JUDGMENT : Master Haworth : Costs Court. 3rd September 2008

1. This is an appeal pursuant to CPR Rule 47.20 from a decision of Costs Officer Martin in relation to a detailed assessment which took place on 4 March 2008.

BACKGROUND

2. The Appellant commenced proceedings seeking damages for personal injuries suffered as a result of a collision between herself and a horse whilst attending an equestrian event at the Respondent's premises on 16 December 2004. In the initial letter of claim dated 3 February 2005 the Appellant's solicitors alleged negligence and/or breach of statutory duty under the Occupiers Liability Act 1957. Following an initial pre-action protocol investigation proceedings were commenced in February 2006 seeking damages limited to £15,000. The Respondents filed a defence denying liability and/or negligence and putting the Appellant to strict proof of her claim.

3. The matter proceeded to a case management conference and disclosure of detailed witness statements. The action was allocated to the Fast Track with a trial listed to commence on 1 November 2006. On 27 October 2006 the Appellant's solicitors put forward an offer to discontinue proceedings on the condition that each side bear their own costs. The offer was rejected by the Respondent and on 30 October 2006 the Appellant's solicitors filed notice of discontinuance.

4. Costs could not be agreed and on 21 June 2007 the Defendant's solicitors requested detailed assessment of their bill of costs. On 18 December 2007 Deputy District Judge Eddon sitting at Middlesbrough County Court transferred the detailed assessment proceedings to this office. The matter was heard by Costs Officer Martin on 4 March 2008, when costs were assessed at £10,235.17 including the costs of detailed assessment.

NOTICE OF APPEAL

5. Notice of Appeal was lodged on 25 March 2008 in the following terms:

(1) Item 14 of the bill of costs (disbursement in respect of Questgates) claimed and allowed in the sum of £1,850 plus VAT

Grounds:

*The Costs Officer was wrong as a matter of law and/or on the facts of this case to allow the recovery of any part of the "**disbursement**" claimed at item 14 of the bill of costs for any or all of the following reasons:*

*(i) the sum related to pre-litigation work undertaken by someone other than a legal representative and does not fall within the categories of "**costs**" recoverable on an inter parties basis;*

(ii) the sum claimed was incurred at a time when the Defendants were not legally represented and does not properly form a disbursement of the Defendants' solicitors or a disbursement or expense of the Defendants such as to be recoverable on an inter parties basis;

(iii) the sum claimed formed no part of any liability of the Defendants and accordingly its allowance on an inter parties basis was in breach of the indemnity principle. In that regard given that the sum incurred was not a disbursement of the Defendants' solicitors the court should not have attached any or any significant weight to the Defendants' solicitors' signature to the bill of costs.

(2) The order in relation to the costs of the detailed assessment, assessed in the sum of £2,505.53

Grounds:

If the Claimant's first ground of appeal is successful there should be consequential orders in respect of the costs of the detailed assessment and the costs of the appeal.

FACTS

6. Item 14 of the bill of costs is set out in the following terms:

(14) Paid their fees and expenses for initial pre-action protocol investigations and correspondence with the Claimant's solicitors; carrying out further enquiries/investigations and taking detailed statements:

Invoice dated 7 July 2005 £1,203.90

Supplementary invoice dated 5 July 2006 £789.36

7. In response to the bill of costs the points of dispute in relation to item 14 state:

"The Claimant submits that the costs of the loss adjusters are not recoverable against the paying party.

The loss adjuster is not a body that can claim legal costs under the Solicitors Act 1974, nor can they be said to be acting as a litigant in person.

The adjuster did not produce an expert report for the benefit of the court.

The Claimant has no offer to make."

The Reply is couched in the following terms:

"The Defendants' loss adjuster (Questgates Ltd) undertook the initial pre-action protocol investigation. The work undertaken included entering into and conducting initial correspondence with the Claimant's solicitors.

These costs incurred are clearly 'of and incidental to' the proceedings and the Claimant's solicitors are respectfully referred to the court's inherent jurisdiction to allow the recovery of such fees pursuant to s.51 paragraphs (1) and (3) of the Supreme Court Act 1981 which provides:

'(1) Subject to the provisions of this or any other enactment and to rules of court the costs of and incidental to all proceedings in the Civil Division of the Court of Appeal; the High Court, and any other county court shall be in the discretion of the court. …

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.

The Defendant does not understand the references to (i) the Solicitors Act 1974 and/or (ii) the fact that the loss adjusters have not produced a formal expert report and the Claimants are requested to clarify these points.

In an effort to resolve this particular issue the Defendant will concede an overall fee of £1,850.

N.B: For the avoidance of doubt the Defendant confirms that the above offer/concession remains open for acceptance until commencement of the detailed assessment whereupon if it is not accepted it will be withdrawn and the Defendant will seek recovery of the full amount claimed."

8. Costs Officer Martin at detailed assessment allowed the sum of £1,850 plus VAT of £323.75 in respect of item 14. There is no note of his reasoning relating to the reduction on the bill, although it would appear to accord with the offer made by the Claimant in the Replies.

9. It is common ground that Questgates are loss adjusters who were engaged by the Defendants' insurer (SLE Worldwide) to investigate the case at a stage before solicitors were formally instructed on the Defendants' behalf.

10. The detail in the two invoices which make up the costs at item 14 on page 10 of the bill are as follows:

(i) 7 July 2005: £1,203.90 plus £210.68 = £1,114.58

(Correspondence with the insured (the Defendants); corresponding with the Claimant's solicitors; investigating fully; obtaining witness statements and documentation; reporting to the insurer.)

(ii) 5 July 2006: £789.36 + £113.00 VAT = £927.49

(Disclosure of documents to solicitors; repudiating liability; further work on witness statement; considering medical reports; nominating solicitor and sending papers to solicitor; requesting weather report; further enquiries as requested by solicitor; dealing with enquiries regarding weather report.)"

The costs are claimed in the bill as a disbursement.

POWERS ON APPEAL

11. CPR Rule 47.21 allows an appeal against a decision of an authorised Costs Officer to be made to a Costs Judge. Furthermore, CPR Rule 47.23 confirms that any appeal from an authorised Costs Officer is by way of re-hearing and allows me to make any order or give any directions as I consider appropriate in the circumstances.

THE LAW

12. The relevant provisions to be considered are:

"Section 51 of the Supreme Court Act 1981

51-(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in

(a) the Civil Division of the Court of Appeal

(b) the High Court, and

(c) any county court

shall be at the discretion of the court.

(2) …

(3) The Court shall have full power to determine by whom and to what extent the costs are to be paid."

13. The costs of litigants in person are dealt with by CPR at Rule 48.6(3):

"(3) The litigant in person shall be allowed

(a) costs for the same categories of:

(i) work; and

(ii) disbursements,

which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person's behalf."

14. The definition of "costs" is to be found at CPR Rule 43.2(1):

"(1) In parts 44-48 unless the context otherwise requires:

(a) 'costs' includes fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person under Rule 48.6, any additional liability incurred under a funding arrangement and any fee or reward charged by a lay representative for acting on behalf of the party in proceedings allocated to the Small Claims Track.

I have considered the following cases:

Andre Agassi v S Robinson(HM Inspector of Taxes) [2005] EWCA Civ at 1507
Re Nossens Letter Patent [1969] 1 WLR 638
Nicholas Crane v Canons Leisure Centre [2007] EWCA Civ at 1352
Buckland v Watts [1970] 1 QB 27

SUBMISSIONS

15. For the Claimant it was argued that:

Firstly, item 14 is not properly described as a disbursement in the bill of costs and is not recoverable as a disbursement. No solicitor had been instructed at the time these costs were incurred. It was argued that the position was akin to that in *Agassi v Robinson* [2005] EWCA Civ at 107. In other words, a person who acts without a solicitor cannot recover as a disbursement the fees and expenses paid to a third party for work of a kind which a solicitor could have done. The limit on such a party recovering disbursements under CPR 48.6(3) requires the disbursement to be one that would have been allowed if the work had been done by a legal representative. Accordingly, a legal representative would not have needed to incur these expenses as a disbursement because it is the very work the legal representative would have been doing. It is neither a payment to a legal representative or authorised litigator within the meaning provided by the Courts and Legal Services Act 1990 for legal representation nor is it a disbursement of such a person, nor does it fall within one of the rare recognised exceptions allowing for example the recovery of reasonable and non-profit overhead bearing cost of in-house expertise referred to in ***Re Nossens Patents*** [1969] 1 WLR 638.

16. Secondly, the claim for costs is the Defendants', not the Defendants' insurers. The insurer merely provides the Defendant with an indemnity for their legal costs. In the usual way, in order to recover costs inter parties a legal fiction is indulged when solicitors are instructed so that even though the instruction is by the insurer the client is deemed to retain the solicitor so as to create a prima facie liability on the client which can then be recovered inter parties. However, until that point the insurance contract normally imposes no liability on the client and is the reason why insurers are not normally able to recover their costs of handling a case inter parties but the solicitors (once instructed) are. It was argued on behalf of the Claimant that Questgates were instructed by the insurers. This was a simple case of an insurer contracting out part of its work to a third party for whatever reason. It was work that many insurers would undertake in-house. Furthermore, the Defendants had no direct liability either through the insurers or directly to Questgates for these costs, any more than an insured could be said to be directly liable for his insurance company's direct cost of handling his claim. Accordingly, there was nothing to indemnify the Defendants for. Inter parties recovery was in breach of the indemnity principle.

17. For the Defendant, it was argued:

the doctrine of subrogation applied, namely that the insurers *"step into the shoes*" of the insured, so as to enjoy the latter's legal position or his rights against a third person. Subrogation may arise from the express or implied agreement of the parties or by operation of law. In this case there is an express clause in the insurer's contract dealing with subrogation. The costs of the loss adjusters were incurred by the insurers and these costs must be treated in the context of costs recovery as costs incurred by the insured, namely the Defendants. It was argued that s.51 of the Supreme Court Act 1981 provided the widest possible discretion as regards the recovery of costs. The costs claimed in the present case were an expense or disbursement, being a liability incurred by the insured and therefore came within the definition of *"costs"* in CPR 43.2(1). Mr Farber argued that the costs of the loss adjuster must be treated as an item of expenditure or disbursement incurred by the Defendants in accordance with the doctrine of subrogation. There was no reason in principle why such expenditure should not be recoverable as costs. The costs claimed are the Defendants' costs and disbursement. It is an expense or disbursement by the Defendants/insurers for specialist expertise and must be recoverable under s.51 of the 1981 Act and CPR.

18. Mr Farber submitted that the sort of work carried out by Questgates was work that could be done by a lawyer, In this case it did not need legal skill that could only be obtained by legal training and applied by qualified lawyers. The work actually formed part of a package of services provided by loss adjusters up and down the country. It required the exercise of skill and judgment obtained from experience and did not depend on legal qualification. The facts of the present case did not involve delegation of work by a legal representative and the work done is work that is normally done by a loss adjuster. Indeed, he went on to argue that it was work that could be expected to be done in less time and at a lower cost by loss adjusters than by qualified lawyers.

19. It was argued that if the work had been done on the formal instruction of a solicitor and if a bill had been rendered to the solicitor, there would be no doubting the entitlement to recover albeit that the solicitor would invoice the insurer. Recovery cannot turn on a bookkeeping exercise, routing the instruction and invoicing through a solicitor merely for the purposes of costs recovery which by its nature is cumbersome and in itself costly.

20. As an alternative approach, Mr Farber argued that the Defendant/insurer should be treated as a litigant in person before the solicitor was instructed. Accordingly:

(1) the expenses of Questgate were recoverable as an out of pocket expense in accordance with *Buckland v Watts* [1970] 1 QB 27;

(2) it is a disbursement by the Defendant/insurer which would be allowed if made by a solicitor and is recoverable pursuant to CPR 48.6(3)(a)(ii).

21. It was also argued in the alternative that the cost is recoverable on a basis that is an extension of or analogous to the exception in *re Nossens Patent* [1969] 1 WLR 638. The insurer could undertake the work itself but would lack the specialist expertise of a loss adjuster: the insurer could develop its own in-house expertise but plainly preferred the economies of using a specialist third party loss adjuster. If the work had been done in-house by the insurer it would have been an exercise of in-house skill within the contemplation of the *re Nossens Patent* exception by analogy or extension.

DISCUSSION

22. In the course of argument Mr Mallalieu accepted that the first invoice of Questgates dated 7 July 2005 related wholly to a period prior to solicitor instruction. However, insofar as the second invoice, dated 5 July 2006 was concerned, it was accepted that this invoice spanned the time when solicitors had been instructed on behalf of the Defendant to pursue the matter.

23. In ***Agassi v Robinson***, Dyson LJ said:

"62. The special costs regime for litigants in person long pre-dates the 1990 Act and the CPR. The Litigants in Person (Costs and Expenses) Act 1975 was designed to reverse the effect of Buckland v Watts [1970] 1 QB 27 in which it was held (in the words of the headnote) that:

A litigant in person other than a solicitor was not entitled to claim costs in respect of the time which he had expended in preparing his case but only his out of pocket expenses.

Section 1(1) of the 1975 Act provides:

Where in any proceedings to which this sub-section applies any costs of a litigant in person are ordered to be paid by any other party to the proceedings or in any other way there may subject to rules of court be allowed on the taxation or other determination of those costs sums in respect of any work done and any expenses and losses incurred by the litigant or in any connection with the proceedings to which the order relates."

24. At paragraph 67 Dyson LJ went on to state:

*"The argument advanced on behalf of the appellant … the CPR contains no definition of **'disbursements'**. They rely on what Sir Gordon Willmer said about disbursements in **Buckland v Watts** [1970] 1 QB 27 at 37G, **'… disbursements, that is to say, money which he has actually had to pay out to other people such as witnesses, counsel, professional advisers and so forth'**."*

25. At paragraphs 69 and 70:

69."… The right to payment in respect of disbursements is defined by CPR 48.6(3)(a). It is the right to be allowed costs for the same categories of disbursements which would have been allowed if the disbursements had been made by a legal representative on the litigant in person's behalf. To take an obvious example: counsel's fees are a category of disbursement which would have been allowed if counsel had been instructed by a legal representative on behalf of the litigant in person. So too would the fees payable to an expert witness. But what about somebody whose fees are in respect of the very services which would have been rendered by the legal representative if one had been appointed?"

*70.This question was answered by this court in **United Building**. At paragraph 14 Tuckey LJ (with whom Rix LJ agreed) said:*

"14. Looking at the wording of the Rule sub-paragraph (a) deals with the litigant in person's own time and disbursements which would have been recoverable if made on his behalf by a legal representative. This is not apt to cover fees paid or due to Mr Whiteland to assist with the litigation since no such disbursement would be made by a legal representative. Sub-paragraph (b) relates to 'legal services' which are not defined by the rules …"

26. At paragraph 73, Dyson LJ said the following:

*"It is true that the Rule refers to costs which would have been allowed as a disbursement **if the disbursement had been made by a legal representative.** But this court does not require the court to make a fanciful hypothesis as to what disbursements a legal representative might have made. The Rule contemplates allowing as costs only those categories of disbursements which would normally have been made by a legal representative. If the expenditure is for work which a legal representative would normally have done himself it is not a disbursement within the language of CPR 48.6(3)(a)(ii).*

74. A clear distinction has always been recognised between disbursements made and work done by a legal representative. The fact that an element of the legal representative's work is delegated to a third party does not mean that it may be regarded as a disbursement, since the point can be illustrated by reference to the treatment of solicitors who employ the services of other solicitors to act at their agents. The charges of such agents are not allowable as disbursement and must always be itemised as part of the principal solicitor's bill of costs."

27. Dealing with the question of specialist services at paragraph 76, Dyson LJ said the following:

"But it seems to us that it does not necessarily follow that the appellant is not entitled to recover costs in respect of the ancillary assistance provided by Tenon's in these appeals. Mr Mills is an accountant who has expertise in tax matters, especially in the kind of issues that arose in the present case. It may be appropriate to allow the appellant at least part of Tenants' fees as a disbursement. It may be possible to argue that the costs of discussing the issues with counsel, assisting with the preparation of the skeleton argument etc. is allowable as a disbursement because the provision of this kind of assistance is a specialist esoteric area, is not the kind of work that would normally be done by the solicitor instructed to conduct the appeals. Another way of making the same point is that it may be possible to characterise the specialist services as those of an expert and to say that for that reason the fees for these services are in principle recoverable as a disbursement."

28. It is important to ascertain what work was done by Questgate in relation to both the invoices raised by them, the subject of item 14 in the bill. So far as the first invoice is concerned, dated 7 July 2005, that work consisted of corresponding with the insured and the Claimant's solicitor: investigating the circumstances surrounding the accident: obtaining witness statements and dealing with documentation. So far as the second invoice is concerned,

the work is explained in more detail and consists of disclosing documents to the solicitors: repudiating liability: reconsidering witness statements and a medical report: requesting a met report and carrying out further enquiries.

29. I have to ask myself the question "Is this work that would normally be carried out by a solicitor?" In my judgment dealing with the Claimant's solicitors and corresponding with the insurer, repudiating liability, taking witness statements, together with the disclosure of documents are all items of work which would normally be carried out by solicitors up and down the country in the context of this type of litigation.

30. In relation to the first Questgate invoice no solicitor was instructed at the time the costs were incurred. Applying the *Agassi* principle that a person who acts without a solicitor is not to recover as a disbursement the fees and expenses paid to a third party for work of a kind which a solicitor could have done, it follows in the light of my finding at paragraph 29 that a legal representative (as defined by the 1990 Act) would not have needed to incur the Questgate expenses as a disbursement because it is the very work that the legal representative would have been doing. The limit on a party recovering disbursements pursuant to CPR 48.6(3) requires the disbursement to be one that would have been allowed if the work had been done by a legal representative. This was not the case here.

The second Questgate invoice covers a period from July 2005 to July 2006, and spans a time when the Defendant had instructed solicitors. So far as I can ascertain from the papers before me this would appear to be in or about March 2006. It is impossible to identify from the Questgate invoice, precisely which of their charges were incurred in relation to instructions received from the Defendant's solicitors once they had been instructed on the Defendant's behalf. The question I must ask myself is whether the relationship between the Defendant's solicitors and Questgate was one of principal and agent with the solicitor specifically instructing Questgate to act on its behalf in connection with aspects of this litigation. In ***Crane v Canons Leisure Centre*** [2007] EWCA Civ at 1352, May LJ at paragraph 7 said:

"… On the other hand there are cases in which work done by outsiders has been held to have been done for costs purposes as a fee earner for the solicitor. This is acknowledged to be so when a solicitor engages another solicitor, as for instance when a London agent acts for a solicitor out of London … other cases include:

Smith Graham v Lord Chancellor's Department *(30.7.99) where a litigation enquiry agent was treated as a fee earner of the solicitors so that the costs of engaging him were not disbursements.*

31. I am quite satisfied that following this authority had the defendant's solicitor in this case sought the assistance of Questgate in the litigation on an agency basis the Defendant's solicitors would have been entitled to recover the costs of Questgate not as a disbursement but as a profit cost. However, in my judgment, no true agency agreement existed between the Defendants solicitor and Questgate. I was provided with no letters of instruction, no terms of engagement, the only document being the second Questgate invoice which is directly addressed not to the Defendants solicitor but to SLE Worldwide Ltd. In those circumstances and for those reasons I find that no true agency existed between the Defendant's solicitor and Questgate to allow recovery of part of the Questgate fees post the instruction of a solicitor by the Defendant in this case.

32. I also have to ask the question whether there was any contractual nexus or liability on the part of the Defendant to discharge Questgate's invoices. Both invoices are addressed to SLE Worldwide Ltd, the Defendant's insurer. I was provided with no documentation, letter of instruction or terms of business being agreed between the Defendant and Questgate. The defence by the insurers on behalf of their insured was based on the subrogation clause contained in the insurance contract between the Defendant and her insurer. In my judgment this clause does not amount to an assignment of the cause of action from the Defendant to the insurers. The general law is that in any claim the Defendant's insurers can only recover the losses of the insured. They *"step into the shoes"* of the Defendant so as to enjoy her legal position or her rights against a third party. There is no basis on the facts of this case for saying that the Defendant has any direct liability, either through her insurers or directly to Questgate for their fees and that being the case, the Defendant has suffered no loss for which her insurer is entitled to be subrogated. I accept the submission by Mr Mallalieu that the inter parties recovery is therefore in breach of the indemnity principle.

33. It follows that Mr Farber's submission that "*recovery cannot turn on a bookkeeping exercise"* must fail. Likewise his submission at paragraph 10(i) of his skeleton argument that the Questgate fees are recoverable as an out-of-pocket expense in accordance with ***Buckland v Watts*** [1970] 1 QB 27 must also fail. Dyson LJ in ***Agassi,*** at paragraph 62, to which I have already referred in paragraph 23 of this judgment, confirmed that the Litigants in Person (Costs and Expenses) Act 1975 was designed to reverse the effect of ***Buckland v Watts.*** Neither do I accept Mr Farber's submission in paragraph 10(ii) of his skeleton argument that CPR 48.6(3) permits recovery of disbursements by a litigant in person where recovery would be allowed if the *disbursements* [my emphasis] had been made by a legal representative. My findings as to the arrangement between the Defendant's solicitor and Questgate in relation to some of the fees claimed by Questgate in their second invoice would not satisfy the test required by CPR 48.6(3).

34. Are the costs recoverable on the basis that they are an extension of or analogous to the exception in **Re *Nossen's Patents*** [1969] 1 WLR 638? In that case Lloyd Jacob J said:

"The established practice of the courts has been to disallow any sums claimed in respect of the time spent by the litigant personally in the course of instructing his solicitors. In the light of litigation by a corporation this has not been strictly applied for it has been recognised that if expert assistance is properly required it may well occur that the

corporation's own specialist employees may be the most suitable or convenient experts to employ. If the corporation litigant does decide to provide expert assistance from its staff as happened in this case, the Taxing Master has to determine the appropriate charge to allow. For an outside expert the normal assessment would be based on current professional standards and this in suitable cases would include a proper proportion of the overhead costs of running his office or laboratory, that is of the costs necessarily incurred by him in his capacity as a consultant as well as a profit element upon such expenditure."

35. Accordingly, was the work carried out by Questgate in this case *"expert assistance"* within the meaning of *Nossens?* Mr Farber submitted that work in this case carried out by Questgates is "*part of the loss adjusters package of work"* not normally work which a solicitor would have done. They had in his words "experience in a field of work" In my judgment the work carried out by Questgates does not come within the exception of "expert assistance" in ***Nossens.*** I accept the submission of Mr Mallalieu that this was a simple case of an insurer contracting out to Questgates part of its work to investigate claims made against its insured. It is routine work, which many insurers up and down the country would undertake in-house. The mere fact that the insurer chose to contract out that work to Questgate does not render the costs recoverable under the *Nossens* principle itself either by analogy or extension of that principle.

CONCLUSION

36. In short and for the reasons given, I am bound to follow the decision in *Agassi*. Accordingly the appeal is allowed and item 14 of the bill of costs is disallowed in its entirety.

37. There remain the following matters to be determined:
    1. The costs of the appeal which in principle (and subject to any further argument) be awarded to the Appellant.
    2. Quantification of the costs of the appeal which I propose to summarily assess on submission by the Appellant of a schedule with written representations thereon from the Respondent within 14 days of the handing down of this judgment.
    3. Any adjustment of the costs of detailed assessment consequent upon this appeal.
    4. Amendment of the final costs certificate.

Mr R Mallalieu (instructed by Costs Advocate) for the Appellant
Mr J H M Farber (instructed by P Jane M D Phillips) for the Respondent