Claim No: 4LS08603
SCCO Ref: 050071

IN THE WESTON SUPER MARE COUNTY COURT

ON APPEAL FROM MASTER SEAGER-BERRY
SITTING AS A DEPUTY DISTRICT JUDGE OF THE COUNTY COURT

Clifford's Inn, Fetter Lane
London, EC4A 1DQ

Date: 24 May 2006

BEFORE :

SENIOR COSTS JUDGE HURST, SITTING AS A RECORDER

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BETWEEN :

1) MR I WOOLLARD **2) MRS D WOOLLARD**	**Appellants/ Claimants**
- and -	
MR R FOWLER	**Respondent /Defendant**

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- -

Mr Nicholas Bacon (instructed by **Colman Coyle LLP**) for the **Appellants**
Mr Benjamin Williams (instructed by **QM Solicitors**) for the **Respondent**

Hearing date: 12 April 2006

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Approved Judgment

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Senior Costs Judge Hurst Sitting as a Recorder

INTRODUCTION AND THE LAW

1. This is an appeal from the decision of Master Seager-Berry sitting as a Deputy District Judge of Weston Super Mare County Court on the 14 December 2005, by which he disallowed certain fees charged by Mobile Doctors Limited for obtaining a medical report and GP and hospital records. The appeal turns on the interpretation of CPR 45.10.

2. CPR Part 45 is headed "Fixed Costs", it is divided into five sections, namely: I Fixed costs, II Road Traffic Accidents, III Fixed Percentage Increase in Road Traffic Accident Claims, IV Fixed Percentage Increase in Employer's Liability Claims and V Fixed Percentage Increase in Employer's Liability Disease Claims. The provisions of sections II to V are sometimes referred to as "predictable costs".

3. CPR 45.10 is headed "Disbursements" and so far as relevant, provides:

> "(1) The court -
>
> (a) may allow a claim for a disbursement of a type mentioned in paragraph (2); but
>
> (b) but must not allow a claim for any other type of disbursement.
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> (2) The disbursements referred to in (1) are -
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> (a) the cost of obtaining -
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> (i) medical records;
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> (ii) a medical report;
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> (iii) a police report;
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> (iv) an engineer's report; or
>
> (v) a search of the records of the Driver Vehicle Licensing Authority
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> . . .
>
> (d) any other disbursement that has arisen due to a particular feature of the dispute."

4. Since the judgment in this case was given Mr Justice Simon has given judgment in a case dealing with CPR Part 45 section II: *Butt v Nizami* [2006] EWHC 159 (QB); [2006] 2 All ER 140. Although neither Counsel relied on any part of the judgment, it does in my view give a helpful insight into the approach to be adopted by the court in

predictable costs cases under Part 45. At paragraph 16 of his judgment Simon, J quoted from the judgment of Master O'Hare at first instance:

> "As he put it in paragraph 7 of his judgment:
>
> > the purpose of the rules was to simplify the payment of costs in small cases, not to make it more complex. The fixed recoverable costs are just that; they are fixed. But they are payable by the Defendant whether or not the Claimant's solicitor's retainer is valid. An extra 12.5% is payable if the Claimant and his solicitor entered into a CFA, whether that CFA is valid or not."

So far as the disbursements claimed under CPR45.10 were concerned, he said:

> "… I am unable to take the same approach to disbursements. It seems to me that, for them, the standard rules, including the familiar Indemnity Principle, continue to apply. I accept that it seems inconsistent to allow what might be invalid profit costs whilst at the same time disallowing unpaid disbursements . . . Nevertheless, I think that the inconsistency arises because Part 45 does not deal with the disbursements in the same way as it deals with profit costs. Disbursements are not fixed by Part 45"

5. I quote selectively from Simon J's conclusion:

> "19. I am advised by the assessors that until the Court of Appeal decision in *Hollins v Russell* [2003] EWCA Civ 718 numerous technical challenges were made to the validity of Conditional Fee Agreements. As Mr Mallalieu put it, in the course of argument "The history of litigation in this field indicates that disproportionate points were taken.
>
> …
>
> The problem was addressed in three ways:
>
> 20. In *Hollins v Russell* (see above) the Court of Appeal gave guidance on the approach which should be adopted to technical challenges to Conditional Fee Agreements . . . This guidance was intended to cut down the highly technical arguments based on minor infractions of the conditions.
>
> 21. Secondly, there was a change in the law effected by the amendment to Section 51(2) of the [Supreme Court Act] 1981 which significantly modified the Indemnity Principle and permitted changes in the rules to give effect to the modification.

22. Thirdly changes were made to the Rules of Court. Some of these changes and in particular the provisions of sections II to V of CPR 45, were introduced following "industry wide" discussions under the aegis of the Civil Justice Council. Agreement was reached on the recoverable costs in the different situations covered by the various sections.

23. It seems to me clear that the intention underlying CPR 45.7 – 14 was to provide an agreed scheme of recovery which was certain and easily calculated. This was done by providing fixed levels of remuneration which might over reward in some cases and under reward in others, but which were regarded as fair when taken as a whole.

24. It is clear that in making this change, the draftsmen of the rules, intended that the Indemnity Principle should not apply to the figures which were recoverable. If that is so, I can see little reason why it should be assumed that the Indemnity Principle has any application to CPR 45.9 and 11 and good reasons why it should not . . .

(iii) the whole idea underlying Part 45 section II is that it should be possible to ascertain the appropriate costs payable without the need for further recourse to the court.

25. I should add that in coming to this conclusion:

. . .

(ii) I have rejected the argument that there is an anomaly in that CPR 45.10 requires a different approach. The reason why the costs under CPR 45.10 call for a different approach is that there are no fixed figures for disbursements.

. . ."

6. The present appeal concerns three items contained in the Claimants' bill namely: item 3 – fee paid to MDL for GP records, £65 plus £4.38 VAT. Of this item, £40 was charged by the GP himself, his charge was non-VATable. The balance of £25 plus VAT was the fee charged by MDL. Item 4 – fee paid to MDL for hospital records £39 plus £4.38 VAT. Of this item, £14 was charged by the hospital. Its charge is non-VATable the balance of £25 plus VAT was the fee charged by MDL. Item 5 – fee paid to MDL for a report by a surgeon £435. Of this fee, £275 was paid to the surgeon, the balance of £160 was paid to MDL for its services.

7. The point which arose on the detailed assessment was whether Mrs Woollard the second Claimaint, could recover the full amount charged by the medical reporting agency for providing her solicitor with a medical report and medical records as a disbursement under the fixed costs regime in section II of CPR Part 45. On the detailed assessment, Master Seager Berry allowed the fees charged by the doctors and hospital but refused to allow the recovery of the fees charged by the medical reporting agency.

THE BACKGROUND

8. The underlying claim arose out of a road traffic accident on the 20 October 2003 when the second Claimant, driving a vehicle owned by the first Claimant, was struck from behind by a vehicle driven by the Defendant. The Defendant admitted liability and the first Claimant's claim was settled for £1,336.21. The second Claimant's claim for personal injury and loss was settled in the sum of £4,000 in June 2004. The Defendant's insurers paid the Claimants' costs, save for the disputed items, which I have set out above.

9. Master Seager Berry stated:

> "13. The thrust of Mr Williams' submission was that the fixed recoverable costs regime provides a ceiling for recoverable profit costs and it does not permit work which would usually form part of profit costs to be delegated by the solicitors and claimed as a disbursement instead. He has submitted that when the discussions took place, which led to the negotiated settlement, it was well known that Claimant's and Defendant's solicitors used agencies. Mr Carpenter also stressed this point
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> . . .
>
> 25. … the issue which divides the two parties is the extent to which, if at all, charges made by Mobile Doctors Limited for work which a solicitor would otherwise have done can be recovered by way of a disbursement. It is clear from the judgments of His Honour Judge Cook [in *Stringer v Copley*] and the Senior Costs Judge [in the *Claims Direct Test Cases Tranche 2* [2003] EWHC 9005] that, as Mr Williams puts it, any administration element must be excised from the agency's disbursements bill. However, no such charges (as opposed to charges simply for doing the work) have been made in this case. (See the letter from Mobile Doctors Limited dated 8 July 2004).
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> . . .
>
> 32. The wording of CPR 27.14 and CPR 45.10(2)(a) is different. I am unable to accept Mr Carpenter's

submission that if Parliament had considered that agency fees were not recoverable the position would have been made clear in the rules. The rule refers specifically to disbursements and not, for example, to "further charges" or "additional costs" in the preceding parts of the rule. In my judgment it is not possible to transfer what would otherwise be a profit cost element of work when carried out by a solicitor into part of a disbursement claimed by a solicitor, where the amount of fixed (profit) costs is limited to the formula set out in CPR 45.9(1). To do so, would disregard the objections which have been raised by Mr Williams. I accept that the rule refers to "obtaining" which means to acquire or secure or have something granted to oneself. The benefit of market forces which allow a reduced fee to be negotiated for repeat work does not, of itself, permit a more liberal interpretation of the rule where there is a clear formula for the recovery of profit costs. If that was permitted, Mr Carpenter's submission could prevail, provided sufficient information was given by MDL (or the appropriate agency) which ensured that any administration element in the fees was eliminated.

33. The Claimant, through Mr Carpenter, is seeking to extend the meaning of disbursement in CPR 45.8 and in CPR 45.10(1)(a) and (b) and (2) to include, in lieu of profit costs, an element of work done by an agency which solicitors would otherwise claim as profit costs. The rule does not state that such recovery is permissible. The level of profit costs is fixed under the rule by a defined formula in CPR 45.9(1). The rule does not contain any provision to enable an element of profit costs work to be subsumed within a disbursement and awarded in lieu of profit costs. The ceiling on profit costs imposed by the rule cannot be exceeded. I therefore reject the argument of Deputy District Judge Ward in *Moss v Campbell* on which Mr Carpenter has relied."

SUBMISSIONS

10. At the outset of this appeal an application was made by Mr Cox, a solicitor appearing on behalf of AMRO (The Association of Medical Reporting Organisations) for that body to be allowed to intervene and to submit a witness statement made by Dr Margolis, the Chairman. I was told by Mr Cox that medical reporting agencies provide between 300,000 and 400,000 reports every year, of which some 80% relate to road traffic accidents, but he was not able to tell me what proportion of those cases are governed by the predictable costs regime.

11. Mr Bacon for the Appellant had no objection to the admission of the witness statement, but Mr Williams did object on the basis that the application was, in any event, extremely late, that it was difficult to know whether the witness statement was intended to be evidence or a written submission, and that if it was evidence it was inadmissible on *Ladd v Marshall* [1954] 1 WLR 1489, principles. In addition, professional bodies which might take an opposite view to that put forward on behalf of AMRO, would have no opportunity to respond. I declined to admit the witness statement, since neither party to the appeal had sought to rely on the evidence in support of their case, AMRO is not a party to the appeal and this was not a case in which the court (as the Court of Appeal sometimes does) had invited written submissions from interested bodies. In addition I formed the view that the witness statement as well as containing a great deal of comment addressed policy issues which are not a matter for this court.

12. It is not controversial that, outside the Part 45 predictable costs regime, the fees of medical reporting agencies are recoverable, provided that they are reasonable and proportionate and do not contain an administration fee. Mr Bacon referred to the pre-action protocol for personal injury claims: "some solicitors choose to obtain medical reports through medical agencies, rather than directly from a specific doctor or hospital …" and says that this is exactly what happened in this case. There is nothing in the protocol that discourages the use of medical agencies by solicitors.

13. He drew a comparison with CPR 27.14(3)(d) dealing with costs in small claims. Here PD 7.3(2) states: "expert's fees for a sum not exceeding £200 for each expert". In his submission this makes it clear that the recoverable amount is in respect of a report only, and does not include agency fees, whereas, under Part 45 different language is used, which envisages the recovery of additional costs "of obtaining" a report. He argues that agency fees are, for the purpose of Part 45, a disbursement, and should not be treated as part of the fixed profit costs.

14. Mr Williams' case is that if agency fees were awarded in lieu of solicitor's costs then the receiving party would thereby evade the fixing of the profit costs. He says that it is for this reason that agency charges have always been treated as irrecoverable on the small claims track.

15. Mr Bacon submits that it has become very common for solicitors undertaking personal injury claims of low to mid value range, and often in more serious cases, to utilise the services of medical reporting agencies to facilitate the obtaining of medical records and data and medical reports for use in the claim. Medical agencies are able to secure terms of engagement with potential medical experts which enable them to obtain and provide relevant medical source material and reporting at considerably less cost than would otherwise be available to the solicitor. Saving costs is not the only attraction to the solicitor of employing an outside agency to obtain such records/reports. Medical agencies relieve the solicitor of the, often burdensome and time consuming, task of chasing up reports, fixing appointments for their client, liaising with GP practices over the provision of records and the like. The involvement of medical agencies is also largely encouraged by the liability insurers. Many liability insurers use the services of medical reporting agencies when obtaining their own medical evidence. Indeed Zenith, the liability insurer in these proceedings, itself uses the services of medical reporting agencies. Mr Bacon relies on a number

of passages from my judgment in *Claims Direct Test Cases Tranche 2* [2003] EWHC 9005:

> "78. … The correct treatment of disbursements and profit costs has been the subject of a considerable amount of litigation. Lord Langdale, in the case of *Re: Remnant* (11 Beav 603, 613), laid down the following rule:
>
> > "That those payments only, which are made in pursuance of the professional duty undertaken by a solicitor, and which he is bound to perform, or which are sanctioned as professional payments, by the general and established custom of the profession, ought to be entered and allowed as professional disbursements in the bill of costs."
>
> At that time other payments made by a solicitor as agent for the client were properly recorded in the cash account not in the solicitors bill. Section 67 of the Solicitors Act 1974 now provides, in respect of disbursements:
>
> > "A solicitor's bill of costs may include costs payable in discharge of a liability properly incurred by him on behalf of the party to be charged with the bill …"
>
> 79. And chapter 20 of the Law Society's Guide to the Professional Conduct of Solicitors (Eighth Edition) states at paragraph 20.01:
>
> > "**Duty to pay agent's fees**
> >
> > A solicitor is personally responsible for paying the proper costs of any professional agent or other person whom he or she instructs on behalf of a client, whether or not the solicitor receives payment from the client, unless the solicitor and the person instructed makes an express agreement to the contrary".
>
> 80. It is now not at all uncommon for a solicitor to pay money for services as agent for the client and then to bill the client in respect of that payment. Such a payment is not strictly a professional disbursement but is treated as a disbursement for the sake of convenience. In those cases where the client is able to pay, solicitors frequently ask for money from the client to cover those payments which the solicitor proposes to make on the client's behalf. In my judgment, if any of the MLSS fee is recoverable it

should be treated as a disbursement not as part of the solicitors' profit costs. In my view the solicitor can charge as profit costs only that work undertaken by him or a member of his firm in the capacity of solicitor. If a task is delegated to a solicitor agent that too is chargeable as part of the principal solicitor's profit costs. Where tasks are delegated to other non solicitor bodies any charge which those bodies make must be treated as a disbursement incurred by the client through the agency of the solicitor (see *In Re Blair & Girling* [1906] 2 KB 131 CA). Where a solicitor, for example, instructs an enquiry agent to carry out certain work and perhaps to obtain a witness statement, the enquiry agent's charges will be paid by the solicitor as agent for the client and will be treated as a disbursement in the solicitor's bill. If the enquiry agent fails properly to carry out the solicitor's instructions, or carries them out negligently, the solicitor will not in normal circumstances be liable for the negligence of the enquiry agent and the client may be able to withhold payment of the fee or to pay a reduced fee. (The solicitor may of course have been negligent in his selection of enquiry agent.) If, on the other hand, the solicitor (in his own capacity rather than as agent for the client) instructs another solicitor to act as his agent, for example to interview a distant witness, the solicitor agents' charges are not entered in the solicitor's bill as a disbursement but appear as part of the principal solicitor's profit costs (see paragraph 4.6(9) of the Costs Practice Direction). One of the reasons for this is that the principal solicitor remains liable for the acts of his agent, and another is that any agency charge is borne by the principal solicitor. It forms part of that solicitor's overheads.

…

110. The position with Mobile Doctors Ltd has been greatly clarified by the evidence of Matthew Game (9A/8/75). Mr Game describes the history of his company and, at paragraphs 21 to 23 of his statement, the involvement of the company with Claims Direct. At paragraph 25 he states (9A/8/82):

> "The arrangement between ourselves and Claims Direct as to the fact that we paid any commission and the amount, was a normal commercial arrangement between the two of us and I would expect an arrangement of this nature to exist when anyone was providing bulk work and

> understand that this is common practice with our competitors in the industry as well. By Claims Direct providing volume referrals we did not need to spend time and money on advertising and promotion.
>
> 26. As far as I am aware panel solicitors had no knowledge of this arrangement, nor was there any reason why they should …"

…

114. There is no doubt that MDL carries out a certain amount of correspondence, which, had they not been involved, the solicitor would have had to do. To the extent that this work is carried out at the same or a lower cost than if the solicitor had done it, it is recoverable. The judgment of His Honour Judge Cook in *Stringer v Copley* (Authorities/4) is trite costs law. I agree with Judge Cook that there is no principle which precludes the fees of a medical agency being recoverable between the parties provided it is demonstrated that their charges do not exceed the reasonable and proportionate costs of the work if it had been done by the solicitors. There may however be, within MDL's fixed charge, an element in the nature of an administration fee which is not recoverable. Mr Charlton argues that if the fee charged is reasonable the court should look no further but merely allow the fee as claimed. I further agree with Judge Cook when he states (at p.8):

> "… It is important that [medical agencies] invoices … should distinguish between the medical fee and their own charges, the latter being sufficiently particularised to enable the costs officer to be satisfied that they do not exceed the reasonable and proportionate costs of the solicitors doing the work."

115. The Judge also raises concerns about the proper treatment of VAT. I part company with the Judge in his finding that the fees of medical support agencies "could also be treated as though the work had been done by the solicitors and charged accordingly". For the reasons I have already given (at paragraphs 78 to 80) I am of the view that such expenditure should be treated as a disbursement. I am reinforced in that view when it is remembered that a large part of the MDL fee is that charged by the expert. The expert's fee cannot on any reading be part of the solicitor's

> profit costs. Judge Cooke based his view on the decision in *Smith Graham (A Firm) v The Lord Chancellor's Department* [1999] NLJ R1443 QBD. The basis of that decision (on which I sat as an assessor with Mrs Justice Hallett) was that the retired police officer could be treated for the time being as the temporary employee of the solicitors who throughout remained responsible for the conduct of the case and for the conduct of the retired police officer."

16. Mr Bacon argues that this decision (which was not appealed on this point) provides the definitive answer in this case, namely that the MDL fee is a disbursement and has been claimed as such.

17. He also relies on the decision of the Court of Appeal in *Agassi v Robinson* (HMIT) [2005] EWCA Civ 1507. Mr Agassi had instructed a firm of accountants to deal with his tax affairs, and they in turn had instructed counsel under the Licensed Access Scheme. The matter progressed from the Commissioners to the Court of Appeal, where Mr Agassi was successful and was awarded his costs. The question then arose of what, if anything, was recoverable, given that, as the court found, Mr Agassi was a litigant in person. The court stated:

> "69. The right to payment in respect of disbursements is defined by rule 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 …
>
> …
>
> 73. 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 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)(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. The point can be illustrated by reference to the treatment of solicitors who employ the services of

other solicitors to act as their agents. The charges of such agents are not allowable as disbursements, and must always be itemised as part of the principal solicitor's bill of costs. This was made clear, for example, in *In re Pomeroy & Tanner* [1897] 1 Ch 284. A country solicitor had employed a London agent. The country solicitor delivered a bill of costs to his client. It included a lump sum for the agent's fees. It was contended that they were recoverable as a disbursement and there was no need to deliver a detailed statement of the agent's charges. This contention was rejected by Stirling J. He said at p 287:

> "What is done by the London agent is part of the work done by the country solicitor for the client. The country solicitor does or may do part of the work personally. He does or may do part of his work through clerks whom he employs in the country. Or, if necessary--and the necessity occurred in this case—he may do part of his work through a London agent. But as between the country solicitor and the client, the whole of the work is done by the country solicitor. It follows, therefore, that the items which make up the London agent's bill are not mere disbursements, but are items taxable in the strictest sense as between the client and the country solicitor, just as much as items in respect of work done by the country solicitor personally, or by the clerk whom he employs in the country."

75. It follows in our view that the appellant is not entitled to recover costs as a disbursement in respect of work done by Tenon which would normally have been done by a solicitor who had been instructed to conduct the appeal. This means that the appellant is not entitled to recover for the cost of Tenon providing general assistance to counsel in the conduct of the appeals.

76. 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 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 Tenon's fees as a disbursement. It may be possible to argue that the cost 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 in 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 these specialist services as those of an expert, and to say for that reason that the fees for these services are in principle recoverable as a disbursement."

18. In Mr Bacon's submission a litigant in person would be able to recover a medical agency fee, since it is a proper cost and is not work which would normally have been done by a solicitor.

19. Although MDL do not charge for work done on an itemised basis, as a solicitor would, they have, by letter of 8 July 2004, set out an analysis of the work which they undertook in this case. The work includes considering initial instructions, identifying appropriate experts, making the appropriate appointment with the agreed expert, checking and scanning hospital records and GP records and perusing, checking and dispatching the expert's report. This is said to have occupied 78 minutes, involved two telephone calls and nine letters. MDL suggest that if this work had been charged at a solicitor's grade C rate of £125 per hour, the total fees for the work done would be £299.74. The letter continues:

> "I can confirm that our invoice totalling £547.46 is for all of the above work and does not contain any element of an administration fee. However, it does contain £275 that has been paid to the examiner, £40 to the GP and £14 to the hospital.
>
> As you can see from this breakdown had a solicitor undertaken this work the cost of providing the report would have been in the region of £628.74. I trust this demonstrates that MDL's fees are reasonable in line with Master Hurst's judgment."

20. In respect of Mr Williams' argument that the MDL fee should be deconstructed to show that a part of it is profit costs, Mr Bacon argues that the submission is flawed. Mr Williams puts his case in this way:

> "Obtaining medical reports is solicitor's work, a necessary incident, in a claim of this kind, to their contract of retainer. They would not be able to recover any additional costs under the regime if they did the work themselves, but it is said that they may outsource it in order to avoid this limitation. In this way, use of medical agencies, which has always been justified as a means of saving costs, is used instead to justify increasing them, all in the context of a regime which was created with the specific intent of controlling costs."

21. In addition Mr Williams argues that if the Appellant is correct the solicitor could also justify recovery of additional costs by outsourcing the obtaining of other allowable

items as well, for example: a police report, engineer's report or a search of the DVLA records.

22. Mr Bacon says that the flaw in the argument can be demonstrated by reference to CPR 10.(2)(c), which permits the recovery of fees paid to counsel "where they are necessarily incurred by reason of one or more of the claimants being a child or patient …" It is perhaps also worth mentioning rule 45.10(2)(d) "any other disbursement which has arisen due to a particular feature of the dispute". Mr Bacon points out that the work done by counsel may also be "solicitor's work" in that some solicitors may choose not to instruct counsel, but may instead undertake the work themselves. Clearly they are unlikely to do so since the profit costs element is fixed, but if counsel is instructed those fees are recoverable quite legitimately under the predictable costs regime.

23. Finally Mr Bacon argues that if Mr Williams' submission is correct, in future, in non predictable costs cases, solicitors will charge at their full rate with a success fee for obtaining medical reports, thereby greatly increasing the costs between the parties. The present difficulty arises only in predictable costs cases, namely those in which a case has settled below £10,000 before proceedings have been commenced. He suggests that Mr Williams' argument would deter settlements, so that solicitors could recover their full costs outside the predictable costs scheme.

24. Mr Williams accepts that the rationale for allowing claimants to recover fees, augmented by the charges of medical agencies, has always been that the agencies are carrying out work that would otherwise have been performed by the solicitor at greater cost. The agencies themselves have always been the first to emphasise this point but even here, any administration element, must be excised. It has been my experience that since the position with regard to medical reporting agencies was explained in *Claims Direct* and *Stringer v Copley* no administration fee has ever appeared on a medical reporting agency invoice. Mr Williams accepts the decisions in *Claims Direct* and *Stringer* at this level.

25. Mr Williams argues that Master Seager Berry was correct to excise the MDL element from these disbursements, both as a matter of jurisdiction, in that the agency element was not recoverable under the fixed costs regime, under Part 45 Section II, or as a matter of discretion on conventional assessment principles of proportionality and reasonableness. He argues that since the level of solicitors' costs is fixed by reference to the formula in CPR 45.9, if the solicitors had performed the work carried out by MDL they would not have been able to recover increased costs. If the solicitor is permitted to delegate that work he thereby avoids the limitation. In other words by doing less work the solicitor obtains a greater profit.

26. Mr Williams' primary position is that the agency element of a charge for procuring medical notes or reports is not actually a disbursement at all. He suggests that although it is billed as a single item it is necessary to deconstruct it for the purpose of analysis. In his submission, by delegating work to a medical agency the solicitor is delegating work which would ordinarily be performed by a solicitor. In this regard he relies on the Court of Appeal decision in *Agassi*, at paragraph 74 which I have already quoted above (at paragraph 16). In the light of that decision he argues it is necessary to identify the work that is in the nature of solicitor's work and excise it.

Hence, in this case he submits there is no jurisdiction to recover the agency element of the MDL fees since they are not disbursements falling within CPR 45.10.

27. As to the meaning of “disbursement” Mr Williams argues that each of those set out under rule 45.10 is a commodity which the solicitor could not provide himself. Furthermore, the rule excludes for example the cost of an enquiry agent obtaining a witness statement or a delegate going through a CFA, taking photographs or making a sketch plan of the locus in quo. Although rule 45.10(2)(c) permits the instruction of counsel in certain limited circumstances, he submits that payments to counsel have in any event “always been treated as a disbursement”.

28. As to the difference in language between CPR Part 27 and Rule 45.10, and in particular the words “the cost of obtaining”, Mr Williams argues that these rules are the work of different hands. He suggests however that the objective in both cases was that the actual cost of the expert’s report only, should be recoverable. He further suggests that Part 45 records the results of negotiations and contains what he calls, destructive ambiguity rather than the Diplomats’ “constructive ambiguity”. He argues that disbursements are goods or services supplied to the client for which the solicitor is bound to pay, whether or not in funds, in order to discharge his professional duty. He suggests that there is no significance in the use of the word “obtaining” in rule 45.10(2) and that the draft of the rule clearly intended that the recoverable cost should be only the cost of medical records, medical report, etc.

29. Mr Williams agrees with Mr Bacon’s suggestion that it is very common for solicitors in personal injury claims to instruct medical reporting agencies. He also suggests that it is useful to have experts who are local to the claimant. In modern personal injury litigation it frequently happens that the solicitor will be many miles distant from the client. In addition the agency tends to give the solicitor time in which to pay the fee. The services are supplied to the solicitors not to the client, thus, outsourcing is for the convenience of the firm of solicitors, not for that of the client. Mr Williams accepts that within the predictable costs regime this may be economically sensible, but it increases the costs payable by the paying party.

30. Mr Williams argues that, in circumstances where the predictable costs regime was manifestly introduced in order to fix the cost claimed for work performed by solicitors, a purposive interpretation of the applicable provisions strongly suggests that work ordinarily performed by solicitors cannot be labelled a disbursement and recovered by that route instead. He argues that, as a matter of construction, the rule should be taken as referring to the cost to the solicitor of obtaining the medical reports or records himself, not via delegation to an agency. Rule 45.10 is restrictive and no disbursements, other than those it identifies, are recoverable. Delegation to counsel is strictly limited, and, he submits that a solicitor could not delegate to counsel the task of obtaining a medical report. Delegation to another solicitor would qualify as a profit costs and therefore be governed by the fixed remuneration figures. He suggests that the answer must depend on the nature of the work which is delegated rather than the status of the person to whom it is delegated. He suggests that it cannot have been the intention of the rule makers to allow solicitors to escape the fixing of their fees by delegating solicitors’ work to agencies and by dressing up their charges as disbursements.

31. Mr Williams also relies on the judgment in *Re: Pomeroy & Tanner* (1897) 1 Ch 284, which dealt with the charges of solicitor agents. Although *Pomeroy & Tanner* put beyond doubt that a solicitor agent's fee is neither a disbursement, nor to be treated as a disbursement, it does not in my view assist in the present case. I reiterated the position at paragraph 80 of my judgment in *Claims Direct* (see paragraph 15).

32. Mr Williams disagrees with that proposition. In *Blair & Girling* the court was dealing with the payment of stamp duty, and the question for decision was whether the payment had been made by the solicitors in their professional character as solicitors, or whether it had been made by them "as agents independently of that character, just as a banker or any other agent might make disbursements for a client". Following *Re: Remnant* the court was in no doubt that the payment was not a professional disbursement made by the solicitors. The court went on to consider whether, by the custom and practice of solicitors, the particular disbursement had been treated as a professional disbursement as between solicitor and client. On the evidence the court decided that it had not been so established. The only reason why this question had to be decided was because of the incidence of the taxing fee which would attach to disbursements, but not to an item in the cash account. The fact is however that the court had no difficulty with the concept that a payment by solicitors could be treated as a disbursement incurred by the client through the agency of the solicitor. Mr Williams argues that until the advent of the predictable costs regime it has never previously been necessary to distinguish between whether fees paid to a medical agency were truly disbursements or profit costs. He agues that there is no established practice and that Master Seager Berry was correct in his decision. Mr Bacon points out and I accept, that in *Claims Direct* the MDL fee was treated as a disbursement, and was recoverable as part of the general and established custom. He argues that the character of the MDL fee has not changed with the advent of the predictable fee regime, and that so long as the fee compares favourably with what would have been charged had a solicitor done the work it should be allowed.

33. Mr Williams then turned to the decision in *Smith Graham v The Lord Chancellor's Department*, 30 July 1999, Hallett J, and the decision of HHJ Cook in *Stringer v Copley* which relied on *Smith Graham*. In *Smith Graham* the solicitors instructed an enquiry agent to carry out certain work on their behalf, and then sought to recover the work done by the enquiry agent at the rates laid down in the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989. The sums claimed exceeded the sums actually paid to the enquiry agent. The Lord Chancellor's Department argued that the costs of instructing the enquiry agent should be treated as a disbursement. The solicitors argued that, for the purpose of those proceedings, the enquiry agent could be treated temporarily as being employed by the firm. Hallett J stated:

> "I have been helpfully referred to a number of authorities which establish that whether someone is to be regarded as a fee earner is very much a question of fact to be determined in each individual case.
>
> On the facts of this case, despite the limited nature of the information before me, I am satisfied that the nature of the work Mr Fryer was instructed to do here was work which was appropriate for a fee earner to do. I doubt that anyone would have considered it inappropriate in a case such as this for the

> solicitor in charge of the case or someone similar to have carried out the work himself and to make a direct charge to the client. The fact that Mr Fryer was not actually employed by the solicitor either as a full time or part time employee does not in my judgment exclude him from the definition of fee earner.
>
> …
>
> Having considered Mr Fryer's background and the services he offers, I have no doubt that Mr Fryer comes within the definition of someone who may be instructed to do fee earning work. Attending at council offices to examine important documents with the lay client is clearly "fee earning work".
>
> I am satisfied, therefore, that in the circumstances of this case Mr Fryer does come within the definition of "fee earner" within the Regulations."

34. *Smith Graham* was a mirror image of this case, in that had the enquiry agent's fees been treated as a disbursement, the solicitors would have made a smaller profit than they did in the event. The case turned on the interpretation of the particular Regulations. The solicitors were, on the facts, permitted to so arrange their affairs as to maximise their profit costs. In this case Mr Williams argues, for the reasons I have already set out, that the solicitor must be prevented from maximising his profit costs.

35. HHJ Cook considered the decision in *Smith Graham* in *Stringer v Copley* in connection with the taking of witness statements. He went on to deal with the fees of a medical reporting agency and came to the decision with which I agreed in *Claims Direct*. He then added:

> "As a postscript … in view of my finding in respect of the litigation support agency, it would appear that the fees of medical support agencies could also be treated as though the work had been done by the solicitors and charged accordingly."

36. I have already set out my views of that proposition in paragraph 115 of *Claims Direct* (see paragraph 15 above). I have not changed my view.

37. Under the heading "Discretion" Mr Williams argues that the solicitors' recoverable costs are controlled by law. To delegate work to a third party is not, in his submission, reasonable and it should therefore be disallowed. The Claimants in these proceedings live in Somerset, whilst their solicitors are in Yorkshire. Mr Williams argues that the proliferation of distant solicitors in relation to claimants has been matched by the proliferation of medical agencies. He submits that the solicitors cannot recover extra costs as a result of being in a distant location on conventional *Wraith v Sheffield Forgemasters* [1998] 1 WLR 132 CA grounds. In addition there may be an element of duplication, in that the solicitors must write to the agency to request the report, and the agency then writes to the GP or expert, thus two letters are written instead of one. There are also arguments as to the nature of the work carried out by the agency, ie, is it all fee earning work? In summary therefore he argues

that, as a matter of discretion, no case has been made for the recovery of the agency charges in this assessment.

38. Mr Bacon points out that there is an obvious unfairness in excluding, as a matter of principle, the recovery of medical agency fees as a disbursement in predictable fee cases. Until the particular case in which the fee is incurred has been concluded, it will not be known whether the fee will be one to which the predictable fee regime applies or not. On the Respondent's case at the time the fee is being incurred the solicitor will be in no position to advise the client as to whether the fee will or will not be recoverable in principle. If the claim eventually fights, or is one in which the damages exceed £10,000, the fee will be recoverable, but if it settles at less than £10,000 it will not be. Mr Bacon submits that such unnecessary uncertainty should not be encouraged through the Respondent's constrained interpretation of the language of Rule 45.10.

CONCLUSION

39. In conclusion Mr Williams submits that paragraphs 32 and 33 of the judgment of Master Seager Berry, which I quoted at paragraph 9 of this judgment, epitomise his submission and that the Master's decision is correct. Mr Bacon criticises that decision, since paragraph 31 of the judgment, which I have also quoted above, ignores paragraph 115 of *Claims Direct* in which I parted company with Judge Cook's decision to the effect that the fees of medical support agencies could also be treated as though the work had been done by the solicitors. Paragraph 32 assumes that the payment to the medical agency is a profit cost, without deciding whether it could in fact be treated as a disbursement.

40. Relying on *Agassi*, particularly the passages which I have already quoted, Mr Williams suggests that since Tenon was doing work normally done by a solicitor the payment to them could not be treated as a disbursement and was not recoverable. In my judgment that submission is flawed. In the case of *Agassi* the Court of Appeal were dealing with the costs recoverable by a litigant in person. The court was not attempting to define the meaning of "disbursement" but merely deciding whether, had solicitors been instructed, they would in turn have instructed Tenon to carry out some or all of the work. The court found in principle that this would not have happened and that therefore nothing was recoverable. Had *Agassi's* case involved the instruction of a medical reporting agency for a proper reason that expenditure would, on the face of it, have been recoverable as a disbursement since it was an expense which a solicitor might quite properly have incurred had such a firm been instructed.

41. As to Mr Williams' point that the word "obtaining" is effectively superfluous I disagree. In my view the drafter of the rule and the Rule Committee were well aware that the obtaining of medical reports and medical records involves additional expense and correspondence and that frequently medical reporting agencies are used for this purpose. Mr Williams suggests that such an interpretation might mean that agencies could be used for the obtaining of police reports and engineer's reports. The argument in favour of using medical agencies is that the cost of doing so is in fact less than if a solicitor obtains the report direct (see paragraph 19 above). The test on all assessments is one of reasonableness and proportionality but there seems to be no reason why an agency should not be used to obtain an engineer's report if, in all the circumstances, it was reasonable and proportionate to do so.

42. Mr Williams submits that it is necessary to decide whether or not the payment to MDL is a professional disbursement. There is no doubt that under the test laid down in *Re: Remnant* the payment is not a professional disbursement, but in my judgment it is entirely proper, and in accordance with general and established custom, that the payment should be treated as a disbursement made on behalf of the client and thus be recoverable on her behalf.

43. As Simon J said in *Butt v Nizami* the intention underlying CPR 45.7 to 14 is to provide an agreed scheme of recovery which is certain and easily calculated. Simon J recognised that the fixed levels of remuneration might over reward in some cases and under reward in others, but were regarded as fair when taken as a whole. As he said:

> "The whole idea underlying Part 45 Section 2 is that it should be possible to ascertain the appropriate costs payable without the need for further recourse to the court."

44. The Judge agreed that disbursements are different from fixed costs but rejected any idea that it was anomalous that CPR 45.10 required a different approach. The use of medical agencies has been widespread for a number of years. In cases outside the predictable costs regime the system has operated without undue difficulty, provided the fees claimed have been reasonable and proportionate. Those fees have, by general and established custom, been treated as disbursements. The advent of the predictable costs regime does not, in my judgment, mean that the court's approach to such fees should alter, so that they are treated in a different way under the predictable costs regime. The difficulty with that proposition is demonstrated by Mr Bacon's point that until a case has been settled it is not known whether or not the predictable costs regime will apply.

45. I mention for the sake of completeness two further authorities referred to by Mr Williams, namely *Murphy v Lloyd*, 25 October 2005, District Judge Smedley and *Earle v Centrica Plc*, 25 July 2005, District Judge Bazley-White, neither of which I have found of assistance in coming to my decision.

46. One of Lord Woolf's underlying objectives in the Civil Procedure Reforms was the attainment of certainty and transparency in relation to costs. If Mr Williams' arguments are correct they will serve to extend uncertainty in relation to medical agency fees until the very last moment, impede settlement and lead alternatively to increased costs.

47. For the reasons which I have given this appeal succeeds.