JUDGEMENT : MASTER SIMONS, COSTS JUDGE. 29th June 2007

1. On 7 and 8 June 2007 I carried out a detailed assessment of 13 bills that had been rendered by the Defendants to the Claimant between August 2003 and September 2005. As a result of decisions made by me the bills were reduced by £6,841.25. Mr Byrne for the Claimant informed me that this amount constituted a reduction of 14% of the amount of the bills. Mr Abraham for the Defendants informed me that he had not had an opportunity of checking the arithmetic relating to the reductions and consequently was not prepared to agree that the reduction constituted 14% taxed off the bills.

2. The parties then made representations to me concerning the costs of the detailed assessment and this judgment is my decision concerning the costs of the detailed assessment.

3. Mr Byrne conceded that the bills had been reduced by less than 20% but submitted that there were special circumstances as to why the court should not order the Claimant to pay the Defendants costs of the detailed assessment pursuant to Section 70(9) of the Solicitors Act 1974. He also submitted that orders for costs should be made in favour of the Claimant in respect of part of the costs of the detailed assessment proceedings.

4. Mr Byrne submitted that the special circumstances were that the Defendants had refused to engage in any dialogue or discussion with the Claimant since the middle of 2005, that they had refused to hand over any of their papers to enable Mr Byrne to advise his client as to whether or not he had been overcharged and that they had refused to engage in any mediation.

5. Mr Byrne informed me that the Defendants had refused to release any papers to him to enable him to advise his client whether or not the bills delivered were fair and reasonable unless the Claimant paid an unpaid balance of £6,654.26. He therefore had to incur the costs of issuing detailed assessment proceedings before being in a position to properly advise his client. It was only when the order was made for detailed assessment and the question of inspection of documents was discussed at court that facilities were made available by the Defendants to Mr Byrne to inspect the papers.

6. Mr Byrne referred me to a letter of 15 June 2006 which had been sent by his firm to the Defendants after Points of Dispute and Replies to the Points of Dispute had been served. He referred me to the final sentences of that letter which read as follows:

   "We could attempt to make progress towards a settlement in correspondence or we could have a without prejudice meeting (with or without my client) or we could have a mediation.

   I myself think a mediation might well achieve settlement in this case.

   However as we have not yet attempted to negotiate it might be worth doing so first. Would you like to make my client an offer in the first instance?"

7. On 28 July 2006 Mr Byrne again wrote to the Defendants concerning the setting down of the case and he reminded them that he still had not heard from them with regard to his suggestion about *"the possibility of mediation or otherwise making some progress towards settling this case …"* A further reminder was sent to the Defendants on 17 August 2006.

8. On 22 August 2006 the Defendants wrote to Mr Byrne stating: *"We have considered this matter but do not perceive that a mediation in this matter would be appropriate. In our view a mediation would potentially add great expense which expense would not be recoverable by either party. Furthermore, we consider that it is extremely unlikely that a mediation would be successful: on the contrary we consider that it would almost certainly fail and the parties would be left with additional and irrecoverable expense."*

9. Mr Byrne referred me to ***Halsey v Milton Keynes General NHS Trust & Ors*** [2004] EWCA (civ) 576 as authority for the court to depart from the normal order for costs of proceedings where one party had refused to negotiate.

10. Mr Byrne also submitted that his client should receive costs of the proceedings. He submitted a costs schedule to me showing that the costs that had been incurred by the Claimant amounted to over £29,000. This claim for costs was in relation to four separate matters:

    a) The fact that the Claimant had to incur approximately £3,000 to £4,000 worth of costs before Mr Byrne had an opportunity to advise him as to whether or not he should apply for a detailed assessment. Mr Byrne submitted that the Defendants acted unreasonably by refusing to allow him to have access to their files.

    b) Mr Byrne stated that he incurred further costs as a result of the Defendants files being disorganised which meant that he had to spend a considerable amount of additional time before he was in a position to give advice to the Claimant.

    c) He referred to the Defendant's application to amend the proceedings to show the change from Colman Coyle to Colman Coyle LLP. The Defendants had made an ex parte application, which following the making of the Order, Mr Byrne had applied to set aside the Order made by me.

    d) The Claimant incurred further costs as a result of the administration of Colman Coyle. Mr Byrne referred me to various aspects of the administration when he received various reports from the administrator. He submitted that at one stage there was a possibility that proposals made by various creditors of Colman Coyle would not be accepted. This involved him incurring further costs on behalf of his client.

11. Mr Byrne therefore submitted that his client should not have to pay the costs of the detailed assessment proceedings and that an order should be made that his client receive a proportion of his costs.

12. Mr Abraham submitted that a failure on the part of the Defendants to mediate could not constitute a special circumstance. Furthermore, whilst he accepted that his firm refused to mediate or negotiate no offers of settlement had been received by the Claimant.

13. He submitted that the reason why his firm had refused to mediate or negotiate was that it was clear to him and to his partners that such mediation was unlikely to succeed. Mr Byrne had given an indication in his letter that his firm's costs by that time were already in the region of £16,000 and that if Mr Byrne was going to seek recovery of those costs there could be no possible chance of any mediation being successful. He further considered that the cost of mediation would be at least £10,000 and by agreeing to a mediation it was more than likely that his firm would have faced unrecoverable costs. Mediation, he submitted, was unrealistic in a situation where the Claimant had already incurred £16,000 worth of costs and the dispute was only about £6,000 to £13,000 worth of costs.

14. Mr Abraham reminded me that the Court of Appeal in ***Halsey*** had made clear that the burden was on the unsuccessful party to show why there should be a departure from the general rule on costs and that the Claimant had not shown that the Defendant had acted unreasonably in refusing to agree to mediation.

15. Mr Abraham rejected that there should be any orders for costs against his firm. His firm was justified in exercising their lien as a result of unpaid fees. The fact that his firm's files were not in the form that Mr Byrne liked did not justify any order for costs against his firm. He accepted that it was not appropriate for the Claimant to have to pay any costs in relation to his application to change the name of the Defendant but after the Claimant had applied to set aside the ex parte Order made in this connection it was the Claimant who acted unreasonably in refusing to accept an undertaking offered by his firm. That undertaking formed the basis of the order that was ultimately made. As far as the costs of dealing with the administrators of Colman Coyle were concerned, this involved little more than reading the documentation that was sent to the Claimant and keeping the Claimant informed as to the progress of the administration.

"Section 70 Solicitors Act 1974

(9) Unless –

(a) the order for taxation was made on the application of the solicitor and the party chargeable does not attend at the taxation, or

(b) the order for taxation or an order under sub-section (10) otherwise provides,

the costs of a taxation shall be paid according to the event of the taxation, that is to say, if one fifth of the amount of the bill is taxed off, the solicitor shall pay the costs, but otherwise the party chargeable shall pay the costs.

(10) The taxing officer may certify to the court any special circumstances relating to the bill or to the taxation of the bill and the court may make such order as respects the costs of the taxation as it may think fit."

16. I accept Mr Byrne's submission that the failure to engage in mediation or to attempt a settlement can amount to a special circumstance within the meaning of sub-section (10).

17. Whether there were special circumstances in this particular case depends on whether or not the Defendants acted unreasonably in refusing to agree to mediate or agree to negotiate. I am satisfied that the Defendants were unreasonable in failing to agree to a mediation or to negotiate. By June 2006 when they received the suggestion from Mr Byrne that the parties should attempt to negotiate or mediate they had already received the Points of Dispute and were aware that the Claimant on his best case was only disputing a maximum of approximately £13,000 against bills that had been rendered for approximately £48,000. It must have been clear to them at that stage that the costs of the detailed assessment would have been well in excess of the amounts in dispute. Furthermore they were aware that the Claimant had been dissatisfied with their service and had made a complaint to the Office of the Supervision for Solicitors in respect of the handling of the case by Colman Coyle. Whilst they had legal justification in refusing to release any of their papers until the outstanding bills had been paid, nevertheless they must have been aware that Mr Byrne could not have been in a position to advise the Claimant as to whether or not the fees that were charged by them were excessive and that the Claimant would have to incur significant costs before he could even get to the stage of deciding as to whether or not he should seek a detailed assessment.

18. I have formed the view that the Defendants were making it as difficult as possible for the Claimant to succeed in scrutinising their bill. I bear in mind that the Claimant was dyslexic and was dependent upon advice. I also bear in mind that whilst the Defendant successfully resisted many of the challenges made by the Claimant to their bill there were various items that were successfully challenged and should never have been in the bills at all, such as charging for time spent in preparing holiday notes and charging for time spent in preparing narratives for bills and for chasing for payment of their bills.

19. Whilst finding that there are special circumstances as to why I should depart from the normal rules with regard to the costs of the detailed assessment I reject Mr Byrne's submission that there should be any orders for costs in favour of his client. As I have found that these Defendants were unjustified in refusing to permit the Claimant to inspect the files, as a result of this finding the amount of the costs of the Detailed Assessment that the Defendants will be able to recover from the Claimant will be reduced. Consequently, it would be a double jeopardy to order the Defendants to pay any of those costs to the Claimant. Mr Byrne has identified these costs to be £3,000 to £4,000 which are figures which I find to be quite staggering and disproportionate. I fail to understand as to why the application for detailed assessment could not have been submitted without incurring such substantial costs.

20. I also reject Mr Byrne's submission that his costs were increased by the fact that the Defendant's files were not organised. I accept Mr Abraham's submission that the files were organised in the way that his firm likes to organise them. This may not have been to Mr Byrne's liking but it is up to any firm to organise their files any way that they wish to and should not be penalised for doing so.

21. With regard to the court application to change the name of the Defendant I accept Mr Abraham's submission that he has not made any claim in respect of those costs against the Claimant. Mr Byrne has sought the costs of the hearing before me on 10 April 2006 but my note of that hearing indicates that the undertaking upon which my order was ultimately based had been offered by the Defendants to the Claimant prior to the hearing. At the hearing I reserved the costs of the detailed assessment and having looked back at my notes I consider that the appropriate order for that hearing is no order for costs.

22. With regard to the claim that the Claimant incurred further costs as a result of the administration of Colman Coyle I am not satisfied that substantial further costs have been incurred and even if they had been incurred I consider that they are small in comparison with the costs of these detailed assessment proceedings. I do not consider it appropriate for there to be any order that the Defendants pay any of the Claimant's costs with regard to this.

23. At the end of the submissions with regard to costs each party submitted statements of costs. The Claimant's costs amounted to £29,479.88 inclusive of VAT and disbursements. The Defendants submitted a schedule for costs which Mr Byrne informed me he had not had an opportunity to study. Mr Abraham informed me that he wished to amend the Defendant's schedule and I gave him permission to do so and directed him to serve a copy on Mr Byrne and further directed that Mr Byrne sends me written comments on the Claimant's schedule. These documents have now been received as have the Defendant's comments on Mr Byrne's comments and have been read by me.

24. The Defendant's amended schedule amounts to £20,246.74.

25. My finding that there are special circumstances gives me full discretion to decide what the appropriate order for the costs of Detailed Assessment should be. By the time the Claimant had suggested mediation the Defendants had already incurred costs and would have incurred further costs as a result of the mediation. I bear in mind that the bills have been reduced, on Mr Byrne's calculations, by 14%. I therefore consider it unfair for the Defendants to be deprived of all of their costs.

26. I therefore consider that the Defendants should receive two thirds of their costs of the Detailed Assessment. Having considered their amended costs schedule and the representations made by Mr Byrne in relation thereto and the Defendant's responses, I assess the Defendant's costs at £9,000 and costs draftsman's fees of £2,358.66. Two thirds of this sum is £7,572.44 and I accordingly order that the Claimant pay the Defendants the sum of £7,572.44 in respect of the costs of the Detailed Assessment.

Mr John Byrne (instructed by John Byrne & Co) for the Claimant
Mr David Abraham (instructed by Colman Coyle LLP) for the Defendant