



CFA Update 2009: “Yet another round in the costs wars”

Hailsham Chambers Annual Costs Group Seminar

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Wednesday 17th and Wednesday 24th June 2009

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(1) Compliance with Regulations

Three cases on compliance with Regulations; the most important is the latest (and last?) of the big CFA cases: Tankard v John Fredericks [2008] EWCA Civ 1375.

Part at least of the reason for the length of the costs wars has been the difficulty the Court of Appeal has found in striking the balance between two proper purposes: on the one hand the Court has wanted to protect the consumer, even where this has involved imposing draconian standards and on the other hand the court has not wanted to damage access to justice by striking down the schemes which have replaced legal aid. A particular problem for the judiciary has been that where cases are decided so as to protect the client, this may trigger another wave of challenges from the liability insurers. The last year has seen another swing back between the two positions, from the hard line we saw in Garrett to a more permissive and solicitor friendly approach in Tankard v John Fredericks [2008] EWCA Civ 1375

The rigorous approach in Garrett triggered a series of challenges to other referral schemes. The most important scheme to come under attack was the Accident Line Protect scheme. That scheme

¹ Sir Anthony Clarke at paragraph 2 in Tankard *It is yet another round in what have become known as the costs wars between claimants’ lawyers and defendants’ liability insurers arising out of the introduction of CFAs in the 1990s.*

was both vital to the solicitors' profession and vulnerable. It was vital because the scheme was approved by the Law Society and had been widely used by solicitors up and down the land. It was vulnerable after Garrett because the scheme (a) required members to recommend the ALP policy in all suitable cases (b) provided in the standard form CFA that the solicitors had no interest in the policy and (c) provided for claims to be referred to members.

Many observers expected the Court of Appeal to find that these arrangements amounted to a breach of the Regulations, but to conclude, in the light of the lack of importance of the referral element, that the breach was not material. In the event the decision was rather different. The Court decided that the solicitors had not had a declarable interest and therefore that none of the solicitors involved in the cases before the Court had been in breach of the Regulations. The Court decided that the test of an interest which needed to be declared for the purposes of regulation 4(2)(e)(ii) of the Conditional Fee Agreements Regulations 2000 was as follows:

A solicitor has an interest if a reasonable person with knowledge of the relevant facts would think that the existence of the interest might affect the advice given by the solicitor to the client.

Crucially the Court did not consider that the exclusivity requirement, obliging the solicitor to recommend the ALP policy to all clients, was something that was likely to affect the solicitor's advice: far from being objectionable this provision was necessary to prevent cherry-picking and allow the proper working of the ATE market. Nor were the flow of referrals in any of these cases sufficiently substantial to affect the solicitors' advice; the position of ALP was quite clearly distinguished from that of a claims farmer.

The same indulgence will not necessarily be extended to other schemes: this is apparent from the decision of the Senior Costs Judge in Findley v Motor insurers Bureau [2009] EWHC 90130 (Costs). That was an Accident Group case where it was held that a reasonable person would consider the obligation to use the TAG policy and documentation and membership of the TAG panel were facts that a reasonable person would consider as affecting the solicitor's advice. The obligation to disclose therefore applied. See too Ibbertson v MFI & Ors [2009] EWHC 90132 (Costs) concerning a referral scheme called Freeclaim IDC.

These declaration of interest cases do, however, turn on their facts: a challenge failed in Overton v Horder [2008] EWHC 90109 (Costs) where there was evidence that the solicitor acted under a referral scheme but no evidence that the scheme required the solicitor to recommend any particular policy of insurance.

Bray Walker v Silvera [2008] EWHC 3147 (QB)

This CFA case was unusual because the party challenging the fees was not an opponent but a disgruntled client. The client's problem was that he was a serial suer of his solicitors and other legal representatives and that in these as in other previous proceedings he made a series of wide allegations against his former lawyers.

Amongst the thickets of fact based allegations there lurked two interesting points. The first was that the CFA contained nothing but pro forma reasons for setting the success fee: the section for entering

the particular risks of the case had been left blank. The issue was whether this amounted to a breach of regulation 3(1)(a). The judge, Blake J, held that the pro forma reasons amounted to a literal compliance with the regulation and that therefore there was no breach.

The second was that the claim had comprised two subclaims, a small claim with good prospects of success and a large claim with poor prospects. Success was defined as recovery of any damages. It was contended that as part of the obligation under regulation 4(2)(a) to explain the circumstances in which the client may be liable to pay costs this should have been explained. The judge accepted the evidence of the solicitor that he had taken the client right through the CFA, including the definition of success, and that this amounted to compliance.

Forde v Birmingham [2009] EWHC 12 QB

This was another skirmish in hard fought costs litigation about CFAs for disrepair cases. Three interesting points emerge from a lengthy judgment:

- a) the court reaffirmed (following Jones v Wrexham [2007] EWCA Civ 1356) that the terms of the retainer may be found in part in documents other than the CFA itself, in this case a letter to the client;
- b) a retrospective CFA providing for a retrospective success fee is not impermissible per se, even though it may be difficult to establish that the success fee is properly recoverable from the opponent;
- c) the rule that costs may not be recovered under a quantum meruit in the event that a CFA is found to be unenforceable remains good law.

(2) The level of success fees

There appears to be a general perception in the higher courts that the success fees generally allowed are overall too high (this is of course reflected, too, in certain of the submission to the Jackson enquiry). An example of a sceptical attitude to the level of success fees is provided by Strachey v Ramage [2008] EWCA Civ 804 where the Court of Appeal, whilst dealing with an application for costs of the appeal commented on the level of costs and criticised the success fee that had been claimed at 100%. This was said to be excessive notwithstanding that success on the appeal had required overturning the decision below.

There have been a number of decisions that cast light on two specific issues as to the level of success fees.

(i) C v W: How should a quantum only risk be assessed?

The Court of Appeal has for the first time considered the knotty problem of determining the appropriate level of success fees in cases where liability is not in issue. The problem with assessing such fees is that although it can confidently be predicted that a Part 36 offer will be made it cannot be known when or at what level. How is the level of risk to be assessed?

In C v W [2008] EWCA Civ 1459 the Court of Appeal grappled with this question and found it difficult to identify a wholly principled approach to the valuation of a risk where the extent of the Part 36 risk is unknown at the time of the valuation. They nonetheless concluded that the success fee of 50%

allowed by the circuit judge in the case was excessive. The judges accepted the difficulty of making any accurate assessment of the risks but reduced the success fee to 20% on the basis that a success fee at that level would be appropriate to reflect the risk of failing to beat an uncertain Part 36 offer. The Court of Appeal held specifically that the risk of a client not proceeding with a claim was not a risk that could properly be taken into account in assessing the proper level of a success fee.

(ii) CFA entered into before any significant investigation into the merits

Another difficult question that arises on assessment is the approach that the courts should take where a solicitor chooses to enter into a CFA at the earliest point, and therefore at a time when the merits of the claim are not known. Certain clinical negligence solicitors appear to have a practice of signing up their clients to agreements before obtaining medical records or any expert evidence and therefore seeking a 100% uplift.

Paying parties have characterised this approach as seeking a “premium on ignorance”, whilst receiving parties have argued that the client needs insurance to fund disbursements and that it is therefore reasonable to sign them up to a CFA at the earliest stage. This issue came before a High Court judge in the case of Oliver v Whipps Cross [2009] EWHC 1104; Jack J held that the solicitor had been entitled to enter into the CFA at the earliest stage, and that on the facts the case was one with real difficulties that justified a 100% success fee. A further case, McCarthy v Essex Rivers Healthcare is going to appeal in the near future.

(3) A new headache for solicitors: the Cancellation of Contracts

Regulations 2008

The Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008 came into force on 1 October 2008. It applies to almost all contracts with consumers (the exceptions do not include contracts for legal services) made at the consumer's home or place of work.

Regulation 7 provides that the trader must give the consumer written notice of his right to cancel the contract at the time of the formation of the contract. In the event of failure the contract is unenforceable and the trader is guilty of a criminal offence.

This Regulation would appear to apply to any CFA made at the client's home or place of work; this often happens, particularly where a Claimant is significantly injured. Any such agreement made after 1 October 2008 where the requisite notice has not been given will be unenforceable.

(4) Capacity and CFAs

Senior Costs Hurst grappled with this difficult topic in Findley v Motor insurers Bureau [2009] EWHC 90130 (Costs). The client had entered into two CFAs and then lost capacity by reason of mental illness. It was argued on behalf of the solicitors that a contract for legal services was a contract for necessities and therefore survived the loss of capacity. The Judge held, however, that when a client lost the capacity to contract and the solicitor was aware of this fact the contract was automatically frustrated and therefore came to an end.

What should happen in this situation? A litigation friend may formally enter into a new CFA. But if this does not happen, and instead the claim proceeds as before but with the client represented by the litigation friend, what is the effect? How far is it possible for the litigation friend, by their conduct, to adopt the frustrated CFA? It is generally easy to imply an acceptance of an implied retainer, and on the fact the Senior Costs Judge accepted that the litigation friend had retained the solicitors on the terms of the CFA. Since all this occurred before November 2005, however, this implied retainer was a CFA to which the Regulations applied. Therefore the Regulations had not been complied with. The Costs Judge held, however that the departures from the requirements of the Regulations were not material and that therefore the retainer was enforceable.

(5) Liability of client under unlawful CFA

Where an agreement is held to be an unenforceable CFA, the issue may arise of whether any payments made under the agreement are recoverable by the client. The case of Aratra Potato v Taylor Johnson Garrett [1995] 4 All ER 695 established that in such circumstances unpaid costs are not payable but paid costs are not recoverable. How far does that rule apply to paid disbursements?

In the case of Tandara v Weightmans [2008] EWHC 90101 (Costs) the solicitors had inadvertently entered into an unenforceable CFA. They decided that they would not seek to rely on the rule in Aratra to try and retain the profit costs paid, but did argue that paid disbursements should not be repayable. Costs Judge O'Hare agreed. He did not accept that Aratra barred recovery but accepted that the dicta in Hollins v Russell [2003] EWCA Civ 718 about the recoverability of disbursements

inter partes in these circumstances must apply between solicitor and client. The client was therefore unable to recover the moneys paid in respect of disbursements.

(6) The overlap between CFAs and costs caps

It has generally been assumed that since additional liabilities are not be determined until the end of proceedings and the level of success fee is not required to be disclosed, costs caps must limit base costs alone and that success fees should be excluded. This assumption is called into question in the case of R (Buglife) v Thurrock [2008] EWCA Civ 1209; there the Court of Appeal imposed a cap of £10,000 including success fee on the costs recoverable by the applicant in the event of success and rejected the argument that this would be unfair on an impecunious body that could only afford to instruct lawyers under a CFA.

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