BA02D00472 – The Skeleton Arguments of Spenser Michael Poultney

For use in

The High Court of Justice
Principal Registry of the Family Division
(Gee Street Court House)

Before

His Honour Judge John Mitchell

On

Monday 16th November 2009 at 10:00am

This document will be filed and served in accordance with the Order of His Honour Judge John Mitchell dated 1st July 2009. http://www.lcs-test.co.uk/images/Order.pdf

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Notice:
This application is for leave to appeal the order of District Judge James made on 25th June 2008 and for direction that the application be transferred to the Court of Appeal.

The underlying application, dated 25th April 2007 and heard by District Judge James, named FDC Law, solicitors to the former Mrs. Poultney, as a Party to the application. District Judge James refused to allow this or for FDC Law to be "joined" as a Party. This despite the facts:

1. The application was firmly rooted in the factual ***Professional Negligence*** and ***Professional Misconduct*** of FDC Law in 2003 and 2004.
2. FDC Law was (and is) the SOLE beneficiary of the costs Orders they had obtained since 2003. The 150 year old Indemnity Principle assures this.
3. FDC Law was the ONLY Party who had known the TRUTH from the outset.
4. The entire application was brought because FDC Law and their costs draughtsman, Nigel Long, misled District Judge Nigel Brookes in 2004.

Solicitors are Officers of the Court:

I argue FIRST and FOREMOST and THROUGHOUT that Her Majesty the Queen would not want Her People to be cheated by Her Officers of the Court.

*"The court has a **right** and a **duty** to supervise the conduct of its solicitors, and visit with penalties **any** conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally."* (**Myers -v- Elman** [**1940**])

This has NOT happened to date and it is primarily WHY WE ARE HERE TODAY.

No Precedent Found – (Ruling Request) - in the public interest

I lead with the following contentions:

1. In (plain) civil law the costs rules differ from those in ***family law***.
    1.1. In (plain) civil law, the provision of costs estimates may be subject to the vagaries of the CPR and (to some extent) the whim of the Judge. In ***family law*** the provision of estimates for Ancillary Relief purposes has been **mandated** for at least a decade by **2.61F of the FPR 1991 – amended 1999**.

    1.2. None of the "irregularities" (e.g. CFA's or "success fees") are permitted in ***family*** cases. They are banned by statute. The provision of proper cost information is as **vital** in ***family*** justice as the principles of "openness" and "disclosure".
2. No solicitor who charges by the hour can fulfil his or her **duty** to complete Form H under the FPR without **first** determining the hourly **rate** used in calculating the Indemnity Costs declared in Form H.
3. While the number of hours claimed might be "estimated" (and subject to later adjustment) the one thing that can **never** be subject to "estimation" is the hourly **rate** used in the calculation the solicitor MUST perform.
4. From the time the Form H is filed and served the hourly rate used becomes an estoppel on the **rate** that can be charged by the solicitor for the related work.
5. In the absence of a contract between solicitor and client the **rate** "ceiling", inherent in the Form H declaration, **must** be binding upon the solicitor for the inter-party costs to which the Form H relates.
6. Allowing a solicitor to **double** the hourly rate charged a YEAR and five MONTHS **after** a costs order has been obtained <u>completely negates the FPR and the whole of the Form H system</u>. Indeed, it undermines the decisions of EVERY judge from the FDA, through the FDR to the Final Hearing (and, in this case, beyond).

See also Pages [50] and [59] of the mini-bundle attached to N161

Rulings sought on these points

I ask the Court for a clear and unequivocal ruling that endorses the above.

OR

In the event that the Court does not accept these contentions, then I ask for clear and unequivocal rulings on the following: -

1. Under what circumstances it is permissible for a solicitor to increase the **rate** used in calculating the Indemnity Costs declared to the Court and the Parties in Form H **after** an Order for costs has been made?
2. By how much (percentage?) is it reasonable to increase the **rate** used?
3. What (if any) is the time limit in which such an increase can be applied?
4. Should the Judge performing a detailed assessment be told of the increase?
5. How any of these (possible) rulings apply in **this** case?

I ALSO seek a ruling on whether a solicitor can charge her client MORE simply because a costs order has been obtained against the other party – see point 1, page 6

Misleading District Judge Nigel Brookes

Most of the authorities on CPR 3.1(7), which grant judges the powers to Set Aside orders made in cases where the judge was **misled**, are listed in the judgement of D J James. They will not be re-listed here.

In any event the finding of D J James that he **had** the powers to grant the "set-aside" order, if D J Brookes had been misled, **is not the subject of this appeal**.

Full, approved, transcripts of the judgement and the hearing before D J Brookes are available.

The FACTS are as follows:

1. In respect of Ancillary Relief costs D J Brookes determined that I should pay ***"one and a half times the estimate given to the court by the Petitioner's solicitors."*** [SIC] (NB. Estimate +15% is more usual in such cases).
   - 1.1. He rounded down the figure of £6,187.50 from the final Form H to **£6,000** and made his order that I pay **£9,000**.
   - 1.2. In paragraph [72] D J James found that the Final Form H ***"…represented ALL of the costs incurred on this file."*** - the £6,000 was not just AR solicitors costs but actually included Mrs Poultneys **other solicitors costs** - which were "no order for costs"
   - 1.3. At paragraph [45] D J James determined that those **other solicitors costs** were £1,552.00 (£1,823.60). It follows that the solicitors estimate for AR costs were: -

     £4,993.75 - £1,823.60 = **£3,170.15.**
     £3,170.15 x 1.5 = **£4,755.23** (now add the disbursements)
   - 1.4. The order for £9,000 means that, in addition to 1.5 x the AR costs, I must ALSO pay 1.5 times **Mrs. Poultney's costs of divorce and injunction**. Indeed, since Mrs. Poultney had already PAID the £1,823.60 in July 2004, we **now** see that FDC Law has been paid **two-and-a-half** TIMES for the SAME work.
   - 1.5. D J Brookes would not, indeed COULD NOT, have made the £9,000 Order if he had known the TRUTH. It follows that he MUST have been misled, whether intentionally or "by accident", (it does not matter which).
2. The "bill" itself is misleading. The rates and the increase claimed are presented exactly as if they were subject to contract and notification of the increase. The entire file was "missing" at the detailed assessment and D J Brookes was **not** told:
   - 2.1. That there was **no** contract (this was only formally admitted in 2008). Indeed at paragraph [43] D J James found that Nigel Long ***"deliberately tried to mislead the court"*** (in 2008) over this point and found his evidence ***"unquestionably tainted"*** and he was ***"…bound to regard it with considerable scepticism"***
   - 2.2. That there had been no notification of the claimed rate increase.
   - 2.3. That the only agreed charging rate was £80/hr.
   - 2.4. That the Forms H were all based on £80/hr.
   - 2.5. That on 15/10/2003 (over a year earlier) Ms. Wayman had written to her Client agreeing that the sum ordered (£6,187.50) more than covered the AR work done.

3. District Judge Brookes made a "Leigh" type decision (Leigh Vs. Michelin Tyre [2003] EWCA Civ 1766). He had to seek a ***reason***, or ***reasons,*** for the increase in costs between Forms H and the final bill and then apply his judgement based on that ***reason***. Later the CPR was modified, in view of Leigh, (2003) to make providing a ***reason*** mandatory for increases of only **20%** - and these were "out" by up to **530%**.

   3.1. In December 2004 D J Brookes (and H H J Cardinal in 2005) accepted the ***reason*** was the one put forward by (the now proven and discredited liar) Nigel Long. Namely: that the solicitor had failed to record her TIME properly.

   3.2. In 2008 the Statement of Nigel Long included a printout from the time ledger used by Ms. Wayman to prepare the Forms H. The first two pages (we know related to the Occupation Order and Divorce – 19.4 hours @ £80/hr) [45] and [49]) were missing and the printout is dated 01/11/2007. In paragraph 6 of Nigel Long's statement he says the printout was "similar" to the one he was given in 2004. He did NOT at any point pretend that it was identical.

   3.3. At paragraph [72] we see that Ms. Wayman admitted using the time ledger in preparing the Forms H (there is nothing wrong with this, it is the whole purpose of computer based time-recording and no other method makes sense)

   3.4. Examination of the time ledger clearly shows that the RATE used, and intended throughout, right up to bill rendered to Mrs. Poultney in June 2004, was **£80/hr**. The change in RATE between the Forms H and the "bill" was the BIGGEST ***reason*** for the increase – NOT the "reason" (part truth) tendered by Nigel Long.

   3.5. Not ONLY did Long mislead D J Brookes over the **size** of the final AR estimate (para 1 above) he ALSO misled him over the ***reason*** for the increase. D J Brookes could not apply his "discretion over costs" because he had been (twice) misled.

   3.6. In October 2008 an independent tribunal of the ALCD fined Nigel Long **£5,000** with **£500** costs for: **1.** Lying to, and deliberately trying to mislead, the Court in THIS case and **2.** For his part in yet ANOTHER exaggerated "bill" that claimed £1,000's that FDC Law was NOT entitled to under the contract they **now** had with their Client.

4. In March 2008, Ms. Wayman admitted under oath that she should not have signed the certificate on Nigel Long's "bill". The transcripts show that both D J Brookes and H H J Cardinal **relied** on that certificate – they were entitled to – (Bailey -v- IBC Vehicles Limited [1998] 3 All ER 570 CA). Both judges were regrettably misled by the false declaration of an "officer of the court". As Henry L J said in Bailey - ***"And the other side of a presumption of trust afforded to the signature of an officer of the court must be that breach of that trust should be treated as a most serious disciplinary offence."***

These are the true FACTS about the conduct of Nigel Douglas Long FALCD, 9, Boulevard, Weston-Super-Mare, BS23 1NN in a ***family*** case. According to Longs' own website he is a former solicitor and sat for 5 years as a Deputy District Judge.

http://www.lcs-test.co.uk/images/ALCD2Me121108.pdf

Nigel Long is the type of person FDC Law instructed after they had misled District Judge Rutherford on 29/07/2003 – as D J James found in paragraph [73] - and lost an appeal.

See also my Skeleton Arguments in the "mini-bundle" attached to N161 – which argue the reverse and shows that if D J Brookes was NOT misled, then he was an "accessory" – a viewpoint I refuse to accept, but which would be the only other logical conclusion possible. Title: "**On Misleading the Court**" - http://www.lcs-test.co.uk/misleading.htm

The Indemnity Principle

See also Skeleton Arguments attached to N161
See also the **original** Skeleton Arguments Page [54] of the mini-bundle attached to N161

Case List
Harold -v- Smith [1860] 5 H&N 381
Gundry -v- Sainsbury [1910] 1 KB 645
General of Berne [1998] 1 WLR 1231
Bailey -v- IBC Vehicles Limited [1998] 3 All ER 570 CA

Also…

1. Paragraph [79] - D J James says [£80/hr]***"…has to represent the charging rate either agreed with Mrs. Poultney or intended throughout by Miss Wayman. If he is right about that then the bill for detailed assessment would have been in clear breach of the indemnity principle…"***
2. The time ledger, which came to light in 2008, clearly shows that the RATE intended throughout, right up to bill rendered to Mrs. Poultney in **June 2004**, was **£80/hr**. It was the rate used in the preparation of all three Forms H and Ms. Wayman did not move away from that rate until she signed Nigel Long's "bill" in October 2004.
3. The closest D J James comes to dealing with this is between [47] and [51] of his judgement. Unfortunately he again falls into error over the FACTS:-
   - 3.1. At [47] he says [I] ***"carried out a complex calculation"*** – I did NOT. I simply copied the dates, the time-unit and the rate columns, verbatim, from the printout (dated 01/11/2007) into a spreadsheet set up to mimic the original time ledger. By adding a "running total" column I could see exactly the figures Miss Wayman saw, on the various dates, when she prepared each of the three Forms H. It is as easy to adjust the rate column in the spreadsheet as it is in a real time-ledger – all figures and totals follow the RATE with no (human) calculation required.
   - 3.2. At [49] he attempts some calculations of his own. His figures are WRONG and the conclusions he reaches in [51] (based on these) are of necessity also WRONG.

The true figures @ £80/hr for the FDR were **£632.00 (£742.60**) - which Miss Wayman rounded UP to **£850**

The figures @ £80/hr for the FDR were **£1,216.00** (**£1,428.80**) - which Miss Wayman rounded UP to **£1,527.50**

The figures @ £80/hr on 25/07/2003 were **£2,616.00 (£3,073.80) –** add in the **other costs** (the first two missing sheets – but known to be 19.4 hours @ £80 / hr = £1522.00 (£1823.60))

On 25/07/2003 Miss Wayman saw **£4,168.00 (£4897.40)** which she rounded UP to **£4,250.00 (£4,993.73**)

4. At [51] he reasons that Ms. Wayman would have had to "analyse", "calculate" and "recalculate" – **this is incorrect.** She would simply read off the figures (as indeed is admitted at paragraph 72). He says that the figures would ***"have been precise and then the argument very strong"***. The figures, @ £80/hr, ARE precise and the argument IS very strong. He says ***"To the contrary the fact that the figures in Form H are less than those in the ledger to my mind clearly refutes Mr. Poultneys theory."*** To the contrary, at £80/hr the figures in the ledger are less than the Forms H in **all three cases** and (as one would expect) were rounded UP for the Forms H.

"If he is right about that then the bill for detailed assessment would have been in clear breach of the indemnity principle" – I WAS and AM right. The bill WAS in breach!

Some More Judicial Oversights

The Judgement of D J James, handed down on 25/06/2008 is deficient in a number of ways:

Firstly: The judgement does not deal at all with my most fundamental Skeleton Arguments compiled as a direct result of the evidence (time ledger) which came to light only through the Order D J James himself made in 2007.

Secondly: The judgement does not address any of the (many) ways in which D J Brookes was misled. See also - the "mini-bundle" and imore detail on pages 3 & 4 of this document.

Thirdly: In many places, what D J James says is just plain WRONG – examples below:

1. At [72] he says ***"I believe she would have limited her total costs to her client to the figure in Form H had there been no order for costs made against Mr. Poultney."*** This is indistinguishable from saying *"She decided to charge her client* more (i.e. a success fee) *because (and after) an order had been obtained."* This is not permitted, even in normal civil matters, without a CFA agreed up-front with the client. Any form of CFA is explicitly banned in ***family*** cases by statute**. (I seek a ruling on this point)**
2. In paragraph [82] the Judge states ***"In the absence of any agreed rate the obvious charging rate to adopt ... is the guideline rate …"*** In a ***family*** case, where costs have already been declared, based on a lower rate, this MUST be WRONG for the reasons outlined on page 2 of this document. Another fundamental oversight. [more]
3. In paragraph [73], where D J James accepts that FDC Law misled D J Rutherford, he again falls into error. He goes on to say that [because of my successful appeal] ***"… the consequences of that decision is that the effect if any on District Judge Rutherford's decision of the misleading comments on the Form H were nullified."*** Clearly this has to be WRONG … as he himself pointed out at paragraph 68…
   - 3.1. [68] When discussing the importance of Form H he says ***"At the final hearing the judge needs to know each parties costs liability to their own solicitors because it may impact the effect of the order the judge makes."*** How can D J Rutherford have dealt with costs judicially when the claim included **£1,823.60** of solicitors costs that should NEVER have been there in the first place AND the (AR) solicitors costs were later multiplied by FOUR when the solicitor was finally caught out?
   - 3.2. The rule "costs follow the event" had been removed by statute, but for years before that ***family*** Judges often "re-sliced the cake" as the JSB's Family Bench Book puts it. I could not pay ANY costs and D J Rutherford knew this. If he had not been misled we can be sure that he would have dealt with this differently – if only for the sake of the children - (both of whom lived, and still live, with me).
4. At paragraph [80] D J James is the first judge to discover that FDC Law "totally ignored" the Solicitor's Costs Information and Client Code 1999. What he fails to take into account in his judgement is that this ***Professional Negligence*** and (worse) the filing of ambiguous and misleading costs information led to ALL that followed.
5. At paragraph 67 he states that if Form H 1 (which details rates) had been in place in 2003 then ***"I think it highly likely that the problems that we are faced with now would not have arisen"***. To excuse the solicitor by blaming the "rules" is to ignore the FACTS:-
   - 5.1. CPD s 13.5, the Client Care Code, FPR Rule 2.61F and Principle 17.03 were more than adequate. If FDC Law had followed ANY of them, then none of what was to follow COULD have happened. Rewarding **Professional Negligence** is WRONG.

Human Rights & Wasted Costs – ECHR & Myers -v- Elman
Why the Judgement of District Judge James CANNOT be allowed to stand

At the very TOP LEVEL there are fundamental WRONGS in the judgement of D J James:

In his Judgement D J James establishes a number of FACTS that were NOT known to: -

1. District Judge Mark Rutherford on 29/07/2003 [costs Order £6,187.50]
2. His Honour Judge Barclay on 08/09/2004 [order]
3. District Judge Nigel Brookes on 06/12/2004 [order]
4. His Honour Judge Barclay on 17/02/2005 [order]
5. His Honour Judge Cardinal on 01/08/2005 [order]

We can be fairly certain that FDC Law, and only FDC Law, knew ALL of these FACTS at the outset and throughout ALL of the above proceedings.

Throughout his judgement D J James has failed to take into account what was known to the various Courts (and to me) and what was hidden. He has failed to put this into context and to consider the effect the "missing" FACTS had on the earlier judges, their resulting Orders and my actions.

As a result ALL Orders of the Court since 2003, including that of D J James, effectively legalise and reward *gross (and on-going) solicitor misconduct*.

This misconduct is factually ***Professional Misconduct*** AND ***Professional Negligence*** (dereliction of **duty** to the court and the parties) worse – the misconduct appears, based on the evidence, tantamount to ***criminal fraud***. (NB: proving fraud is not necessary to this case or this argument)

In short, D J James has erred by failing to take the opportunity to right a **serious** wrong which no earlier Court could have **realised** or **corrected** because of these HIDDEN facts.

This goes against the wisdom of a Roman Law maxim: *Quod ab initio vitiosum est, tractu tempore convalescere non potest.* **What is wrong from the beginning cannot be validated by passage of time.**

Since 2003 FDC Law has ***Maintained*** their Client (also not revealed until March 2008) and spent **£40,000** to **£50,000** and still the TRUTH was kept from the Courts **until 2008**. FDC Law is the SOLE beneficiary to ALL of the subsequent costs Orders they obtained by hiding the TRUTH. [more]

The ancient formula *Nemo auditur propriam turpitudinem allegans.* (**"Nobody should profit from his or her own wrongdoing."**) explains even better the recurrent possibility of the perversion of justice that has happened in THIS case, but which has NOT been addressed by the Bath County Court OR by District Judge James (Aldershot & Farnham).

The court now recognises and accepts that the costs order was WRONG from the beginning:
Specifically D J James found: (The bracketed numbers e.g. [43] reference paragraphs in the Judgement)

1. [73] On **29th July 2003** the Senior Partner of FDC Law **misled** District Judge Mark Rutherford (Bath County Court) over costs in a ***family*** case.
2. [72] FDC Law asked for an Order for Ancillary Relief Costs in the sum of **£6,187.50**. Unknown to the District Judge (or Myself), the Form H upon which they based this claim **included** their Client's **other** costs (Divorce and BA02F00456)
3. [45] We **now** know that those **other** costs totalled **£1,823.60.** Simple subtraction shows that the solicitors estimate of their AR costs on 29/07/2003 was actually only **£3,170.15**
4. [80] We **now** know that FDC Law had ***"totally ignored"*** [SIC] the ***Solicitors Costs Information and Client Care Code 1999.*** This provides a motive which suggests that including their client's **other costs** on 29/07/2003 may have been a deliberate ruse.
5. The Form H claiming these costs was prepared on **25/07/2003**, 4 days before the Final Hearing. This suggests that including their client's **other costs** was pre-meditated and deliberate.

6. FDC Law refused to provide any further costs information even when their Governing Body, the Law Society asked them to. Indeed, they attempted to enforce the (incorrect) costs Order through the courts. This is evident in paragraph 4 of the approved judgement of H H J Barclay.
7. [5] (*"principle grievance"*) When I turned up evidence which showed this overcharging I appealed "out of time", an appeal D J James accepts I "won" for the wrong reasons – and yet D J James **now** accepts that I was RIGHT all along, suggesting that H H J Barclay was also misled.
8. [78] If I had not appealed (and won), if I had simply paid Mrs. Poultney's **own costs** in addition to the AR costs, D J James found that Ms. Wayman ***"would have limited her costs to her client for all work done to the figure recovered"*** [SIC]. **£6,187.50** for everything – a figure FDC Law raised to **£8,011.11,** in June 2004, in order to further mislead H H J Barclay.
9. [88] D J James says ***"Mr Poultney embarked on this adventure nearly five years ago. That it has come so far and cost so much is tragic, but Mr. Poultney, I'm afraid has only himself to blame."***

So… Rhetoric…

I am to blame because FDC Law failed in their **professional duty** to follow the FPR, the CPR, the Law Society Rules and the Client Care Code in 2003? This despite the fact that NONE of this COULD have happened if ANY of these Rules had been followed?

On 29/07/2003 I obtained a substantive order **£9,000** better than the (belated) "offer" tendered by the "professionally led" Party. **Yet, I am to blame** because FDC Law broke ALL the Rules and took advantage of a LIP who did not know them, who was not expecting a claim for costs and had no Notice or idea of the sums?

I am to blame because FDC Law **misled** D J Rutherford on 29/07/2003 over costs in a ***family*** case and sought to extort an additional **£1,823.60** from me**?** **I am to blame** because FDC Law failed in its **professional duty** to clearly state their clients' **Ancillary Relief** costs and (worse) filed ambiguous and misleading information? The SAME misleading information Nigel Long later used to trick D J Brookes so that I must **now** pay 150% of "costs" D J Brookes had no authority to to make an order about at all.

It is my fault that FDC Law kept the TRUTH from the Law Society and all later Courts?

According to D J James: The correct action for a wronged party in such a case is to shut up and pay everything the solicitor has (wrongly) demanded. **This MUST be WRONG.**

"Nobody should profit from his or her own wrongdoing."

Under the present Orders: A Law Firm that has behaved like this in a ***family*** case shall be rewarded with an additional **£30,000+** for their **wrongdoing**. (Legalised extortion ratified by Court Order)
Under the present Orders: A single parent that was RIGHT all along, but who seeks justice and his Human Rights through the BATH County Court, shall be **"fined" £30,000+** for daring to tell the **TRUTH**.

It is therefore to be regretted that the BATH County Court, in view of its MANY hearings in this case, refused to see this issue and in effect legalised a family solicitor's obstinate disregard of the MANY Rules, her professional **duty** and the rule of law.

ECHR, Strasbourg, 27th June 2000 - http://nkmr.org/nuutinen_v_finland.htm
The ancient formula *Nemo auditur propriam turpitudinem allegans.* ("Nobody should profit from his or her own wrongdoing.") explains even better this recurrent possibility of perversion of justice. It is, therefore, to be regretted that the European Court of Human Rights, especially in view of some of its own precedents, refused to see this issue and, in effect, legalised the obstinate parent's disregard for the rule of law.

Authorities sited: See Also: http://www.lcs-test.co.uk/highcourt.htm
NUUTINEN v. FINLAND – ECHR (Application no. 32842/96) - recurrent perversion of justice.
Myers -v- Elman [1940] AC 282; [1939] 4 All ER 484 - Courts DUTY and powers, solicitors costs.

"The jurisdiction is not merely punitive, but compensatory" Lord Wright

"From time immemorial judges have exercised over solicitors … a disciplinary jurisdiction in cases of misconduct..." Lord Atkin

Solicitors are Officers of the Court: I argue FIRST and FOREMOST that Her Majesty the Queen would not want Her People to be cheated by Her Officers of the Court.