KAIN KNIGHT
COSTS LAWYERS - LEADING THE WAY

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Costs InBrief

Solving your costs problems in the new legal landscape

Inside this issue

WELCOME TO THE NEWSLETTER AND COSTS IN BRIEF

As 2017 draws to a close, the usual rhetorical question is asked: where has the year gone? With Christmas on the horizon, it is a legitimate question as we look back on a year of mixed fortunes in the costs world. At the start of 2017, we were awaiting with trepidation, the outcome of another Jackson Report, Sir Rupert's review of fixed costs, with the possibility that the regime would be extended to cases worth up to £250,000. There was also the uncertainty about proportionality and how the "new" proportionality rule in CPR 44.3(5) in operation since 1 April 2013 (another Jackson recommendation in his Final Report), was to apply in practice.

Next, we had the continuing uncertainty about Conditional Fee Agreements ("CFAs"): what to do, if the client changed solicitor or the firm merged or had been taken over: could a CFA made before 1 April 2013 be validly assigned as a matter of law, so as to preserve the entitlement to the success fee and After The Event ("ATE") insurance premium? Also in the loop was costs budgeting. Loads of inconsistent decisions and we had no guidance about what, if any, the effect a cost budget would make to the outcome of a detailed assessment. Last but not least, there was the prospect, but not the reality of the New Electronic Bill, another Jackson recommendation, which had been the subject matter of a Pilot Scheme in the Senior Courts Costs Office ("SCCO"), but with no certainty about when, if ever, it would become compulsory.

Getting on for a year later, we now have some but not all the answers. Here they are!

The NEW BILL: are you ready to "Go Electric"?

In his Final Report into the Costs of Civil Litigation (hard to believe we will soon be into the 10th year since its publication), Sir Rupert Jackson likened the paper bill, which had served the needs of the courts through decades of taxations and latterly detailed assessments, to a "Victorian Account Book". In an age in which everything was becoming electronic, the paper bill could not be the sole survivor of the old regime and would be replaced by an electronic bill which would be fit for purpose in the 21st - century, to be called the "New Bill". Its aim, so it was said, was to remove the need to prepare bills in parts, there would be automatic calculation of the work at the relevant hourly rate and/or VAT rate, and the much maligned "documents" item, which was impenetrable and into which work was often dumped, would disappear.

Easy to say; less simple to deliver. The task of inventing an electronic bill was initially given to Jeremy Morgan QC, but upon his retirement, that responsibility fell upon his successor, Alexander Hutton QC, and his Committee. Emphasis was placed on recording time by reference to phase, task and activity so that the work can be seamlessly reproduced on a spreadsheet showing what has been done, when and how long it has taken. In more detail:-

- Phase means essentially the Precedent H Phases e.g. witness statements
- Task means what the fee earner has done e.g. drafting the client's witness statement
- Activity means how the work is being done, e.g. writing to the client

The bill then has the following structure:-

- a summary of what it contains
- the detailed body of the bill, arranged by phase
- a Master Summary
- summaries of base costs and success fees and ATE premiums shown separately
- a summary comparing the costs claimed in the bill with those set out in the last approved or agreed budget
- any other summaries as may be useful for the parties and the court

At Kain Knight, we have prepared a number of New Bills, but it is fair to say that their use so far has not been universally popular with solicitors, quite the reverse, in fact!

The idea was that the New Bill would be piloted in the Senior Courts Costs Office (SCCO) with a view to it becoming mandatory in all courts.

To that end, a voluntary pilot scheme commenced in the SCCO on 1 October 2015. Unfortunately, it remained unused, so under PD 51 L, the timetable was amended to take effect from 3 October 2016 for another year, with a view to establishing a mandatory form of bill of costs to apply to all work done from 1 October 2017.

That never happened. At its May 2017 meeting, the Rule Committee was informed that no New Bill had actually been assessed under either pilot scheme. In addition, the dual screens and various IT improvements which would be required in the County Courts, made realistic implementation on that date impossible, so 1 October 2017 for implementation was abandoned and the project put back for another six months.

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What does all this mean for practitioners?

Firstly, as the pilot scheme ended on 30 September 2017, in theory, no New Bills can be lodged in any Court for detailed assessment, although the word on the street is that if one is sent to the SCCO, it will not be turned away! Second, the New Bill will become mandatory in all courts in England and Wales (not just the SCCO) from 6 April 2018, without there first having been any trial period or pilot schemes in the County Courts. Third, the paper bill will continue to be accepted for all work undertaken until that date, but anything done thereafter must be presented as a New Bill.

All of this will be effected through changes to the Practice Direction to rule 47.6, but these have yet to be finalised. Paragraph 5.3 of the proposed practice direction provides that the bill must be in the form on the Ministry of Justice website (Precedent S) or in any other spreadsheet format which

- reports and aggregates costs in phases, tasks and activities and expenses as defined in Schedule 2 to the Practice Direction
- allows the user to identify in chronological order, the detail of all work undertaken in each phase
- automatically recalculates the intermediate and overall summary totals if input data is changed
- contains all calculations in reference formulae in a transparent manner so as to make "its full functionality available to the court and all other parties"

The bill will be served and filed at court electronically, but there must also be a hard copy "in a manageable paper format as shown in the PDF version of Precedent S" delivered to the paying party and to the court.

The upshot of this is that receiving parties will be able to use a paper bill for all work up to and including 5 April 2018, but anything claimed thereafter must use the New Bill. So for a period of time, it is likely that there will be hybrid bills, part paper and the rest electronic. The rationale behind this is to avoid solicitors having retrospectively to convert time recorded under the old system in preparation for a paper based bill, into the new, so that the information can be presented electronically.

That has been our experience so far at Kain Knight. Earlier this year, our London office developed a hybrid bill and after points of dispute and replies had been served, in March they lodged a request for detailed assessment in the SCCO. Most bills wait between six and nine months for a hearing date, but much to everyone's surprise, the hybrid bill was expedited with listings of one day in May, two in June and three in August!

The case then settled, so no one was much the wiser about how the assessment would have worked out in practice:-

Two things in our opinion were certain; first, there was more detail in the New Bill and second, the data was more manoeuvrable by either party, neither of which had been possible before.

> *"It remains to be seen whether the extra transparency provided by the spreadsheet bill assisted in the quick resolution of the detailed assessment proceedings."*

Where do we go from here?

The answer is that there is no hiding place any more for those reluctant or unwilling to embrace the new technology. This time the New Bill really will become mandatory for use in all courts from 6 April 2018 and solicitors should already be recording their time by reference to phase, task and activity so that when their clients win their cases, the New Bill can be drafted without having to convert work recorded by traditional methods into electronic format.

At least, that is the theory! The practice may be much more difficult. At Kain Knight, we have been preparing hard for D day and will be happy to heed any calls for help and assist where we can!

Proportionality

Date of birth:

26 April 1999 under the Woolf reforms implemented in the Civil Procedure Rules

What did it mean?

Carry out a global test at the start of the assessment: if the standard basis costs were or appeared to be disproportionate, they must be assessed so as to be both be reasonable and necessary, not just reasonable- the Lownds test (see Lownds v Home Office [2002] 2 Costs LR 279).

"... absurd and unworkable to apply the new test of proportionality to the base costs, but the old test of proportionality to the success fee".

Did it work?

No, according to Sir Rupert Jackson. "In my experience, there is no doubt at all, but that costs are assessed with nodding respect only to proportionality."

What to do?

- Introduce a new proportionality test on 1 April 2013: CPR 44.3(5) - To be proportionate, standard costs (indemnity costs exempt) must bear a reasonable relationship to:-
- the sums in issue in the proceedings
- the value of any non-monetary relief
- the complexity of the litigation
- any additional work generated by the conduct of the paying party
- any wider factors such as reputation or public importance

How is CPR 44.3(5) to be applied?

Difficult question! Nobody knows!

The solution:

Test cases taken to appeal will give guidance!

So where are we now?

Unfortunately the answer is not much further on, nearly five years having elapsed since the "new" proportionality rule was implemented. The problem with the rule was highlighted in two cases BNM v MGN [2016] 3 Costs LO 441 and May v Wavell Group [2016] 3 Costs LO 455 and the legal profession has spent the last year waiting for appeals to be heard in both matters and for guidance to be given.

- BNM - was a privacy case in which the claimant recovered £20,000 damages: bill £241,817 including success fee and ATE insurance premium: reduced on line-by- line assessment to £167,389: CPR 44.3(5) then applied to that figure at the end of the assessment. That done, the costs were "about twice the sum which would be proportionate" so the amount allowed was £83,964 on the basis that it would have been "... absurd and unworkable to apply the new test of proportionality to the base costs, but the old test of proportionality to the success fee".
- May v Wavell Group - was a privately funded case (no CFA). Agreed damages recovered of £25,000 plus an injunction to prevent a nuisance: bill of costs £208,236: reduced on the line by line assessment to £99,655. Amount allowed, having regard to all the factors in CPR 44.3(5)- £35,000 plus VAT. That did not even cover the acoustic expert's fee!

In each case, points of general importance for the profession about the applicability of the proportionality rule arose which would be clarified on appeal, or so we thought:-

- When should the "new" test be applied? Line-by-line as the bill is being assessed or at the end when the court should "stand back" and consider the proportionality of the resulting figure? That was the opposite of the Lownds approach which was to apply the test at the outset in order to avoid "double jeopardy".
- How should the court apply CPR 44.3(5) in order to justify an adjustment to the reasonable and necessary costs by amounts such as another 50% off in BNM and 58% in May?
- Did CPR 44.2(5) apply to "pre-commencement funding arrangements" viz CFAs and ATE premiums entered into before the new test was implemented on 1 April 2013?

The appeal in May was heard in January by HH Judge Dight in the Central London County Court, but judgment has yet to be handed down. At one point, the delay was believed to be due to the appeal

in BNM which was yet to be heard by the Court of Appeal, but that does not appear to be the case. It follows that the approach to be taken at the conclusion of the detailed assessment is still not any clearer, assuming that it was right in the first place, that CPR 44.3(5) is to be applied at the end rather than item-by-item during the assessment (but see Harrison below).

The appeal in BNM was heard on 11 October 2017 with judgment being given on 7 November 2017. It at least gave one answer, namely that it was never intended that the new test should apply to pre-commencement funding arrangements, so the decision to allow £83,964 for the costs was set aside on the basis that subjecting the base costs and the additional liabilities to the new proportionality rule had been wrong in principle. Would the Court of Appeal sort it out and apply the correct test? No it would not. The bill would therefore have to be sent back to the SCCO to consider the proportionality of the costs again, paying no attention this time, to CPR 44.3(5).

What about proportionality of costs to which the costs budgeting regime had been applied under CPR 3.12 to 3.18? The perceived wisdom at the SCCO had been that where there were budgeted costs, only those that were reasonable, necessary and proportionate would have been approved. Accordingly, on any subsequent assessment, those costs need not be subject to any further scrutiny for proportionality purposes.

Not so, said the Court of Appeal in Harrison v University Hospitals Coventry & Warwickshire NHS Trust. [2017] 3 Costs LR 425. Pre-budget costs, if not agreed, are subject to assessment in the usual way. Once that has been done, the resulting costs must be aggregated with the budgeted costs in order to decide whether the resulting figure is proportionate. Thus:-

"...where ...a... costs judge on detailed assessment will be assessing incurred costs in the usual way and will be considering budgeted costs..., the costs judge ordinarily will, as I see it, ultimately have to look at matters in the round and consider whether the resulting aggregate figure is proportionate, having regard to CPR 44.3(2)(a) and (5)." - Davis LJ

Result: even if your costs have been budgeted and the line-by-line assessment has been completed, as a receiving party, you are not necessarily out of the woods. Quite the reverse. The new proportionality test will be applied at the end of the assessment to budgeted costs, which the procedural judge has already approved at Case Management Hearing, as being reasonable, necessary and proportionate. Double Jeopardy, no more, no less.

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Of course, these problems can be solved at once in the event that an indemnity basis costs order is obtained. CPR 44.3(5) only applies to standard basis costs. If you secure an order for costs on the indemnity basis, your troubles are over so far as proportionality is concerned. Indeed, an order on that basis will also free you from your costs budget and is a "good reason" for doing so.

That leaves the profession's understanding about proportionality little further forward than it was a year ago. Rumour has it that three further cases are destined for the Court of Appeal about proportionality, or so it was said at the recent Costs Lawyers' Conference, but we at Kain Knight know nothing about them, and nor, it appears, do the Costs Judges. If you do, please tell us!

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Costs Budgeting under CPR 3.12

As we all know, this is a cornerstone of the Jackson Reforms and has been operating in the multitrack since 1 April 2013. Costs budgeting is here to stay, but approaching five years on, there is still much uncertainty and inconsistency.

When does budgeting apply?

Budgeting is supposed to apply only to cases worth up to £10 million, but the reality is that the court has power to impose budgeting in any case, its discretion to do so being unfettered. In Napp Pharmaceutical Holdings Ltd v Dr Reddy's Laboratories (UK) Ltd [2017] 4 Costs LR 647, the claim was worth £155 million. Nonetheless Birss J decided he could order budgeting, although pro tem, he would limit the exercise to an exchange of costs schedules, with costs budgeting to be reviewed at the CMC.

> The date for filing and exchanging is "not later than 21 days before the first case management conference"

When it does apply, get your budget filed and exchanged on time!

The date for filing and exchanging is "not later than 21 days before the first case management conference"- CPR 3.13(1) but suppose that you are late. Inconsistent decisions still abound.

One day late and you have had it, said Mr Daniel Alexander QC in Lakhani v Mahmud [2017] 4 Costs LO 453, so the defendant would be limited to applicable court fees for future costs, even though in the dreaded Mitchell case, the Court of Appeal found that one day late was de minimis.

What about 12 days late? In Mott v Long [2017] 4 Costs LR 817, the budget was served 12 days after it should have been due to "IT" difficulties in the solicitor's office. No problem. As the budgeting exercise would not have been completed in the court time available, there would have needed to be another hearing. No time lost. Relief given.

Going, going, gone over budget? What can be done?

The authorities are still inconsistent about whether you can have a retrospective increase. The Coulson J view (see Elvanite v AMEC [2013] 4 Costs LR 612 is that :-

"The certainty provided by the new rules would be lost entirely if the parties thought that, after trial, the successful party could seek retrospective approval of the costs incurred far beyond the level of the approved costs management order ".

However, there are authorities the other way, see for example, Thomas Pink v Victoria's Secret [2015] 3 Costs LR 463 Birss J and most recently, Sony v SSH [2016] 6 Costs LR 141 in which Mr Roger Wyand QC held that:-

"Taking all factors of the case into account, I find that this is a case where there is good reason to depart from the budget on the Expert Report Phase.... the Trial Phase..."

That decision is, however, subject to appeal for hearing by the Court of Appeal in July 2018.

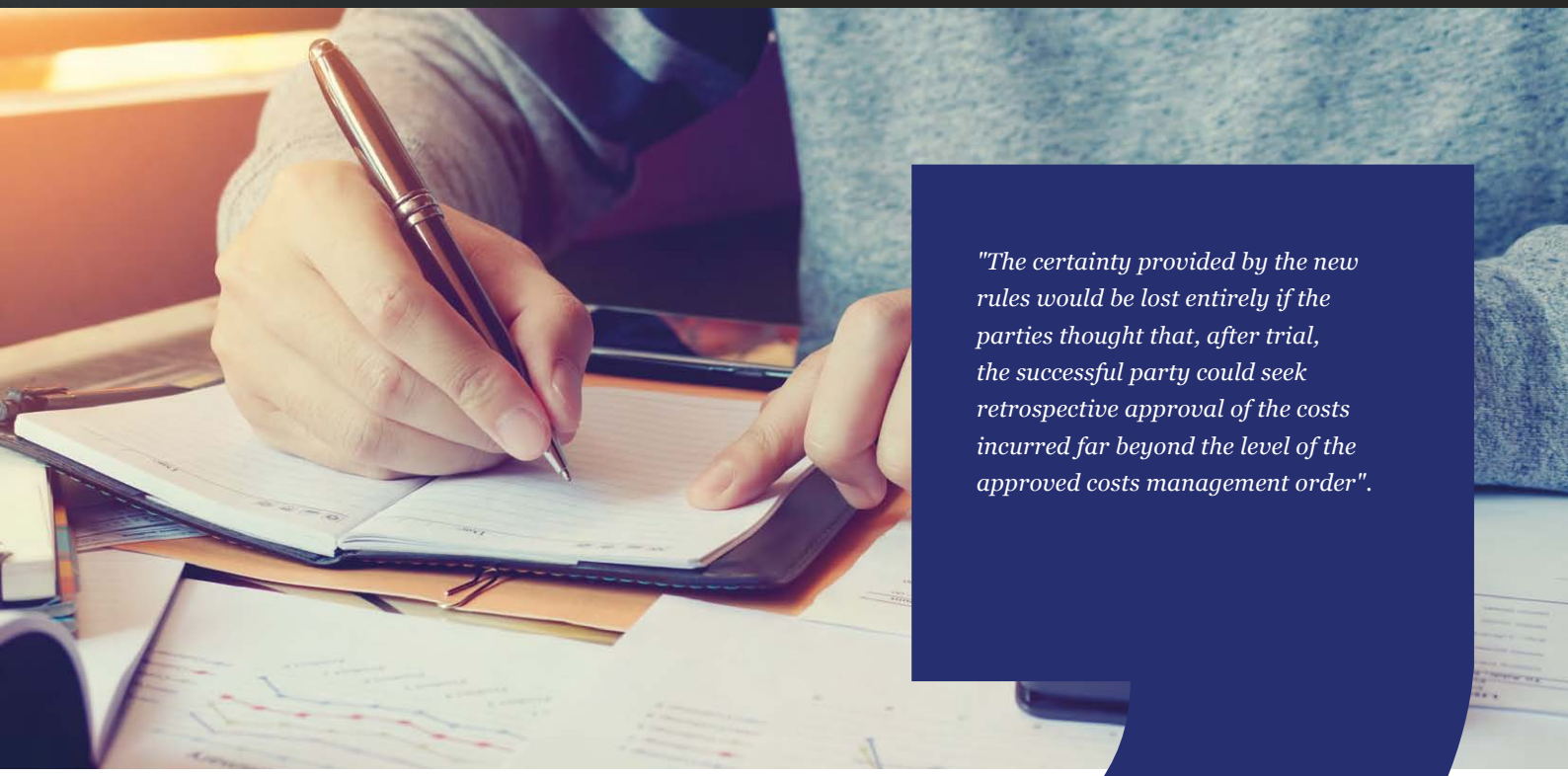
One thing is clear, however. You can apply during the trial to go over budget. In JP Bank v Pugachev [2017] 5 Costs LR 861, the trial was overrunning and was expected to last another day and a half. To cover that and additional closing submissions, prospectively Birss J permitted an increase in the budget by a mere £84,000 for one party alone (the claimant in that case).

Ideally, before going over budget, an application to vary or amend the budget should be made under CPR PD 3E 7.6, but if that is not done, the party going over budget will need to throw themselves at the mercy of the Costs Judge at any subsequent assessment by showing that there was "good reason" under CPR 3.18 to exceed the last approved or agreed budget.

What is "good reason"?

Remember that "good reason" cuts both ways. If paying costs, you need to show "good reason" why the costs should be allowed in less than the budgeted figure and if receiving, having gone over budget, you will also need to establish "good reason" for recovering more.

How is "good reason" shown? The judiciary has not gone out of its way to be helpful in providing guidance where parties want to depart from budgets. Asking the trial judge to give a steer fell on



"The certainty provided by the new rules would be lost entirely if the parties thought that, after trial, the successful party could seek retrospective approval of the costs incurred far beyond the level of the approved costs management order".

deaf ears in Car Giant v the Mayor and Burgesses of the London Borough of Hammersmith [2017] 2 Costs LO 235, in which Mr Stephen Furst QC decided that the court should be slow to give any indication about the reasonableness of costs incurred in excess of the latest budget following trial. In particular, it should not seek to:-

"...trammel the cost judge's jurisdiction where the costs judge has much greater experience in such matters..."

Indeed, according to Carr J in Merrix v Heart of England NHS Foundation Trust [2017] 1 Costs LR 91:-

"There is no reason for present purposes to examine in any detail what might or might not be "good reason" for the purpose of CPR 3.18"

She was supported by the Court of Appeal in Harrison;

"As to what will constitute "good reason" in any given case, I think it much better not to seek to proffer any further, necessarily generalised, guidance or examples". Davis LJ

Nonetheless, there are now some guidelines.

- If the receiving party did not do all the work covered by the budget, then the figure will be adjusted downwards (see Merrix at paragraph 74).
- If hourly rates are not fixed at the budgeting stage, this may be a 'good reason '(see Merrix at paragraph 73).
- If the aggregated costs are not proportionate, this may be a "good reason" (see Harrison at paragraph 28 upholding Merrix at paragraph 52) and of course,
- If costs are awarded on the indemnity basis, the receiving party is freed from the operation of CPR 3.18 and the strictures of the costs budget (see Denton v White [2014] 4 Costs LR 752).

Practice on assessment in a costs budgeted case

Cases in which costs have been budgeted are now being received in the SCCO for detailed assessment in growing numbers. The results can be striking. If costs are within budget and the paying party does not advance any "good reason" for allowing a different figure, budgeted costs are literally ticked through. Likewise, if the receiving party has gone over budget, but does not seek to persuade the court to allow the excess, only the budgeted sum is allowed, so that is where the assessment begins and that is where it ends, and everyone can go home early.

The difficulty arises where either or both sides want to raise "good reason". Arguments such as "the conduct of the other side made the case more expensive" or "we don't mind paying for a budgeted case had the damages recovered actually been the million pounds claimed, but they only recovered £100,000 and we should not have to pay for £1m case", are becoming familiar battlegrounds. Far from narrowing the issues, it remains to be seen whether cases in which budgeting has taken place will actually take longer than those which have not, owing to the scope for satellite litigation about what is or is not, "good reason".

Conditional Fee Agreements – a long tail possibly still with a sting!

You make a CFA before 1st April 2013, which provides for a success fee and an ATE premium. Can you recover them both from your opponent if you win? Yes, subject to each being reasonable - s.58 and 59 Courts and Legal services Act 1990.

You make a CFA on or after 1st April 2013 which provides for a success fee and ATE premium. Can you recover them from your opponent if you win? No, unless the claim relates to privacy, mesothelioma or insolvency proceedings (but those no longer) because the Legal Aid (Sentencing and Punishment of Offenders) Act 2012 ("LASPO") abolished their recoverability against losing parties, save in those specified cases (see s.44.(4)).

What happens if you have an old CFA, but an event takes place after 1 April 2013 which may cause it to be terminated?

Can the CFA be assigned so that, rather than having to make a new CFA under which the success fee and ATE premium would have to be met by the client out of damages due to LASPO, the old CFA can carry on?

Such an event might occur where the solicitor moves to a new firm taking the client or, where the original solicitors cease to trade and another firm takes over their books of business, or where the firm merges with another resulting in a name change. In such circumstances, to what extent at all, can the original CFA agreement be assigned to the new solicitors so that the success fee and ATE premium continue to be recoverable from the opponent?

There is some very difficult law on this point with the only case at High Court level which has given any guidance being Jenkins v Young Brothers [2006] 3 Costs 495, but this was decided before LASPO and has its critics! Some have contended that the benefit of the agreement (the right to be paid) and the burden of it (the obligation to continue to act for the client) cannot be assigned as a matter of law (see Linden Gardens Trust Ltd Lenesta Ltd [1994] 1 A.C. 85) and it was hoped that a Supreme Court decision this year would provide clarification. Through no fault of the court, that did not happen because in Plevin v Paragon Personal Finance Ltd [2017], 2 Costs LO 247, the principle that a CFA could be assigned, had been common ground : it was only the validity of two successive transfer agreements that had been challenged (held : they were valid!).

Current hopes for guidance now rested on Budana v Leeds Teaching Hospitals NHS Trust which was heard by the Court of Appeal, on 5 July 2017, and judgment has just been handed down. In that case, the original solicitors had worked under a CFA in a personal injury claim, but on 22 March 2013, had notified the client that it had ceased to handle that type of litigation and another firm was taking over the case via an assignment of the CFA. That assignment failed before the judge at first instance as he found that the solicitors had terminated its retainer via the letter of 22 March, so there was no CFA left which could be assigned. The instruction of the new firm involved a novation (new contract). Added to that, the solicitors had ended the CFA without good reason, so they were not entitled to any payment at all for their work on the case, even though the client won!

Now we have the judgment in Budana and this time the court went out of its way to be helpful to the legal profession, recognising that, according to the Law Society, "...there are many thousands and perhaps tens of thousands of claimants ....whose pre 1-April 2013 CFAs were purportedly assigned by one firm of solicitors to another". No fudges, ducking or diving this time : on the contrary, the court rolled its sleeves up and got to grips with the issues, deciding the case, as Gloster LJ put it, by providing a much more finely nuanced, but ultimately simpler analysis, than either party had contended for.

> Whichever side you are on, if you are in any doubt, help is at hand in any of our offices at Kain Knight

What was that analysis?

"... There is no reason in principle why rights and benefits under a firm of solicitors' contracts with its clients or its books of business should not be capable of assignment in today's business environment...Given the circumstances in which most claimant personal injury litigation is now conducted ... the CFA between a client and his solicitor in such a case lacks the features of a personal contract. What the client wants is representation by a competent practitioner..."

Here, the CFA had not been terminated by the solicitor's conduct: instead, the claimant had confirmed it by agreeing that it should be preserved and transferred to the new firm.The CFA therefore survived and the first solicitors were entitled to payment provided the firm had fulfilled its entire obligations under the contract.

The court split as to whether there had been a novation rather than an assignment. Gloster LJ and Beatson LJ went for the former and Davis LJ for the latter, but this distinction, which the legal profession had believed was so important and fundamental, in the end did not matter a jot because of the interpretation they went on to give to s.44(6) LASPO. This involved a broad interpretive approach that the success fee payable to the new firm qualified as a success fee payable under a conditional fee agreement entered into before 1

April 2013. Were that not to be the case, claimants would potentially forfeit the rights which they had prior to 1 April 2013, whilst also not obtaining the mitigating benefits available to those entering into such arrangements after 1 April 2013. "That surely would be perverse" said Davis LJ. Thus, the appeal against the decision disallowing the costs was reversed so the solicitors would be paid their base costs and success fees after all.

Does this mean that the thousands or possibly tens of thousands of claimants with assigned CFAs can now rest easy in their beds? Far from it in our view. The court was clear that there must be a tripartite arrangement involving not only the assignor and assignee firms of solicitors, but also the client. If that does not happen because, for example, the client simply is told that the case is now being handled by a different firm of solicitors and has not joined in the arrangement, the assignment will not work. In Budana, the documentation was thorough, detailed and sophisticated involving a Transfer Agreement, a Master Deed of assignment and a deed of assignment plus a signed letter of instruction evidencing the client's agreement to the transfer of the business. In many matters which we at Kain Knight have seen, documents such as these have been absent with possibly fatal financial consequences for the solicitors involved. Notwithstanding the judgment in Budana, we think there are still a lot of potentially defective CFAs out there. If in doubt, please ask us!

Even if you have not assigned or taken an assignment of the CFA, what happens if you have a defective CFA? To what extent can it be repaired? The key case here is likely to be Radford v Frade [2016] 4 Costs LO 653 in which Warby J held that once an order for costs has been made, it is too late to amend the scope of the CFA by a deed of rectification, in order to cover work that did not fall within the ambit of that costs order. The appeal was heard in early December with judgment reserved.

Authorities on repairing potentially defective CFAs are thin on the ground, possibly because pre LASPO, another CFA could be made without forfeiting the entitlement to recover the success fee and ATE premium. It follows that any guidance which the Court of Appeal is able to give in Radford and Budana will be welcome but it is unlikely to provide all the answers because they do not cover all the issues that we at Kain Knight are routinely asked to advise about. The potential to do a magnificent job on a case under a CFA and then to lose the lot due to a trip-wire picked up by your opponent at detailed assessment, is not unheard of (remember Cox v Woodlands Manor Care Home [2015] 3 Costs LO 327).

Whichever side you are on, if you are in any doubt, help is at hand in any of our offices at Kain Knight because one thing is certain: the arguments about the validity of pre LASPO CFAs still have plenty of mileage in them – see 'What's coming up in 2018" below!

AFTER-THE-EVENT INSURANCE PREMIUMS

If BNM provided the answer that the "new" proportionality test does not apply to pre- 1 April 2013 funding arrangements, McMenemy v Peterborough & Stamford Hospitals NHS Foundation Trust [2017] 6 Costs LO 973 told us that it does in clinical negligence claims funded under CFAs from that date. The issue in McMenemy was whether it had been reasonable to take out an ATE policy at the same time as the CFA had been signed and in a conjoined appeal called Reynolds, before the claim had been investigated at all. Both claims settled without proceedings for £2,500 and £12,500 respectively, with the block-rated premium in each matter amounting to £6,042, in circumstances where, on the defendants' case, neither would ever have been defended as to liability, so no insurance was needed.

Not so, said the Court of Appeal.

Whilst the new test of proportionality in CPR 44.3(5) applied, so did the policy decision in Callery v Gray [2002] 2 Costs LR 205. Premiums payable under block-rated policies had been assessed by reference to a basket of cases and were lower than they might otherwise have been, so the reasonableness of the premium should not be examined on a case-by-case basis, as the defendant trusts had contended. The government had not intended to disturb the practice of claimants taking out ATE insurance at the same time as entering into conditional fee agreements. What was more, costs judges did not have the expertise to second-guess the insurance market, still less to deconstruct a policy that had been offered as a package into its constituent parts -Rogers v Merthyr Tydfil [2007] 1 Costs LR 77 followed. In Reynolds, that is precisely what the judge below had done by holding that it had been reasonable to take out a policy insuring against the costs of experts' reports on causation, but not on quantum, so the whole premium had been disallowed.

The upshot?

The decision in Reynolds was reversed: in clinical negligence cases funded by CFAs, claimants can continue to take out ATE insurance when they sign their conditional fee agreements, even though the premium may exceed the damages. On that basis, it appears that the new proportionality rule will have little bite because the court still considers that judges assessing costs, do not have the expertise to decide whether the premium was reasonable in amount and should not, accordingly, reduce premiums that have been block-rated.

but there is to be a Round Two!

The Court of Appeal stressed that it was not assessing the quantum of the premium, only the principle of when it was reasonable to incept the policy. If Rogers itself is to be de-constructed, that will happen in another test case called West v Stockport NHS Foundation Trust [2016] EW Misc B40 HHJ Smith, for appeal in July 2018 . Watch this space!

Solicitors Act 1974: estimates, interim on-account bills, interim statute bills, final bills – still a caution to rattlesnakes!

Just when you thought that we had experienced all that could ever have been written, done, argued about , litigated over and adjudged about solicitors' bills, we now have a yet another case on the difference between interim "statute" bills and final bills!

First an aide memoire.

In contentious business, all solicitors' bills rendered during the litigation are deemed to be interim bills, delivered on account of a final invoice to be submitted at the end of the case and the client's time for applying for detailed assessment under s.70 of the Act runs from that point. From the solicitor's point of view, there can be wisdom after the event: the fees are not limited to the charges billed already and they can be increased, if, for example, the claim has succeeded with flying colours.

By agreement with the client, the solicitor is permitted to deliver interim bills during the case which are final for the period to which they relate, so they cannot later be re-opened, but the client's time for applying for assessment under the Act runs from the date of delivery, not from the end of the case when the last bill is submitted. In legal parlance, they are known as interim "statute" bills.

> Over the years and with no let up, solicitors have got themselves into awful tangles about what type of bills they have been submitting to their clients.

Next the case law

Over the years and with no let up, solicitors have got themselves into awful tangles about what type of bills they have been submitting to their clients. That does not matter, of course, when all is well between them, but when there is a falling out, whether or not a bill is an interim-on account bill, an interim "statute" bill or a final bill, it has kept costs lawyers, solicitors, barristers and the courts in business since Victorian times. Thus terms such as "if you do not pay an interim bill "are incompatible with the proposition that sending "a bill for our charges and expenses at the end of each month" has meant that statute bills have been delivered (see Vlamaki v Sookias & Sookias [2015] 6 Costs LO 827). In that case, no final bill had ever been delivered, so the client's time for applying for assessment of work that had been done years earlier, had not even started to run!

Now what happens about disbursements?

According to the solicitors who had delivered 61 invoices, of which 43 were for profit costs and 18 for disbursements, they were all "statute" bills and it was too late to have them assessed under the Act. Not so, said Slade J in Richard Slade & Co v Boodia [2017] EWHC 2699 (QB). Under section 67 of the Act, disbursements are to be regarded as costs for the purposes of statute bills and as none of the bills had included a charge for both profit costs and disbursements, they were all interim bills, so time was not running against clients for applying for an assessment until the last in the series had been delivered. Thus even if the solicitor's terms of business provide for the client to receive interim statute bills, they must contain all disbursements claimed for that period. If they do not do that, they are interim bills on account of a final bill and the s.70 time limit is not running against the client for applying for assessment.

And lastly, estimates.

Of all complaints levelled against lawyers, failure to give estimates or exceeding them must rank high on the list. Harrison v Eversheds [2017] 5 Costs LR 931 is another example of what happens when things go wrong. Here, the client had been given estimates, a couple in fact, of £333,102 and £548,054 respectively. At the end of the case, the client then received an invoice for £1,602,436 including counsel's fees! In fairness, the trial had continued for ten days rather than four, but additional reasons to those given in the court below were required, according to Slade J, so the whole assessment was remitted back to the Master for determination of what would be a reasonable sum for the client to pay for the solicitor's profit costs and counsel's fees. Another fine mess!

What to look out for in 2018

(or possibly before)?

These are the cases in the Court of Appeal (except where stated) we know about which will be important for all who have an interest in costs, whether paying or receiving:

May v Wavell Group

– County Court appeal heard January 2017: HH Judge Dight. Judgment awaited on proportionality.

Radford v Frade

– appeal listed 5 December 2017 – Vos C, McCombe LJ - Doing work outside the scope of the CFA; rectification of the CFA; when can you do it?

Lowin v Portsmouth & Co

-appeal listed 5 December 2017 Vos C, McCombe LJ - Provisional assessment: does an effective Part 36 offer trump the CPR 47.15(5) fixed costs of £1,500?

Surrey v Barnet Hospitals NHS Trust

– appeal listed 6 March 2018 -late transfer from legal aid to CFA

West v Stockport NHS Foundation Trust [2016] EW Misc B40 HHJ Smith

- quantum of After-the-Event Insurance premiums

Sony v SSH

– appeal listed 25 July 2018 – varying the costs budget after trial

Meanwhile back in the Office

Whilst some in the costs industry believe the future of civil costs is all doom and gloom, Kain Knight, in contrast to this belief, has gone from strength to strength. Evidencing this, 2017 has seen the opening and growing of its Manchester office. Director and Costs Lawyer, Nick McDonnell, who has over 18 years of civil litigation costs experience, heads up the office leading a strong team of Senior Costs Draftsmen, Gary Redfern and Simon Sharpe together with Business Development Manager, Mark Hartigan.

Photo of Jonathan accepting the cup from senior costs judge Andrew Gordon-Saker at the costs lawyers' dinner held on november 2017

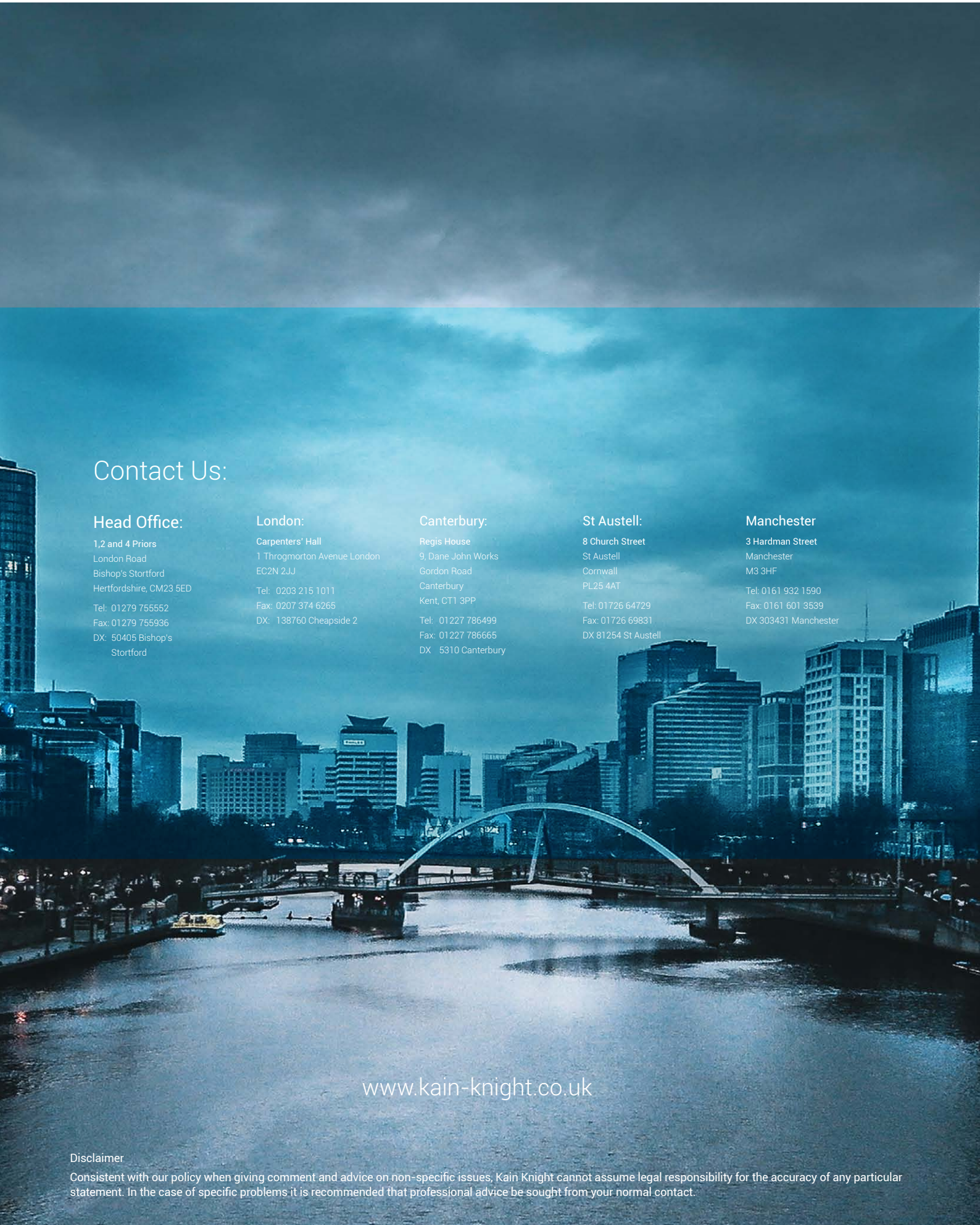
With offices in Spinningfields, the centre of Manchester's legal district, the team provide legal costs services to clients such as law firms, ATE insurers and financial institutions. Costs management and budgeting work, inter partes and solicitor/client detailed assessment proceedings and costs appeals forms a large part of the work the office does.

The Manchester team have already had primary and fundamental involvement in some of the most important Court of Appeal costs cases of the year; Peterborough & Stamford Hospitals NHS Trust v McMenemy & Ors [2017] EWCA Civ 1941 (28 November 2017) and Khaira & Ors v Shergill & Ors [2017] EWCA Civ 1687 (27 October 2017).

Further expansion is planned for next year with projections suggesting the Manchester office will be up to a team of at least 10 by the end of 2018.

Should you wish to instruct Kain Knight's Manchester office please contact Nick McDonnell on **0161 932 1590** or **nick.mcdonnell@kain-knight.co.uk**.

Kain Knight are delighted that both Jonathan Sandford and David Hughes were joint winners of the Association of Costs Lawyers' Student Cup this year. Jonathan joined Kain Knight in 2010, having previously practised as a solicitor. David joined in 2014 upon completion of his law degree and LPC. The work involved in winning the cup included one exam at the end of each academic year and 4-5 pieces of coursework per year. Managing Director Matthew Kain welcomed the news commenting that "The results are testament to the hard work that both Jonathan and David put into the coursework and naturally we are very proud to have them as esteemed members of the team".



Contact Us:

Head Office:

1,2 and 4 Priors
London Road
Bishop's Stortford
Hertfordshire, CM23 5ED

Tel: 01279 755552
Fax: 01279 755936
DX: 50405 Bishop's Stortford

London:

Carpenters' Hall
1 Throgmorton Avenue London
EC2N 2JJ

Tel: 0203 215 1011
Fax: 0207 374 6265
DX: 138760 Cheapside 2

Canterbury:

Regis House
9, Dane John Works
Gordon Road
Canterbury
Kent, CT1 3PP

Tel: 01227 786499
Fax: 01227 786665
DX 5310 Canterbury

St Austell:

8 Church Street
St Austell
Cornwall
PL25 4AT

Tel: 01726 64729
Fax: 01726 69831
DX 81254 St Austell

Manchester

3 Hardman Street
Manchester
M3 3HF

Tel: 0161 932 1590
Fax: 0161 601 3539
DX 303431 Manchester

www.kain-knight.co.uk