Bulletin 51 **March 2014**

Butterworths Costs Services Bulletin

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INTRODUCTION

We have reported on the most significant updates from 27 November 2013 to 20 February 2014. The particular highlights during this period are (i) the proposed reforms of the court fees; (ii) an update on guideline hourly rates; and (iii) the litigations funders' updated Code of Conduct. We also address interesting case law.

Court fees: Proposals for reform

From 3 December 2013 to 21 January 2014 the Ministry of Justice (the MoJ) held a consultation on its proposed reforms to court fees. The ministerial foreword to the consultation sets out that civil and family court users do not meet the entire costs of the court process, and there is a deficit of some £100 million. The proposed solution is that:

> "In most cases, those who use the courts will be expected to pay what it costs. And in some cases, the government believes they should pay more where they can afford to do so. We are separately looking at options to make convicted criminals contribute towards the costs of the criminal courts.
>
> There will be measures in place to protect against setting excessive fees. The Lord Chancellor's existing duty to protect access to the courts will continue to apply and, in setting enhanced fees, he will also be required to consider:
>
> - The overall financial position of the courts: he will need to satisfy himself that fee increases are necessary; and

- The impact of fee changes on the legal services market, so that they do not risk damaging our competitive position."

The consultation paper proceeds in setting out the detailed arguments and proposed revised court fees.

On 5 February 2014 the Civil Justice Council (CJC) responded to the MoJ's consultation paper. The CJC's general points

- "The consultation perpetuates the suggestion the Civil Justice is not self-financing. The effects of these reforms would be to increase the degree of Civil Justice's subsidy of Family Justice …;

- The tone of the paper is that a gentle touch is needed on family fees as cases give rise to "difficult circumstances"…, and this is unquestionably true. However, there is no similar consideration on civil matters such as debt or possession cases and many others, which also give rise to very distressing circumstances, which required acknowledgment …

- Inconsistency of price increases – placing the proposed fee increases in percentage terms reveals some marked disparities … Price increases should be proportionate and set within a logical framework, explained, and consistently applied.

- The Government needs to bear in mind that – as with other above-inflation rises in other public service sectors – the users of the service will be increasingly questioning and scrutinising the levels of service they receive for the increased fees being paid …

- The Council is concerned about the potentially chilling effect on lower to medium value claims of the fee increases, as litigants may opt not to bring claims where the court fee represents a significant proportion of the legal costs and is significant in relation to the overall value of the claim. There is a danger that the effect of the proposals could be counter-productive in such cases, and represent a loss of court income rather than an increase.

- … Great care is needed in adjusting the fee structure for commercial proceedings in a way that does not harm the UK's attractiveness for major international dispute resolution."

Guideline hourly rates

On 2 December 2013 the deadline for the Costs Survey for New Guideline Hourly Rates was extended to 12 December 2013. The Cost Committee to the CJC's report will make recommendations to the Master of the Rolls on the Guideline Hourly Rates for 2014. The report is planned for completion at the end of March 2014, and thereafter it falls to the Master of the Rolls to take the decision. The review of the Guideline Hourly Rates will then become an annual exercise.

Judicial review – Proposals for further reform

In February 2014 the MoJ formally responded to the information it had received during its further consultation from 6 September 2013 to 1 November 2013 about the proposed reforms to judicial review to stem its growth and to avoid delays. The Secretary of State for Justice states in his foreword that the MoJ had received 325 responses, and:

- Having considered the responses, he was "satisfied both that there is a compelling case for reform and that it should proceed at pace";
- Some of the proposed changes were detailed in the Autumn Statement and the National Infrastructure Plan, namely the creation of a Planning Court to reduce delays to key projects, allowing nationally significant cases to reach the Supreme Court more swiftly, and amending how the courts deal with judicial reviews brought on minor technicalities;
- He is proceeding with a comprehensive package of reform to the financial measure relating to judicial review, such that Claimants (and third party funders/supporters) bear a more proportionate degree of financial risk. In particular, he is setting up a strict framework governing when Protective Costs Orders can be made (in non-environmental cases);
- He also intends to implement a proposal to pay legal aid providers for work carried out on applications for permission only if permission is granted; and
- He also plans to introduce a permission filter for appeals under s 288 of the Town and County Planning Act 1990 to weed out weak claims earlier (but does not intend to remove claims under s 289 from the scope of legal aid altogether).

Association of Litigation Funders' (ALF) revised and updated code of conduct

The Code of Conduct for Litigation Funders was originally published by the CJC on 23 November 2011. In January 2014 the Code of Conduct was amended, particularly in respect of the capital adequacy of funders: the ALF identifies the key elements of the Code (and amendments) as follows:

> "Capital Adequacy of Funders
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> The Code of Conduct requires funders to maintain at all times adequate financial resources in order to meet their obligations to fund all of the disputes they have agreed to fund, and to cover aggregate funding liabilities under all of their funding arrangements for a minimum period of 36 months. As amended in January 2014, the Code also requires that funders maintain access to £2 million in capital (or such other amount as the association shall stipulate) and provides for a continuous disclosure requirement in this regard.
>
> Termination and Approval of Settlements

> The Code of Conduct provides that Funders must behave reasonably and may only withdraw from funding in specific circumstances. Where there is a dispute about termination or settlement, a binding opinion must be obtained from an independent QC, who has been either instructed jointly or appointed by the Bar Council.
>
> Control
>
> Under the Code of Conduct, Funders are prevented from taking control of the litigation or settlement negotiations and from causing the litigant's lawyers to act in breach of their professional duties. This is in line with the practice, in England & Wales, to keep the roles of the funders and the litigants and their lawyers separate. Because of their interest in the litigation, funders will however ask to be kept informed of the progress of the case. Some funders may also have considerable litigation experience which could benefit the litigant and its legal team".

Consideration of the Jackson Reforms

The CJC had previously promised to review the impact of the "Jackson Reforms" once they had bedded in. In February 2014 the CJC invited written papers on that impact by 7 March 2013. The "Notice of conference and call for position papers" states:

> "As we near the first anniversary of implementation of the reforms, the CJC wishes to examine early signs of their impact on the civil justice system. In order to do this, it is holding a conference to provide a forum for discussion among representatives of stakeholder groups such as practitioners, the judiciary, consumers, major court users and other interested parties."

The CJC particularly invited written submissions on:

- The types of cases being taken on (and not being taken on) by law firms;
- The funding of civil litigation in the light of changes to commencement funding arrangements (CFAs) and the introduction of DBAs and QOCs; and
- Experiences of costs budgeting and the management of cases through the courts.

CASE LAW

We now report below on some interesting case laws within the relevant period, which include decisions relating to (i) interest on costs; (ii) relief from sanctions for failure to serve a notice of funding in the new landscape after Jackson; and (iii) the thorny issue of the impact of a client's incapacity on a solicitors' retainer.

DIVIDER A – CIVIL LITIGATION COSTS

INTEREST ON COSTS

(1) PAUL SCHUMANN (2) JOANNE CHINNOCK v VEALE WASBROUGH [2013] EWHC 4070 (QB) Mr Justice Dinglemans 18/12/2013

Facts: Following delivery of the judgment dismissing the Claimants' claims, the parties agreed that the Defendant should be entitled to its costs on the standard basis. The Defendant also sought interest at 1.5% on the sums paid by the Defendant to its legal representatives from the date of payment of those costs until judgment.

Held: The court refused to award the Defendant interest on the fees already paid, as: (1) the making of such orders is not usual, which suggests there might be proper reasons for not making an order; (2) the exercise of the costs jurisdiction has always been rough and ready and rarely provides a complete indemnity to the winning party; (3) the making of such an order would introduce an unnecessary level of sophistication into the process for assessing costs, with parties being required to show not only when bills were rendered, but how and when they were paid. This is likely to generate further costs; (4) provisions relating to the summary assessment of costs on interim application and interim payments on account of costs are other routes providing a system which ensures that such parties who have paid costs to their legal representatives are not kept out of pocket for long periods; and (5) there is nothing in this case which renders the making of such an order appropriate, such as a very long delay in the action.

Comment: The court adopted a different approach to interest on costs (prior to the order for costs) than had previously been understood. This case suggests that it will only be in exceptional cases, for example those with a long delay, where interest on costs pursuant to CPR r.44.3(6)(g) will be awarded.

DIVIDER E – LITIGATION FUNDING

NOTICE OF FUNDING AND RELIEF FROM SANCTION

(1) MARK FORSTATER (2) MARK FORSTATER PRODUCTIONS LIMITED v (1) PYTHOM (MONTY) PICTURES LTD; (2) FREEWAY CAM (UK) LTD [2013] EWHC 3759 (Ch) Mr Justice Norris 29/11/2013

Facts: Following judgment, the judge determined which party should pay the costs of the complex action. The Second Claimant's solicitors and counsel had been instructed on pre-CFAs within the meaning of CPR r.48.2(1)(a)(i) (i e the transition provisions relating to additional liabilities). The Defendants maintained that, as the Second Claimant had not served an N251, then the Second Claimant should not be entitled to recover any additional liabilities,

in accordance with CPR r.44.3B. The Defendant applied for relief from sanction under CPR r.3.9 (albeit the new CPR r.3.9).

Held: Allowing relief from sanction from 19 July 2012: (1) there was no good explanation for the failure to give notice of the funding arrangement, it was simple oversight; (2) although the Defendants did not initially know that the Second Claimant was acting on a CFA, from 19 July 2012 the Defendants became aware from the content of some without prejudice correspondence; (3) the court agreed with the statement of principle in *Supperstone v Hurst* [2008] EWHC 735; (4) given that from 19 July 2012 the policy behind CPR r.44.3B had been fulfilled (even if not in the correct form), and given the potential prejudice to the Second Claimant and lack of prejudice to the Defendant, relief would be allowed; and (5) after circulating the judgment, the court had been provided with the decision in *Mitchell v News Group* [2013] EWCA Civ 1537. The court did not revise its judgment which it considered proceeded upon the correct principles.

Comment: This was the first case in which the common issue about relief from the sanction in CPR r.44.3B was considered after the handing-down of *Mitchell v News Group.* However, the Senior Courts Costs Office has also recently considered the issue in the cases of *Harrison v Black Horse Limited* [2013] EWHC B28 (costs) and *Burton v Cranfield Delta Whiskey Group* (*unreported*) which, if the issue arises, may also be of interest.

DIVIDER L – SOLICITORS' REMUNERATION

SOLICITOR AND CLIENT ASSESSMENT AND POINTS OF DISPUTE

MOUNT EDEN LAND LIMITED v SPEECHLY BIRCHAM LLP [2014] EWHC 169 (Ch) Mr Justice Teare (with Master Haworth as an assessor) 05/02/2014

Facts: In the course of a solicitor-client assessment pursuant to s 70 of the Solicitors Act 1974, the Claimant, the client, raised lengthy points of dispute about each and every item in the bill, notwithstanding the generalised approach taken in the Points of Dispute. The Master directed that the Claimant should prepare amended Points of Dispute in the hope of narrowing the issues between the parties. The Claimant amended the Points of Dispute to raise specific, but nondescript objections. At the returned detailed assessment hearing, the Master compared the Points of Dispute against what was required in the Costs Practice Direction and because the paucity of the amended Points of Dispute indefinitely stayed the assessment (effectively allowing the sums claimed). The Claimant appealed.

Held, dismissing the appeal: (1) The Master was entitled to find that both the original Points of Dispute and the amended Points of Dispute were defective because neither adequately stated the Claimant's case; (2) the decision to stay the assessment was certainly a robust one, but it was taken in circumstances where it appeared to the Master, for good reason, that the assessment which the Claimant wished to carry out could not be done at proportionate cost.

The decision was not plainly wrong; and (3) the stay of the assessment was not a breach of the Claimant's Article 6 Rights.

Comment: Although a case very much on its own facts (but not limited to solicitor-client assessments), it emphasises that parties must act proportionately when considering their approach to Points of Dispute and as a paying party in detailed assessment proceedings.

DIVIDER L – SOLICITORS' REMUNERATION

TERMINATION OF RETAINER – CAPACITY OF CLIENT

DIANN BLANKLEY (By her Litigation Friend Andrew M.G. Cusworth) v CENTRAL MANCHESTER AND MANCHESTER CHILDREN'S UNIVERSITY HOSPITALS NHS TRUST [2014] EWHC 168 (QB) Mr Justice Phillips (sitting with Assessors Master Campbell and Greg Cox) 05/02/2014.

Facts: In 2002 the Claimant (through her father as her litigation friend) brought proceedings claiming damages for clinical negligence in respect of a procedure in 1999. In February 2005 the parties agreed that judgment should be entered for the Claimant with damages to be assessed on the basis of a 95% liability. By May 2005 the Claimant had regained mental capacity and an order was made that she carry on proceedings without a litigation friend. On 8 July 2005 the Claimant entered into a CFA with her solicitors. On about 9 February 2007 psychiatrists determined that the Claimant no longer had mental capacity. Although the solicitors and the subsequently appointed receiver liaised about entering into a new CFA, no signed executed CFA could be located. Regional Costs Judge Harris held, in reliance on *Yonge v Toynbee* [1909] 1 KB 215 and *Findley v Barrington Jones* [2009] EWHC 90130 (costs), that the loss of capacity terminated the CFA and that no new CFA had been executed. The Claimant invited the Regional Costs Judge to reconsider his decision on new legal argument and fresh evidence. The Claimant also argued that (i) the receiver/deputy had power to carry on the CFA; (ii) the solicitors' fees were otherwise recoverable as "necessary services"; and (iii) the Claimant had in any event entered in a new but retrospective CFA by executing the draft 2009 CFA in March 2009. The Regional Cost Judge in his second judgment held that none of the new matters satisfied him that he should amend his first judgment. The Claimant appealed both judgments (the first out of time).

Held: allowing the appeal: (1) The supervening mental incapacity does terminate the solicitor's authority. However, the termination of a solicitor's authority by reason of mental incapacity does not, in itself, and in the usual case, frustrate the underlying contract of retainer; (2) if the CFA had been terminated by frustration, then the receiver/deputy could not have adopted or ratified it. It would be necessary to show that a new CFA had been entered into; (3) the Claimant's pursuit of proceedings did constitute "necessary services" (under s 7 of the Mental Capacity Act 2005) so, in the absence of the CFA, the solicitors would have been able to recover reasonable fees for

those services. However, in the present case the solicitors were not instructed by the Claimant but by the deputy, so the question of capacity simply did not arise; (4) if the solicitors had been acting without authority (which was not the case), there would be no basis on which the Defendant would be estopped from asserting the solicitors had no authority; and (5) if it had been necessary to decide the point, he would have upheld the Regional Costs Judge's finding that no new CFA had been entered.

Comment: This decision finally alleviates the difficulties of acting for clients who fluctuate between having capacity and lacking capacity. The previous understanding (in reliance on *Yonge v Toynbee*) that CFAs (and other retainers) would be terminated upon supervening mental incapacity has been shown to be incorrect. However, solicitors should still bear in mind that acting in breach of a warranty of authority can be a serious matter and could lead to problems more significant than merely disallowed fees.

DIVIDER L – SOLICITORS' REMUNERATION

LEGAL OMBUDSMAN'S POWERS

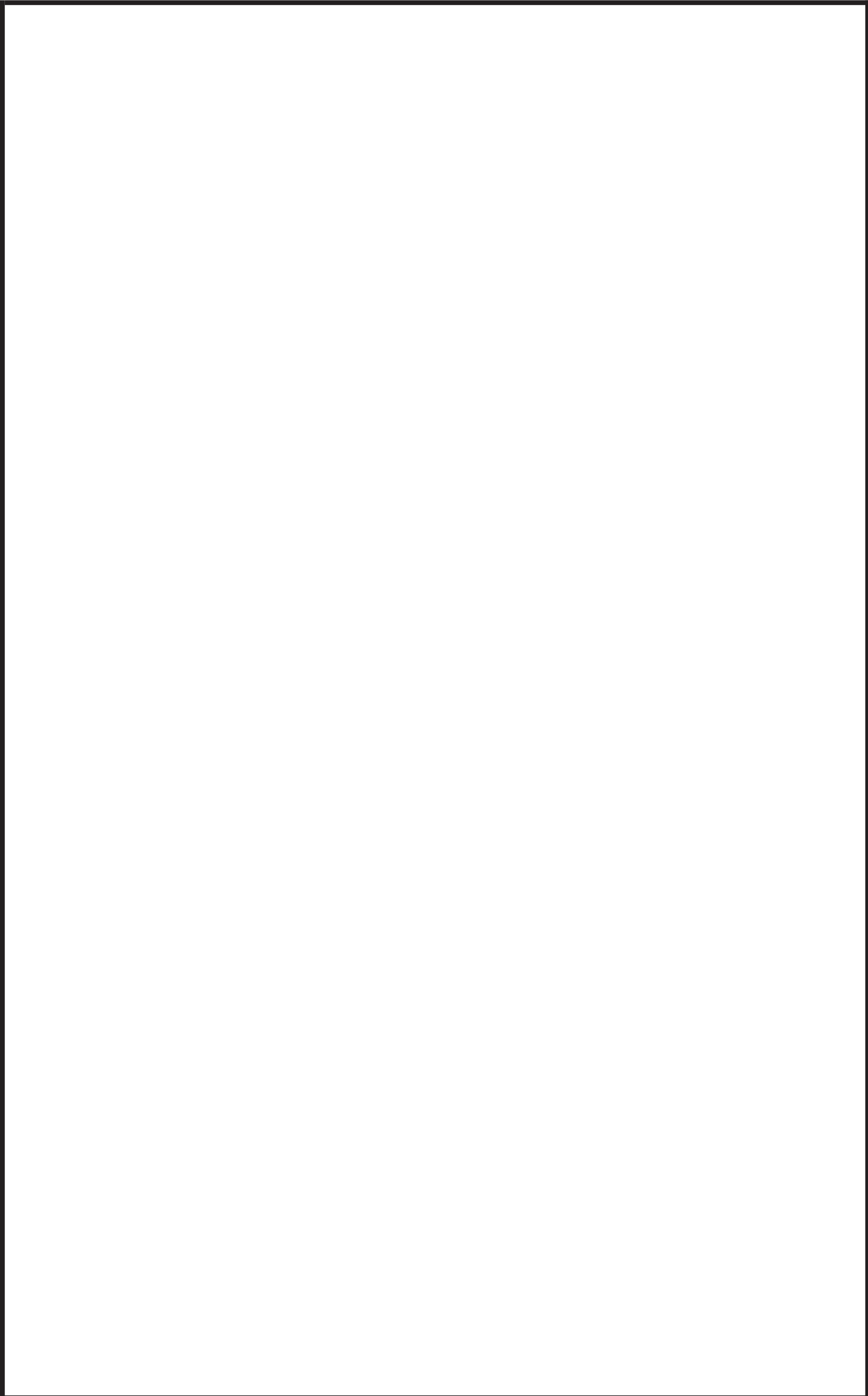
LAYARD HORSFALL LTD v THE LEGAL OMBUDSMAN [2013] EWHC 4137 Mr Justice Phillips 20/12/2013

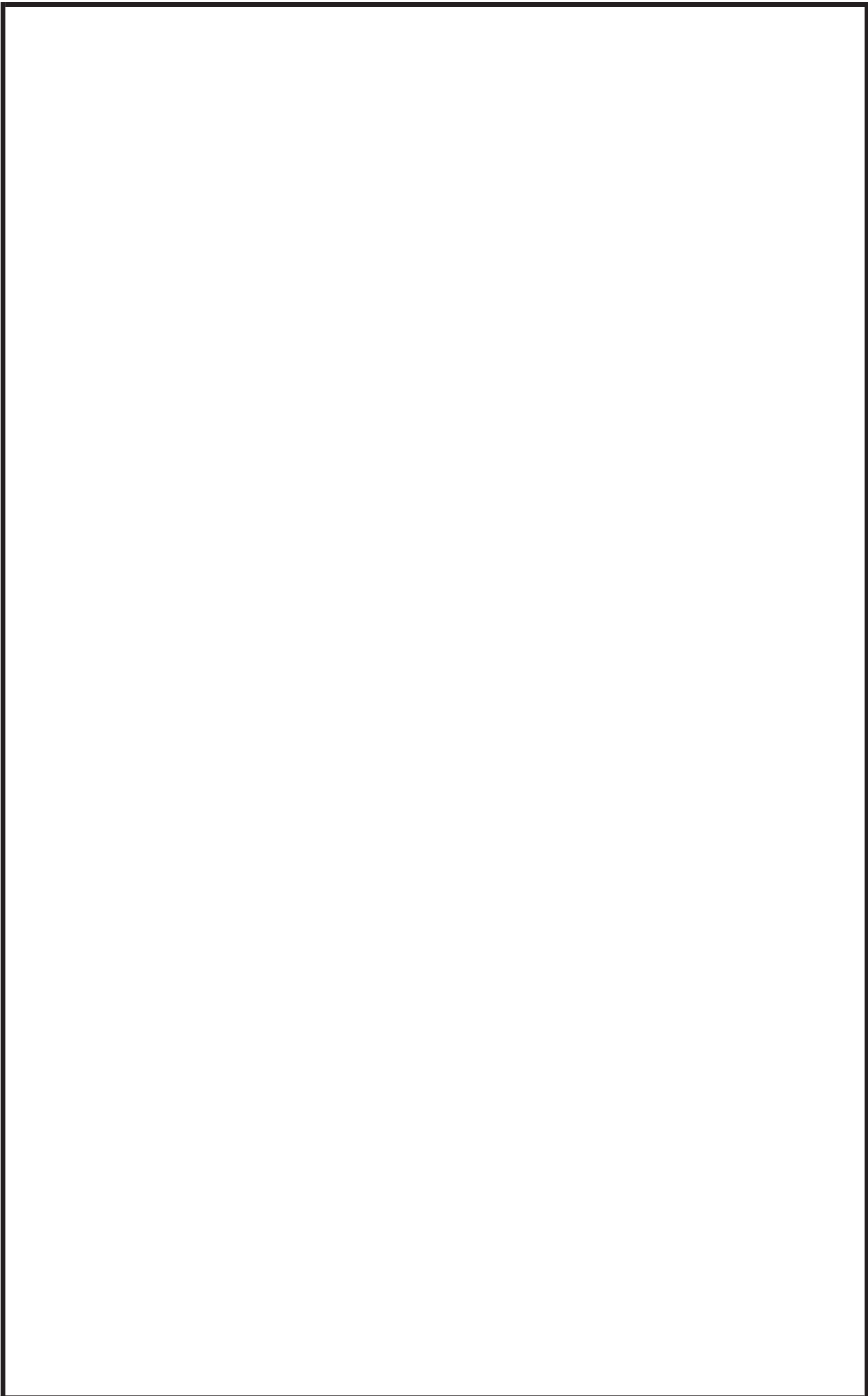
Facts: In 2009 Ms Lane instructed the Claimant on a CFA in proceedings against Mr Marshall which arose from building works to her premises. The CFA provided an estimate of the costs, being £5,000 plus VAT. On 6 November 2009 Mr Marshall went bankrupt and the Claimant advised Ms Lane not to continue with the proceedings. There was a factual dispute between the Claimant and Ms Lane as to whether they reached an agreement for the fees to be paid under the CFA in the action against Mr Marshall. Following receipt of her invoice from the Claimant for £5,000 plus VAT on 11 January 2011, on 26 January 2011 Ms Lane made a complaint to the Legal Ombudsman. Ms Lane alleged that the Claimant (i) had delayed in billing her; and (ii) was attempting to charge her under a CFA notwithstanding that the case had been discontinued. In June 2011 the Claimant commenced county court proceedings for £5,000 plus VAT, which were stayed by agreement. The Ombudsman recommended that the definition of "win" had not been satisfied, so the Claimant should waive any fees. The Claimant objected, and the Ombudsman issued a provisional decision on 1 September 2012 stating that the fees should be limited to £1,500 plus VAT. The Claimant did not comment on the decision, which was made final on 27 September 2011. The Claimant judicially reviewed the decision (with permission) on the grounds that: (i) the Ombudsman did not have substantive jurisdiction to determine the purely contractual dispute about the CFA; (ii) Ms Lane's complaint was out of time; and (iii) the Ombudsman decision was irrational given the contractual agreement to the fees.

Held: Dismissing the claim for judicial review: (1) the Ombudsman does have jurisdiction to determine contractual disputes between the parties; (2) in any event, the Ombudsman's final decision did relate to findings as to the service provided to Ms Lane; (3) for complaints about charging, the time limit only

crystallises when the solicitor submits a fee note relating to the fees in question; (4) this would have been an appropriate case to extend the time limits in any event; and (5) the Ombudsman's decision was not irrational as it was not purely concerned with the contractual analysis, but the Claimant's services as well.

Comment: This decision could be important for practitioners. The court held that the Ombudsman had jurisdiction to determine issues relating to the contractual interpretation of retainers. In future, clients could benefit from using the Ombudsman's service (as opposed to issuing court proceedings) in relation to interpretation of retainers.





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Published by LexisNexis

ISBN 978-1-4057-8409-2