SUPREME COURT COSTS OFFICE
COSTS PRACTITIONERS GROUP
MINUTES OF MEETING HELD ON
THURSDAY 8 MARCH 2007

Present:	Master O'Hare (Chairman)	SCCO
	Master Simons	SCCO
	District Judge Oldham	Association of District Judges
	Mr G Barker	The Law Society
	Mr M Heskins	The Law Society
	Mr G Lewis	The Law Society
	Mr S Bull	Bar Council
	Mr J Hocking	ALCD
	Mr P Allen	APIL
	Mr D Marshall	APIL
	Mr A Parker	LSLA
	Mr J Martin	Minute Secretary

1. APOLOGIES FOR ABSENCE

Apologies for absence were received from Chief Master Hurst, Mr O'Riordan (SCCO), Mr Girling (the Law Society), and Mr Carter (FOIL).

2. MINUTES OF PREVIOUS MEETING

After the correction of some typographical errors the Minutes of the meeting of 11 October 2006 were approved.

3. MATTERS ARISING NOT OTHERWISE ON THE AGENDA

(i) Master O'Hare referred to item (4), the publication of CPG minutes and papers. The minutes cannot safely be published until they are approved. However, in the past, the minutes of one meeting have only been approved at the next meeting, some six months later. He proposed that in future the draft Minutes should be circulated electronically shortly after the meeting with a view to their being

approved by email by all members who attended the meeting. They could then be published within 5 to 6 weeks. After a short discussion the meeting agreed this proposal.

(ii) Mr Bull referred to item (8), fast track trial costs. There had been no progress with the DCA in proposals to increase fast track trial fees. The latest stumbling block appeared to be an issue concerning "retrospectivity" which had been raised by the DCA. They are uncertain whether increased fees should apply to all relevant cases still pending on the date of an amendment to the CPR or only to new cases commenced after the date of amendment. The meeting felt that there was little it could do in practical terms other than to record its continued and growing concern at the lack of progress in what ought to be an uncontroversial measure.

4. COSTS DRAFTSMEN'S FEES FOR BILL DRAFTING AND FOR ADVOCACY

Mr Hocking outlined the current position. For run-of-the-mill cases in the provinces, bill drafting was normally allowed at grade "D" fee earner level, whereas advocacy was generally allowed at grade "C". In larger and/or more complex matters, grade "C" might be achieved for bill drafting and grade "B" for advocacy which would be appropriate for Fellows of the Association of Law Costs Draftsmen, some of whom are also qualified solicitors or FILEX. The meeting agreed with this.

Master Simons raised the question of the appropriate rates for bill drafting and advocacy respectively in legal aid only cases. He had seen inconsistency in cases before him, where some costs draftsmen had charged the prescribed legal aid rate and others claimed commercial rates which were higher. Mr Hocking said that he did not believe it to be correct that costs draftsmen should be able to charge a higher rate than their instructing solicitor could for the same work.

A general discussion ensued on rights of audience, following recent granting to the ALCD of authorised body status, placing the ALCD in the position of a front line regulator. Mr Hocking said that it was the intention of the ALCD that rights of audience would only be granted to fellows of the Association, who formed about one

half of the membership. Mr Hocking said that the Association had a duty in maintaining standards and thought restricting rights of audience in this way was a good method of achieving this.

5. NEW GUIDELINE RATES FOR SUMMARY ASSESSMENT (JANUARY 2007)

Master O'Hare reported that the new guideline rates were now available on the SCCO web site, and had been published in the legal journals.

6. OVER-LENGTHY POINTS OF DISPUTE: THE PROBLEM AND ITS SOLUTION

Master Simons said that over-lengthy Points of Dispute, which ran into many pages and unnecessarily recited case law, continued to cause problems. Although the Costs Practice Direction emphasised that Points of Dispute should be concise, this was not being adhered to in practice. The same was often true of the "narrative" at the start of bills of costs. District Judge Oldham said that the same problem was faced in many county courts. The meeting felt that one of the main reasons for this was that it was now all too easy to "mass produce" Points of Dispute by word processor. The solution was less clear. The imposition of costs sanctions at the assessment hearing has not succeeded in discouraging prolixity. However, for the moment, this seemed to be the only control available to Costs Judges and District Judges.

7. THE LSC's PLANS IN RELATION TO GRADUATED FEES

Mr Bull said that although some of the immediate sting had currently gone out of this, the Bar remain extremely concerned about proposed changes to the graduated fee scheme, and was still taking common cause with the law Society over the LSC's proposals. It seemed that the LSC were to revisit their proposals for graduated fees in care and private family proceedings in 2008. Mr Bull wanted to place on record three concerns in particular.

(1) As from October 2007 there will be an abolition of graduated fees in relation to interim cases in areas other than care proceedings, leading to solicitors and counsel

being paid from the same pot, and solicitors dictating (from the very limited fixed fees which will be paid to them) what counsel will be paid. For example, in ancillary relief proceedings the total money pot available at the FDR phase in London for counsel and solicitors for all work done would be £1900. This is likely to have an impact upon the quality of work which could be done at this important stage, and might well lead to trial counsel (whose presence would be important at such hearings) not being prepared to represent the client for the minimal fees likely to be on offer.

(2) There are great concerns about the LSC's plans to introduce, in April 2008, a new graduated fee scheme, the format of which was, as yet, still unpublished. The Bar does not understand why there is a need for any substantial change to the existing scheme, given that Carter had not proposed any amendments to the Family Graduated Fee scheme, and, indeed, seemed to regard the Family Graduated Fee Scheme as an effective and efficient scheme.

(3) There is also concern about the apparent commencement of a move towards a principle of "one case one fee ", leaving solicitors to pay barristers from the money which they receive from the LSC and ending separate payments to counsel. In the course of a short discussion of this point it was generally agreed that a decision by the LSC not to account to counsel directly rendered counsel open to exploitation by solicitors.

Mr Heskins said that there was a high level of concern amongst solicitors about the proposals as well. The Law Society were to begin seeking the views of practitioners next week. Although LSC had been lobbied by the Law Society, they were not yet in a position to make any public comment.

8. CJC COSTS FORUM 1st and 2nd MARCH 2007

Mr Marshall reported on last week's CJC Costs Forum. Two papers had been presented, on (i) funding mechanisms, and (ii) predictive costs.

(i) Although the funding methods employed in several other countries had been examined, it was not thought that any of them are ideally suited for adoption in this country. A proposal had been put forward for a Supplemental Legal Advice Scheme, whereby wider access to justice would be funded by taking a portion

(possibly 10%) from damages and costs recovered. The meeting expressed reservations on this. For example a deduction of 10% of damages in a clinical negligence case where damages could run into millions of pounds, would be highly controversial. Moreover, given our system of costs recovery, why should losing parties' costs be paid out of winning parties' damages?

(ii) A paper had been presented at the Forum which looked at how the current fixed costs regime had affected road accident claims which settle before the issue of proceedings. Not surprisingly, it showed that there was now less variability in costs recovered, whilst the general level of damages remained about the same. The number of proceedings issued had, however, risen from about 15% to about 20%. The meeting was concerned that the fixed costs recoverable had not been increased since the introduction of the scheme over two years ago. This seemed to be tied in with the DCA's proposals in their paper on Claim Process Reform which was currently before ministers.

9. REVIEW OF RECENT AND PENDING COSTS CASE

Master O'Hare reported on the following cases:-

(a) *Haji-Ioannou v Frangos* [2006] EWCA Civ 1663. A case concerning the principles to be applied on Points of Dispute alleging delay.

(b) *Kew v Bettamix Ltd* [2006] EWCA Civ 1525, in which the Court of Appeal confirmed the lower court's decision to award reduced costs to the Claimant because he had lost on certain arguments even though those arguments had been pressed only at the insistence of the Claimant's ATE insurer.

(c) *Northstar Systems Ltd v Fielding* [2006] EWCA Civ 1660. This case and the next two cases, dealt with issues of conduct and misconduct. In *Northstar* the court cast doubt on the principles laid down by Jack J in *Aaron v Shelton*.

(d) *Lahey v Pirelli Tyres* [2007} EWCA Civ 92 concerned a claim for £150,000 which settled on the acceptance of £2000 in court and a deemed order for costs. Whilst not objecting to the detailed assessment which had been made the paying party argued that, in the circumstances only 25% of the assessed costs should be allowed. This argument was rejected: although the court awarding costs could disallow any costs which were unreasonable it had no power to reduce the percentage of reasonable costs recoverable.

(e) *National Westminster Bank Plc v Kotonou* (lawtel 26/2/07), in which the Court of Appeal upheld an order giving judgment against the bank but awarding each side 50% of their reasonable costs. 50% was a fair estimate of the amount each side would have incurred on allegations of dishonesty which had been wrongly made against the bank and its staff.

(f) *Horsford v Bird* [2006] UKPC 3, in which the Privy Council gave guidance as to orders for the costs of detailed assessment where the receiving party had failed to secure all the costs he had claimed in his bill.

(g) *Aerospace Publishing Ltd v Thames Water Utilities Ltd* [2007] EWCA Civ 3, which casts new light on the issues raised in *Admiral Management Services Ltd v Para-Protect Europe Ltd* (Stanley Burnton J, 2002). Where, because of the Defendant's wrongdoing, the Claimant had been put to the expense of having to use in-house staff as experts, that expense might be compensated as damages rather than as costs.

(h) *Brown v Russell Young* [2007] EWCA Civ 43, which upheld Chief Master Hurst decision entitling the Claimants to recover generic costs in CFA cases even though the CFAs made no mention of the group litigation which gave rise to the generic costs.

(i) *Tierney v Newsgroup Newspapers Ltd* [2006] EWHC 3275 (QB), the first reported appeal against a costs judge's decision quantifying a costs cap previously ordered.

(j) *Willis v Nicolson*. Another costs capping case, in which the Court of Appeal is due to give reserved judgment in the near future.

(k) *Stevenson v Blue Anchor Leisure*, an appeal to the Court of Appeal concerning Part 18 Requests in detailed assessment proceedings. The appeal settled before the hearing. Master O'Hare thought it unfortunate that the courts will not for the time being receive authoritative guidance on this controversial issue.

(l) *Woollard v Fowler; Crane v Cannon's Leisure Centre*. Both of these Court of Appeal cases have been stayed for three months to permit the parties in the first case to attempt resolution by way of a mediation to be conducted by the Civil Justice Council.

10. <u>ANY OTHER BUSINESS</u>

There was no other business.

11. DATE OF NEXT MEETING

The next meeting was fixed for Wednesday 17 October 2007 in Room 2.09 in SCCO at 4.30pm.

The meeting closed at 5.45pm.