
**Senior Court Costs Office
Costs Practitioners Group
Minutes of meeting held on
Thursday 24 March 2011**

Present:	Master Simons (Chairman)	SCCO
	Chief Master Hurst	SCCO
	Master O'Hare	SCCO
	District Judge Besford	DJ's Association
	Mr N Bacon Q C	Bar Council
	Mr P Allen	APIL
	Mr D Marshall	APIL
	Mr A Parker	LSLA
	Mr R Dewie	FOIL
	Mr M Harman	ALCD
	Mr M Bacon	ALCD
	Mr J Martin	Minute Secretary

Also in attendance: District Judge Bedford (Leeds County Court)

1. Apologies for absence

Apologies for absence were received from Mr Heskins, Mr Barker, Mr Vincent and Mr O'Riordan.

2. Comments upon approved minutes of the Last Meeting

There were no comments upon the approved minutes of the last meeting.

3. Matters arising from the minutes of the last meeting

There were no matters arising from the minutes of the last meeting.

4. MoJ consultation: proposals for the reform of civil litigation funding and costs in in England and Wales

The Meeting noted that the consultation period had closed on 14 February 2011. There were no further comments at present.

5. MoJ consultation : proposals for the reform of legal aid in England and Wales

Again, the consultation period had closed on 14 February 2011, and there were no further comments.

6. Update as to PD 51e: The County Court Provisional Assessment Pilot Scheme

District Judge Bedford reported on the pilot scheme, which had been running in Leeds, York and Scarborough County Courts since last October. He stressed that his comments were drawn from his own experiences in Leeds County Court, although he thought that these were similar to the other courts in the scheme.

The intention of the scheme is to deal with *between the parties* assessments of base costs excluding VAT of up to £25,000 by way of a provisional or paper assessment in the first instance. Parties to have a right to subsequently request a formal hearing, but costs penalties are imposed if the provisional assessment is not "beaten" by 20% or more.

Originally, it was thought that, over the year, Leeds would supply some 80 cases to the pilot. So far, 61 cases had been dealt with under the scheme, a better sample than expected. Of these, District Judge Bedford had withdrawn no more than 2 or 3 from the scheme and listed them for oral hearing on his own initiative. These were cases where either an important point of principle was raised or there were potentially serious conduct issues. The reductions made by the District Judge were in line with those previously made on contested hearings, and so far there had only been 3 requests (2 from receiving parties, 1 from a paying party) for an oral hearing. This was lower than had been expected, although there were still some cases where time for requesting an oral hearing had not expired.

In practical terms, cases in the pilot were listed at intervals of three quarters of an hour, on average twice a month, and the parties notified of this so that they would know when their case was being dealt with. The District Judge ensures that court staff and ushers know that on these days the cases are to

be treated as if they were actual hearings and therefore the District Judge is not to be disturbed. He thought it important to deal with it this way so that it is clear to the profession that cases which fall within the scheme are not being treated as normal District Judge box work. The endorsed bill is then sent out to the parties to agree the calculations between themselves. If no request for an oral hearing is made, the assessment is completed as box work in the usual way. Records are kept of the judicial and administration time involved in the process, although the District Judge thought that burden was particularly heavy on the administrative staff at present.

His overall impression was that judicial time was being saved by the pilot scheme, although not as much as had been anticipated. However, this may be due to other initiatives taken in his county court to cut hearing times. The process would be made easier by a change to the format of bill whereby the bill, points of dispute and replies were all contained in a single Scott Schedule type spreadsheet. Working from three separate documents was unnecessarily time consuming. Costs of assessment under the scheme were proving to be, approximately, £600 for cases up to £5,000, £1200 up to £10,000, and £2000 for cases up to £25,000. It was also apparent that points of dispute were becoming more directed, with less emphasis on “standard” objections, and points being more directed to the pilot scheme’s requirements. His overall impression was that, after some initial hostility, the profession was now quite content with the scheme. The District Judge thought the scheme could be extended to cases up to £50,000 quite comfortably and possibly as far as £100,000.

The Chairman thanked District Judge Bedford for his attending the meeting and giving a valuable insight into the current state of the pilot scheme.

7. Draft PD 51f: Costs Management in [All] Mercantile Courts and TCC– Pilot Scheme

Master O’Hare reported that this pilot scheme is now likely to commence in October. The draft Practice Direction is very close to the one used in the

Birmingham pilot but will apply to all cases in the Mercantile Courts and TCC. The initial CMC will determine which cases are to be subject to costs management

8. Changes to listing procedure In SCCO

Master Simons drew the Meeting's attention to two new listing procedures in SCCO:-

(i) the practice of listing short (½ hour or less) applications before the Sitting Master for the week had been dispensed with. Much judicial time was being wasted by the Master concerned needing to clear his diary for the week when he was due to hear applications because many of them settle without a hearing). From the beginning of January, all Masters have been hearing such applications at 10.00 am everyday, prior to the detailed assessment hearings each day which start at 10.30 am. This was proving a success – judicial time was being saved, and applications were being given earlier return dates than before.

(ii) Also from the beginning of January, assessment hearings of 1 to 2 day duration were being listed as “floating”. Although the hearing dates for these cases were fixed, they were not initially assigned to any Master. A week before the hearing date the court manager would ascertain which Master(s) would be free to hear the matter, by reason of longer cases having settled in the interim, and assign it accordingly. Again, this was making more efficient use of judicial time, and earlier hearing dates for these cases were now being given. As yet, 3 months into the scheme, all “floated” cases had been heard on their appointed days.

9. Recent case reports concerning costs

Master Simons drew the meetings' attention to the following cases:-

- (a) *MGN –V- United Kingdom* [2011] ECHR 66: the ECHR finding that the allowance of a 100% success fee in media claims infringed Article 10 of the European Convention on Human Rights (right to freedom of expression)

- (b) *R (Edwards) –v- Environment Agency* [2010] UKSC 57: the Aarhus Convention requires UK courts not to allow costs in environmental cases which are “prohibitively expensive”. However, this limitation must be imposed by the court, not by its costs officers when assessing costs allowed by the court. The Supreme Court has referred this case to the EU Court of Justice for a preliminary ruling as to the approach the court should take when determining what costs are “prohibitively expensive”.
- (c) *Pankurst –v- White* [2010] EWCA Civ 1445: in a very high value claim C made an offer before a trial as to contributory negligence which D rejected but then lost the contributory negligence trial. D then made an offer which C rejected but which C failed to beat at the quantum trial. C was awarded costs up to the date of D’s offer, the latter part on the indemnity basis and was ordered to pay D’s costs thereafter. C was not awarded enhanced interest on any costs, and that decision was upheld by the Court of Appeal. In giving judgment Jackson LJ described C’s solicitors’ claim for success fees on costs as grotesque and criticised the effect of the ATE provision C could claim. The CFA, which stipulated a 2 stage success fee (22.5% and 100%), was made after liability had been admitted and therefore C was never at risk of losing. The costs C was ordered to pay D were in fact paid out of the ATE insurance the premium for which was payable by D.
- (d) *Morris –v- London Borough of Southwark* [2011] EWCA Civ 25: the Court of Appeal upheld the decision of MacDuff J ruling that a CFA which contains a promise by a solicitor to pay any adverse order for costs is not champertous and does not render invalid an otherwise valid CFA.
- (e) *Morgan –v- Spirit Group Ltd* [2011] EWCA Civ 68: the Court of Appeal upheld the claimant’s argument that a judge should not make

a costs order which fixes a figure for costs without reference to the work actually done.

- (f) *Bayat –v- Cecil* [2011] EWCA Civ 135: the Court of Appeal allowed the Defendant’s appeal against orders extending time for service of a claim form; the claimant had delayed service in order to have funding in place first; that was not a good reason for extending time for service of the claim form, particularly where the extension might deprive the defendant of a limitation defence.
- (g) *Sousa –v- Waltham Forest LB Council* [2011] EWCA Civ 194: the Court of Appeal upheld the decision of HHJ Behrens; where a claim is funded by the Claimant’s insurer, and the insurer instructs solicitors on CCFA terms providing for a success fee, the doctrine of subrogation requires the court to treat the CCFA as if it had been made by the claimant. Nor was it appropriate to disallow the success fee as being unreasonable in the circumstances (the claimant being insured and therefore having no risk to share with his legal team); CCFA law applies to all, including rich and powerful insurance companies.
- (h) *Stephens –v Tesco Stores Ltd* (unreported, see Lawtel 5 November 2010): Butterfield J allowed an appeal against a costs judge’s decision as to the costs of a detailed assessment. The paying party had made a late offer to settle (13 days before the detailed assessment) which the receiving party rejected but did not beat. In refusing to take that offer into account the costs judge had relied on *Wills –v- Crown Estate Commissioners* [2003] EWCH 1718 (Ch). However, that case preceded *Stokes Pension Fund Trustees –v- Western Power Distribution (South West) Plc* [2005] 1 WLR 3595 and therefore was no longer good law.
- (i) *Tim Martin Interiors Ltd –v- Akin Group LLP* [2010] EWHC 2951 (Ch): which concerned an assessment of costs as between a solicitor and a third party liable to pay that solicitor’s bill. Lewison J held that

s71 of the Solicitors Act 1974 does not entitle the party liable to raise any Points of Dispute which the solicitor's client (the party chargeable) could not raise. The Court of Appeal has given permission to appeal this decision and the case will be heard in the period 9 May to 31 October 2011.

(j) *Falmouth House –v- Morgan Walker* [2010] EWHC 3092 (Ch): Lewison J upheld the costs judge's decision to order the detailed assessment of a solicitor's bill even though more than 12 months had elapsed since it had been delivered. The costs judge had treated the fact that the bill claimed a large sum which called for an explanation as a "special circumstance" within the meaning of s70 of the Solicitors Act 1974. Whether special circumstances existed was essentially a value judgment which depended upon comparing the particular case with a run of the mill case, in order to decide whether a detailed assessment was justified despite the restrictions contained in s70.

(k) *Redwing Construction Ltd –v- Wishart* [2010] EWHC 190 (TCC): in proceedings to enforce an adjudication which ended (as often happens) in a summary judgment C instructed solicitors on a CFA with a success fee of 100% and took out insurance cover for £20,000 for £8480 (42% of the level of indemnity). Notice of funding was served 14 days late. Akenhead J allowed a success fee of 20% with no success fee for the first 14 days, and allowed only £1680 in respect of the ATE premium. "It is important that claimants do not use CFAs and ATE insurance premiums primarily as a commercial threat to defendants".

(l) *Minkin –v- Cawdrey Kaye Fireman & Taylor* [2011] EWHC 177 (QB): Cranston J upheld the decision of a costs judge to disallow all costs save paid disbursements where the solicitors had terminated their retainer without just cause: the learned judge expressed doubts

as to some of the dicta in the decision of Nelson J in *Wilson –v- William Sturges & Co (a firm)* [2006] EWHC 792.

(m) *Amin –v- Mullings* [2011] EWHC 278 (QB): Slade J (DBE) held that an RTA claim which settled on the day of a trial but before the hearing had begun had not “concluded at trial” within the meaning of CPR 45.16 and 45.17 (*Sitapuria –v- King* unreported (December 10 2007; HHJ Stewart) approved and *Dahele –v- Thomas Bates & Son* [2007] EWHC 90072 (Costs) (Master Haworth) not followed).

(n) *Barrett Goff & Tomlinson –v- HMRC* 2011 First Tier tribunal tax Chamber; a supply of medical records and reports for use in litigation is a taxable supply for the purposes of VAT unless the supplier is not VAT registered and his annual turnover does not exceed £70,000. Where such medical records or reports are supplied to a solicitor for a fee which is free from VAT, the solicitor need not add VAT in respect of them in his bill to his own client.

(o) *Murgatroyd –v- Vibraflo Ltd* (listed for hearing before Master Gordon-Saker on 10 June 2011) will hear argument as to whether VAT need be charged by medical agencies on the whole of their invoices where the records or reports they obtained were supplied to them VAT free.

(p) *Motto –v- Trafigura* [2011] EWHC 90201 (Costs); this lengthy judgment (511 paragraphs) covers the 22 preliminary issues determined by Master Hurst, Senior Costs Judge, in a personal injury claim which was brought on behalf of a group of 30,000 claimants and in which the total costs claimed exceed £100 million.

(q) *Gray –v- Toner* : an appellant asked the Court of Appeal for permission to appeal the ruling of HHJ Stewart QC (unreported, 11 November 2010) as to interest on costs payable under a CFA: the learned judge held that, if these costs are not paid by the winner before assessment, the court should not allow interest on them from a date prior to their assessment (ie, the court's new discretion to alter

the date from which judgment interest runs has negated the old *incipitur* rule). An appeal to the Court of Appeal had been withdrawn. Mr N Bacon said that HHJ Charles Harris had reached a similar decision in *Birdie v Ikhlas* (22 February 2011, unreported). It was not known whether this case was subject to appeal.

10. Any other business

Master O'Hare drew attention to the fact that Mr O'Riordan's absence was due to his imminent retirement. He paid warm tribute to Mr O'Riordan's contribution both to the Group and to the SCCO over many years and wished him well in his retirement. These comments were endorsed by the meeting.

11. Date of next meeting

The next meeting was fixed for Thursday 17 November 2011 in Room 2.09 at SCCO.

The meeting closed at 5.40 pm.