



05 February 2010

Our ref: ICAEW Rep 15/10

Robert Wright
Ministry of Justice
102 Petty France
London
SW1H 9AJ
United Kingdom

By e-mail robert.wright@justice.gsi.gov.uk

Dear Mr Wright

Review of Civil Litigation Costs

The ICAEW has read with interest the final report of Lord Justice Jackson's *Review of Civil Litigation Costs*. We write to suggest an additional opportunity (which was not identified in the Review) to substantially reduce costs and enhance transparency of civil litigation. The cost to the public purse would also be reduced, and access to justice and client protection improved.

Licensed Access Arrangements and Impact on Costs

Our proposal relates to existing arrangements where clients are represented by a professional, operating within his permitted professional competence, in conjunction with a barrister but without the need or requirement for a solicitor.

Under the Licensed Access Rules, members of the ICAEW (and certain other professionals) can directly instruct barristers to appear in cases in the High Court or Court of Appeal without a solicitor but with no provision to recover costs. Authorised members undertake the same work as solicitors in such work, and usually at a considerably reduced cost. The Court of Appeal has positively encouraged their involvement.¹

Costs Anomaly

However a significant anomaly exists. If a successful claimant wins his case then:

- If he has instructed a solicitor who then instructs the barrister, then the claimant can recover his solicitor's costs, but
- If he has instructed an accountant who similarly instructs a barrister, then the claimant *cannot* recover his accountant's costs for doing exactly the same work.

¹ The Court of Appeal said in *Agassi* "In principle, it is obviously desirable that members of organisations such as the Chartered Institute of Taxation who are responsible and skilled persons should be encouraged to use the Licensed Access Scheme". [2005] EWCA Civ 1507

Current Arrangements

In many cases an authorised accountant is the professional most directly involved in the claimant's affairs and best qualified in terms of skills and experience to instruct the barrister.

Nevertheless, the existence of this anomaly on costs recovery means that a claimant is positively encouraged by the legal system to use three professionals rather than two, for the sole purpose of recovering costs. In the example just outlined, if the claimant directly instructs an unrelated solicitor who then "subcontracts" the work back to the accountant, then both the solicitor's costs *and* the accountant's costs are recoverable, as well as those of the barrister.

There is no need for the sub contract arrangement *other* than to recover costs. The overall costs to the claimant in this scenario will be higher as the solicitor will have incurred participation costs.

Public interest considerations

This has a significant implication for the public interest, as it will often be the public purse that will be meeting the unnecessary additional costs incurred in a successful claim which relates to negligence or other claims against central and local government and public sector bodies.

Our proposal

We therefore suggest the costs position of professionals who are permitted direct access are harmonised with the costs position of solicitors

- This accords with and implements the views expressed by the Court of Appeal in the Agassi case:

"the Lord Chancellor has approved the arrangements by which they may instruct barristers direct in a limited range of cases as a new and a better way of providing advocacy services. The advantages of these arrangements are clear. These persons have specialist expertise in the field of tax law, often far exceeding that of solicitors. We were told by our assessor that the fees charged by a firm of solicitors for the work done in respect of these two appeals might well have been three times as high as Tenon's charges."

- The cost to the public purse would also be reduced. As well as the clear views expressed in the Agassi case, tax also provides a good example of an area of law which generates a considerable amount of contentious work and litigation. To enable accountants and tax advisors to extend their services in this area could reduce costs considerably, including those incurred by HMRC, while enhancing the quality of client service.
- The need for arrangements simply to procure an advantageous cost recovery position and for no other reason would be eliminated, contributing to the transparent and efficient delivery of legal services which is a key objective of the Legal Services Act 2007.

We would welcome a meeting, to discuss these matters, but in any case, please contact me should you wish to discuss any of the points raised in this letter.

Yours sincerely

Felicity Banks
Head of Business Law

T +44 (0) 207 920 8413

E felicity.banks@icaew.com

The Institute of Chartered Accountants in England and Wales (the ICAEW) operates under a Royal Charter, working in the public interest. The ICAEW has statutory regulatory powers for audit, investment business and insolvency, and is the anti-money laundering supervisory body for its members providing accountancy and trust and company services by way of business. Its regulation of its members is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the ICAEW provides leadership and practical support to over 132,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The ICAEW's members and practising firms provide a wide range of professional services, not just in financial reporting and audit but in tax services, including tax advice, forensic services and general professional and business advice.