

costs law



The Team

Costs law is an area of increasing importance and rapid change, where expert advice and advocacy are essential.

The complexity of the issues, the many uncertainties in the law and the sums involved all mean that it makes sense to retain specialist counsel. Nor is this something which need only be considered when litigation is over and all that remains is for costs to be assessed. Very often the result of that assessment will turn on the drafting of the solicitor's original retainer and the precise wording of costs orders made in the course of the case.

Getting good advice on costs is also, nowadays, an essential business strategy for solicitors. As the quantum of costs has increased, clients have become more and more dissatisfied with the traditional hourly rate retainer under which they bear all the costs risk. The last ten years have opened up the range of possibilities for funding litigation in a way that could not have been dreamt of a decade before that, but few of these are without their pitfalls. The ability to offer an attractive and effective range of funding options for clients is now a major marketing tool.

39 Essex Street has an outstanding costs law team which enjoys a formidable reputation at every level of seniority. The team undertakes all aspects of costs work. Members appear in every Court and Tribunal where costs issues arise. Our barristers have considerable experience in appellate work, with frequent appearances in Court of Appeal and High Court appeals, as well as the House of Lords and the Privy Council. Members of 39 Essex Street are almost invariably to be found in the most important costs cases. We also conduct all manner of detailed assessments, involving arguments arising from high value commercial litigation and technical challenges to costs recovery, as well as more everyday disputes.

Chambers also has a wealth of experience in advisory and drafting work. In an area of law beset with technical rules and disciplinary risks, getting documents right is crucial. The team has considerable expertise in advising on potential funding arrangements and in drafting costs documentation, including CFAs, CCFAs and legal expenses insurance policies.

Our clients include all those involved with legal costs. Our instructing solicitors range from large City firms to sole practitioners. We are retained by many costs consultants and costs draftsmen. We act for major insurers, government departments, claims management companies, the Legal Services Commission, trade unions and multi-nationals, as well as individuals from the wealthy to those on income support. We have been involved in costs issues worth anything from a few thousand pounds to £73,000,000.

A particular feature of 39 Essex Street's costs team is that, whilst all its members are specialists in the sometimes arcane principles of costs, many are also well known for their work elsewhere, in areas of law ranging from commercial and insurance litigation to judicial review; personal injury and clinical negligence to construction and arbitration. This enables us to offer a rounded and multi-disciplinary approach.

“Considerable depth marks out 39 Essex Street in terms of costs litigation” Chambers & Partners 2009



Areas of Work

Litigation Funding and Non-Party Costs Orders

The funding of litigation by third parties as a commercial enterprise is an increasing feature of litigation in this jurisdiction, especially for very high value claims. Ensuring the legality of such arrangements, and that the funder and the party each have their proper say in the conduct of the litigation, is essential. Members of the team advise on all aspects of this developing area.

The Courts are also showing an increasing readiness to award costs against non-parties, often because they have funded the litigation. We can assist parties who want to be in a position to apply for a non-party order to take the steps that must be taken long before an application is made. We can also advise non-parties involved in litigation, or considering becoming involved, of the risks they face.

We are also fully versed in all the issues that arise in wasted costs applications.

Significant Cases

- R (Factortame) v Secretary of State (No. 8) (CA) [2003] QB 381, [2002] 3 WLR 1104, [2002] 4 All ER 97
- Myatt v National Coal Board (No. 2) (CA) [2007] 1 WLR 1559, [2007] 4 All ER 1094, [2007] PNLR 25
- Sims v Hawkins [2007] EWCA Civ 1175

Solicitor and Client Disputes

The recovery of costs by a solicitor from a (former) client is governed by a unique, and some might say peculiar, set of technical rules. Quite apart from the relevant costs legislation and case law, the field is further complicated by the Law Society's jurisdiction over inadequate professional services and the increasing willingness of the Legal Complaints Service to give clients a less formal remedy. These disputes, which are full of pitfalls for the unwary and which involve difficult tactical choices, form a significant part of our work. We bring to such disputes not only a thorough knowledge of the relevant costs law but also the benefit of 39 Essex Street's specialisation in professional discipline.

Significant Cases

- Turner v Palomo (CA) [2000] 1 WLR 37, [1999] 4 All ER 353
- Pine v Law Society (CA) [2002] 1 WLR 2189, [2002] 2 All ER 658
- Nicholas Drukker & Co v Pridie Brewster & Co [2006] 3 Costs LR 439
- Dorsey & Whitney v Megantic Services Ltd [2008] EWHC 2662 (QB)

Costs Caps and Costs Estimates

The rules on costs caps and costs estimates reflect a desire to ascertain and even control costs long before the assessment process begins.

The amendment of the CPR in April 2009 to make express provision for costs caps is bound to lead to an increase in disputes as to when a cap is appropriate and its level. With the additional prospect that a cap set in the course of a claim may in practice be a substitute for a detailed assessment, parties will want to ensure that their best case is put forward. Members of the costs team are often brought in to supplement trial counsel on capping applications.

Estimates of costs, both those provided to clients and those served inter partes, are an important aspect of the civil costs regime. Depending on the circumstances, an inaccurate estimate, if uncorrected, can lead to significant amounts of costs being disallowed. We can help make sense of the principles involved and the decided case law, which are not always easy to apply.

Significant Cases

- Garbutt v Edwards (CA) [2006] 1 WLR 2907, [2006] 1 All ER 553
- Willis v Nicolson (CA) [2007] PIQR P22
- Mastercigars Direct Ltd v Withers [2007] EWHC 2733 (Ch)

Top Ranked in Costs Litigation

Chambers & Partners 2009 and Legal 500 2008

39 Essex Street Costs Law

Group Litigation

Group litigation gives rise to difficult issues about what, if any, costs structures should be put in place during the lifetime of the claims. As the litigation evolves, lead issues and lead claims are identified, and others invariably fall by the wayside. Guidance on the most advantageous costs structures is essential, as this can affect dramatically both the parties' exposure to costs liability and their ability to recover costs. Parties also need to ensure that their own funding and insurance arrangements meet the particular demands of group litigation. We have extensive experience in this complex area, and in the intricacies of detailed assessment where group litigation orders have been made.

Significant Cases

- Nationwide Building Society v Various Solicitors (Ch 20/7/99)
- BCCI v Ali (Ch 4/11/99; 13/4/00)
- Giambone v JMC Holidays Ltd (QB) [2003] 1 All ER 982
- North West Child Abuse litigation (QB 2/7/03)

Conditional Fee Agreements

No costs issue has caused more controversy in recent years than the legality of CFAs. Whilst the passing into history of the 2000 Regulations means some of those issues are receding, a CFA still needs to comply with the requirements in the primary legislation to be lawful. We all have extensive experience of litigation over CFAs and CCFAs, whether made under the 2000 Regulations or thereafter, acting for claimants and defendants alike.

The use of CFAs and CCFAs is extending beyond claimant personal injury work, and both commercial clients and their solicitors have become alive to the benefits these agreements can bring to other areas. Members of the costs team have been involved in drafting and advising on such agreements since the current regime came into force in 2000, and we continue to do so.

Significant Cases

- Accident Group Test Cases [2003] 1 All ER 353
- Hollins v Russell (CA) [2003] 1 WLR 2487, [2003] 4 All ER 590
- Jones v Caradon Catnic Ltd [2006] 3 Costs LR 427
- Garrett v Halton BC; Myatt v National Coal Board (CA) [2007] 1 WLR 554, [2007] 1 All ER 147
- Various Claimants v Gower Chemicals Ltd and others [2007] 4 Costs LR 647
- Jones v Wrexham Borough Council (CA) [2008] 1 WLR 1590
- Tankard v John Fredricks Plastics Ltd; Hibberd v Fawcett Old Ltd; Jones v Attrill [2008] EWCA Civ 1375, (2009) The Times 16 January

Success Fees and ATE Insurance Premiums

Success fees and ATE premiums have contributed to the significant increase of costs in civil litigation. Consequently there is a growing body of case law on when these additional liabilities can, and cannot, be recovered; and on how the recoverable amount is to be assessed. These issues arise in all types of case, from international commercial disputes, to defamation, to personal injury claims.

Significant Cases

- Sarwar v Alam (CA) [2002] 1 WLR 125
- Campbell v MGN (HL) [2005] 1 WLR 3394 [2005] 4 All ER 793
- U v Liverpool City Council (CA) [2005] 1 WLR 2657
- RSA Pursuit Test Cases [2005] EWHC 90003 (Costs)
- Rogers v Merthyr Tydfil Borough Council (CA) [2007] 1 WLR 808
- Crane v Canons Leisure Centre (CA) [2008] 2 All ER 931
- C v W [2008] EWCA Civ 1459



Inter Partes Recovery of Costs

Whilst a successful party generally expects to recover its costs, this is not always so. The trial judge can disallow some or all of that party's costs in a range of circumstances, for example where that party has failed on some issues, or where the claim was exaggerated. Moreover on an assessment the costs judge has a discretion to disallow whole swathes of the receiving party's costs as unreasonably incurred, where say a step in proceedings was unnecessary, or where there has been misconduct. Members of the team are fully versed in these issues and are often brought in during the substantive proceedings to deal with them.

The costs team of course also has considerable experience in dealing with any points that can arise in detailed assessment proceedings, including disputes as to disclosure and arguments about proportionality, hourly rates, apportionment and related issues.

Significant Cases

- Bailey v IBC Vehicles (CA) [1998] 3 All ER 570
- Haji-Ioannou v Frangos (CA) [2008] 1 WLR 144
- Lahey v Pirelli Tyres Ltd (CA) [2007] 1 WLR 998
- Hall v Stone [2007] EWCA Civ 1354, (2008) The Times 1 February
- Peakman v Linbrooke Services Ltd [2008] EWCA Civ 1239

Security for Costs

Security for costs applications can give rise to difficult issues including problems over quantum. Specialist input can be invaluable and we are often brought in to assist.

Significant Cases

- Nasser v Bank of Kuwait [2002] 1 WLR 1868, [2002] 1 All ER 401

Fixed Costs

Fixed costs regimes are no doubt introduced with the intention of simplifying the quantification of costs. The provisions introduced into the CPR for certain types of personal injury claim have though introduced anomalies and difficulties of their own. We are very familiar with all the issues. We will also be well placed to advise on the anticipated extension of fixed costs to other types of personal injury claim and elsewhere.

Significant Cases

- Lamont v Burton (CA) [2007] 1 WLR 2814, [2007] 3 All ER 173
- Kilby v Gawith (CA) [2009] RTR 2

Public Funding

Public funding is less common than it was and accordingly practitioners are generally less familiar with it. If anything though the provisions have become more complex, with different rules for different generations of certificates. This means it is the more important to engage real expertise in a public funding dispute of the calibre which 39 Essex Street provides.

Significant Cases

- R (Gunn) v Secretary of State (CA) [2001] 1 WLR 1634, [2001] 3 All ER 481
- Brawley v Marczyński (No. 2) (CA) [2003] 1 WLR 813, [2002] 4 All ER 1067
- Merrick v Law Society [2007] All ER (D) 282 (Dec)



Tribunals and Inquiries

Tribunals and Inquiries have their own sets of rules which give rise to particular issues. Furthermore those represented at public inquiries often have the right to have their legal fees paid at public expense; but the issues can be complex. We are ready to assist.

Significant Cases

- Bloody Sunday Inquiry
- Stephen Lawrence Inquiry
- North Wales Child Abuse Inquiry
- Fosberry and Fosberry v Revenue & Customs [2008] EWHC 3344 (Ch)
- Serpes v Revenue & Customs (V&DT 22/12/08)

Criminal Costs

Criminal proceedings have their own highly complex statutory costs regime, which has been subject to almost annual change in recent times. Members of the team have been involved in many of the important cases.

Significant Cases

- Patten v Lord Chancellor [2001] 3 All ER 886
- Secretary of State v Stork [2006] 1 Costs LR 69
- Goodman and Farr v Secretary of State [2006] EWHC 3669 (QB)
- Lord Chancellor v Haggan [2007] EWHC 1212 (QB)
- Lord Chancellor v Rees [2008] EWHC 3168 (QB)

Related Areas of Practice

Costs work is inextricably linked to the management and conduct of a modern legal practice. Chambers offers a full range of expertise in related regulatory, disciplinary and negligence work. Chambers also has a broad range of expertise in public law and human rights related costs issues.

Other Services

Costs Cases Online

The costs team maintains a free, searchable web database with concise summaries of important and topical costs decisions at www.39essex.com.

Training and Education

Members of the costs team lecture frequently at both Chambers seminars and external conferences. Members also participate in CPD training including web-based programmes. We are also happy to provide in-house training.

Publications

Publications written, edited or contributed to by members of the costs team include:

Cordery on Solicitors

Scott, K. Summary Assessment of Costs (OUP 2006)

The Law Society's Gazette

*“a set known for its ‘solid and clear advice’
and ‘excellent manner with clients’”*

Legal 500 2008

39 Essex Street Costs Law

Chambers

The members of 39 Essex Street possess a wide range of expertise, both as advocates and advisers. Our diverse client base includes government departments and agencies, utilities, NGOs, insurance companies, professional indemnity insurers, local authorities, trade unions, public and private companies, educational bodies, health authorities and trusts, and individual litigants. Members also undertake pro bono work and act for public interest organisations. Instructions are accepted through direct professional access from recognised organisations and overseas lawyers.

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