but of whether I am satisfied that he was wrong in the application of the principle of proportionality. There were two aspects of his approach that caused me disquiet. First, his observation that for the recovery of £1,300, £5,500 had been spent on costs which "cried out for some adjustment on proportionality". It was pointed out to the District Judge that the principle of proportionality had already been taken into account in reducing the figure of £5,500 to £2,728.82, of which only £1,600 was the solicitors profit costs. The District Judge then concluded that £1,250 profit costs would be proportionate to the award of £1,300 damages, but he increased his figure of £1,250 to £1,300, thereby making the award of costs virtually identical to the amount of the damages awarded. The detailed assessment took place before the guidance given in *Lownds v Home Office, [2002] EWCA Civ 365* and I am concerned that the approach of the District Judge may have resulted in a double reduction on the grounds of disproportionality, both in respect of the individual items in the bill and the resultant global figure. It is far from self-evident that profit costs of £1,600 are disproportionate to an award of £1,300, which itself was a 50% reduction on the grounds of contributory negligence of an award of £2,600 damages. Despite my concerns, I would not be

minded to interfere with the reduction for that reason alone. However, it appears to me that a fundamental flaw in the District Judge's decision is that he applied the test of proportionality to the whole of the costs awarded, whereas the principle did not apply to any costs incurred prior to the introduction of the CPR on 26 April 1999. As I have said, work was done and costs incurred in 1996, 1997 and the early part of 1999, none of which may be reduced on the grounds of proportionality. I considered whether I could support the District Judge's finding by making some arbitrary apportionment of his reduction between pre- and post-April 1999 work, but I think this would be neither practical nor appropriate, particularly in view of my doubts about the way in which the District Judge applied the principle of proportionality. Accordingly I allow the appeal against the reduction of the costs on the grounds of lack of proportionality.

The Claimant having succeeded on all four heads of the appeal, the costs followed the event and I ordered the Defendant to pay the Claimant's costs of the appeal, which I summarily assessed.

11 June 2002

Ongoing concern

Michael Bacon looks at the implications of House of Lords' decision in *Callery v Gray* and other costs issues

THE LONG AWAITED decision of the House of Lords in *Callery v Gray* [2002] UKHL 28 was published on 27 June 2002. The circumstances of this case are important since the Court of Appeal repeatedly emphasised that its conclusions on the stage at which after-the-event (ATE) premiums and conditional fee agreements (CFAs) should be taken out and the reasonable levels of success fees and ATE premiums applied only to the limited circumstances reflected by the case.

Callery sustained minor injuries in a road accident when the vehicle in which he was a passenger was hit by a vehicle driven by Gray. It was a commonplace accident – there are thousands of claims arising from such incidents every year which never reach the courts. The Court of Appeal described this class of claim as 'modest and straightforward'. It also said its decisions that a success fee of 20 per cent and an ATE premium of £350 were reasonable in the circumstances applied to this class of claim, in which it was also normally reasonable for a CFA to be concluded and an ATE policy effected when the claimant first instructs his solicitor. The paying parties appealed to the House of Lords on aspects of these three issues.

Their lordships dismissed the appeal. However, there was one dissenting opinion from Lord Scott of Foscote in relation to the insurance premium of £350, which he said should be disallowed against the paying party on two grounds:

1) The insurance policy had been taken out too early, at a time when litigation was 'highly unlikely'. He reasoned the purpose of ATE policies was to protect the insured against adverse costs orders and that such orders could not arise unless and until the claimant commences litigation to pursue his claim and therefore the ATE policy is not needed unless there is going to be litigation.

2) The premium had not been calculated with regard to the facts of the case. It was a uniform premium charged by the insurer for every claim which carried a prospect of success of better than 50 per cent. In other words it was a 'block rating' case. Because in this case a block rating premium calculated for use in cases with a prospect of success of above 50 per cent had been used for a case with a prospect of success of over 90 per cent, his lordship felt there could not 'be other than doubt as to the reasonableness of the charge'. CPR44.4(2)(b) requires doubt to be resolved in favour of the paying party in an assessment on the standard basis.

The House did not interfere with the Court of Appeal's decisions on the success fees principally on the ground that the responsibility for monitoring and controlling the developing practice in a field such as this lies with the Court of Appeal and not with the House of Lords. However, it was recognised that CFAs and success fees were in a very early stage of development and there was the risk of abuse and a need to check any practices which may undermine the fairness of the new funding regime. Lord Bingham of Cornhill felt this was a matter for control by the lower courts:

> "I feel sure that district and costs judges, circuit judges and in the last resort, the Court of Appeal can be relied on to maintain a fair and publicly beneficial balance between competing interests".

Lord Hoffman's judgment expressed concerns about the present state of the law, particularly as it applies to the costs of small personal injury claims. In his view, these claims appear to be 'getting out of hand'. He acknowledged the views of the Court of Appeal – that things will settle down when costs judges acquire greater experience of applying the new rules to the system of litigation funding – but doubted such matters could be solved by the traditional method of adjudication by costs judges. He felt it may require a legislative solution and suggested that since cases such as *Callery* (an RTA personal injury case) involved 'standardised legal services at a fairly low level', a fixed costs regime should apply. He qualified his proposition, however, by accepting that such a fixed costs regime should apply 'in all but exceptional cases'. It remains to be seen how far this suggestion of a fixed fee regime will travel. For now, at least in small to moderate claims for personal injury passenger cases, there appears to be no change on the horizon for claimants taking out ATE insurance policies and/or entering into CFAs at a very early stage, nor to the level of success fees suggested by the Court of Appeal for this limited type of case.

Wasted costs

On the same day judgment of the House of Lords was handed down in *Callery*, an important judgment on the wasted costs regime in s 51(6)(7) and (13) of the Supreme Court Act 1981 was given. The case of *Medcalf v Mardell (Wasted Costs Order)* [2002] UKHL 27 (also known as *Medcalf v Weatherill*) was the first time the House of Lords considered the subject since it was introduced into s 51 by s 4 of the Courts and Legal Services Act 1990.

Two barristers were given wasted costs orders by the Court of Appeal. The Court accepted by a two to one majority the submissions of Medcalf – that as counsel for the defendants in the case it was improper for the barristers to have advanced allegations of fraud and other improprieties in a draft amended notice of appeal, in a supplementary skeleton argument and at the appeal. However, in contravention of para 606 of the Code of Conduct of the Bar they could not have had before them reasonably credible material establishing a *prima facie* case of fraud. The costs concerned were those relating to the investigation and rebuttal of the allegations made.

The main limb of the barristers' appeal related to their inability to answer the complaints made against them because they were precluded from doing so by legal professional privilege.

The question was whether the barristers had any material before them which justified making the allegations when signing the amended notice of appeal and the skeleton arguments. Because of the restriction of legal professional privilege, the court did not know whether there was any material before the barristers which justified their actions nor could the court be told by the barristers, who had no opportunity to explain the grounds for their beliefs, that there was such material before them. The court must be satisfied before making a wasted costs order that there is nothing the lawyer could say, if unconstrained, to resist that order and it is in all the circumstances fair to make the order. On the facts of the case there was clearly doubt and the barristers should have the benefit of that doubt. The House allowed the appeal and quashed the wasted costs orders.

Hourly rates

In *R (Hale) v North Sefton JJ* [2002] EWHC 257, heard by the Divisional Court in January this year, the question of how hourly rates should be calculated was considered. The claimant had been acquitted by the justices of common assault and battery and awarded a defendant's costs order pursuant to s 16 of the Prosecution of Offenders Act 1985. His costs had been determined using an hourly rate based upon the solicitor's expense rate of £80 (using the established principle of 'broad average direct costs') to which had been added

Appeals without reasons

Significant guidance has been given by the Court of Appeal in *English v Emery Reimbold* [2002] All ER (D) 302, and two other cases heard with it, on the position where a judge fails to give reasons for his decision, or where a trial judge makes an order as to the costs of the proceedings without explanation (in the third appeal the order was for 'no order as to costs').

The court held it is generally recognised in the common law jurisdiction that it is desirable for judges to give reasons for their decisions. In the case of decisions as to costs, it is in the interests of justice that judges should be free to dispose of applications in a speedy and uncomplicated way. Where no express explanation has been given for a costs order, an appellate court approaches the facts on the assumption that the judge has good reason for the award made. In practice, it is only in those cases where an order for costs is made with neither reasons nor any obvious rational explanation that it is appropriate to give permission to appeal against an order for costs on the ground of lack of reasons for the order.

a care and conduct uplift of 50 per cent, which took account of the particular factors and issues involved in the case. The claim for costs had been based upon a global hourly rate of £140 (although the rate agreed between solicitor and client had been £145 per hour), which it was contended was a reasonable hourly rate having regard to 'the current rates for taxation [now of course assessment] of standard costs of senior solicitors in Liverpool and other county courts'. It was pointed out in support of the claim that since the introduction of the CPR in April 1999:

> "...solicitors have generally moved, in criminal as well as civil work, away from the system of broad average direct cost plus mark-up mode of billing their work to a flat hourly rate applicable to all types of work".

Another issue in the case was whether the instruction of a senior solicitor was reasonable in the circumstances. The justices' clerk considered a junior solicitor would have been reasonable. In holding it reasonable to have instructed a senior solicitor of more than four years standing, Auld LJ commented:

> "It is necessary to consider whether it was reasonable to pay him on the then emerging general basis of a flat hourly rate instead of the old and diminishing practice of a broad average cost plus mark-up."

He concluded a flat rate of £140 per hour was appropriate and reasonable but Gage J suggested:

> "... the rate agreed between Mr Learmouth (the solicitor instructed) and his client was £145 an hour ... in my judgment an error of law is established in the rate set by the clerk".

Such a dramatic conclusion is difficult to support. Nowhere is the position expressed more succinctly than by HHJ Michael Cook in *Cook on Costs* where he explains that the concept of a global flat rate (a notion promulgated by the Supreme Court Costs Office since April 1999) simply hides the reality of how solicitors' practices calculate their billing charges. It is, of course, simple and more client-friendly to express the basis of a charge by a single hourly rate figure, but it must still be calculated by reference to the actual costs figures to which is then added an uplift to cater for all the factors set out in CPR 44.5 (formerly known as 'the seven pillars of wisdom'). As Cook states:

> "It is proper commercial practice for a business to calculate the cost of doing the work in terms of time and materials and then add a profit. The profit element is still there whether the client or the paying party is told what it is or not. Hitherto the courts and the parties have had the advantage of knowing what it was, and what is revolutionary is that with guideline charging rates not distinguishing between the cost of doing the work and the profit, it is not possible to know how the figures were arrived at, what represents expense and what profit, with the consequence that the CPR 44.5 factors must be applied to the total figure. Otherwise there would be no facility to enable a judge carrying out a summary assessment to reward skill, effort, specialised knowledge and responsibility or for him to acknowledge the importance, complexity, difficulty or novelty of the matter."

These comments are made in the context of the consideration of the guideline hourly rates originally promulgated by the SCCO in an attempt to assist the judiciary when carrying out summary assessments. But as Cook points out, if this approach were to be adopted in detailed assessments (as apparently is fast becoming the case), the quantification of costs would have become nothing more than a bureaucratic exercise rather than a judicial function. Seems we are back to Hoffman LJ and fixed costs again.

Outside agency fees

Constructive guidance on the contentious subject of whether fees invoiced by medical agencies should be allowed between parties, and the reasonableness of such fees, was given by HHJ Michael Cook in *Stringer v Copley* (unrep) in May this year. This matter has been the subject of dispute and district judges' approach to these costs varies from one part of the country to another. The court declared there was no reason in principle why medical agency fees should not be properly claimed from a paying party. The judge said he was "satisfied that there is no principle which precludes the fees of a medical agency being recoverable between the parties, provided it is demonstrated that their charges do not exceed the reasonable and proportionate costs of the work if it had been done by the solicitors". He stressed that when sending in their invoices, such agencies should ensure their fees distinguish between the medical fee and their own charges and the latter should be broken down to enable the costs officer to be satisfied they do not exceed the reasonable and proportionate cost of the solicitors doing the work.

In the same judgment, HHJ Cook was asked to consider the recoverability of the costs incurred by a litigation support agency, instructed by the solicitors to attend the claimant and another to take statements. The question was whether the solicitors were entitled to treat the work done by these agents as though it had been done by their own fee earner, and to charge on that basis, even though the charge made by the solicitors on a time basis was more than was actually charged by the agency. The judge concluded that, while the reaction of the district judge, who had questioned why a solicitor should make a profit out of someone else's work, was understandable, an increasing number of firms use outside agencies to do work for them, but nevertheless treat that work as having been done by their own firm. Fee earners within most practices are charged out at a higher figure than their cost – firms 'make a profit out of those whom they employ'. The Costs Practice Direction at 4.16(6) provides that agency charges between a principal and his agent will be dealt with on the principle that such charges, where appropriate, form part of the principal solicitor's charges. It is not, for example, appropriate to charge the fees of a retired police officer, who is not an employee of the firm but an independent contractor, as a disbursement (*Smith Graham (a firm) v The Lord Chancellor's Department* [1999] NLJR 1443). The judge allowed the time claimed in respect of this work as if it had been carried out by the firm itself. He added that similar principles would apply in the case of medical support agencies.

Such a practice has long operated in the case of work carried out by independent costs draftsmen instructed by firms of solicitors, although there are still many cases where their charges are passed on to the client as a disbursement rather than as a profit costs charge based upon the time spent as if the draftsman was a member of the firm as envisaged by CPD 4.16(6). There is nothing immoral or illegal in making a profit out of someone else's work when acting for a client in litigation. Whether it be litigation or medical support, costs drafting or solicitor agency work, a service is being provided to the client and a fair and reasonable charge for such work includes the solicitor's profit. It's called 'doing business'! ■

Michael Bacon is a law costs consultant. A separate article on *Medcalf v Mardell* will be published on 19 July