

Costs Law Update – Various Claimants v Gower Chemicals Ltd & Others

A recent decision, *Various Claimants v Gower Chemicals Ltd & Others* ([Cardiff County Court, 28/2/07](#)), has done much to nullify the effect of the old Collective Conditional Fee Agreement Regulations 2000. This was an appeal heard by Mr Justice Field (sitting as a County Court Judge) from a decision of Master Wright of the Supreme Court Costs Office.

The decision concerned the operation of Regulation 5 of the Regulations which states:

“(1) Where a collective conditional fee agreement provides for a success fee the agreement must provide that, when accepting instructions in relation to any specific proceedings, the legal representative must prepare and retain a written statement containing –

- (a) his assessment of the probability of the circumstances arising in which the percentage increase will become payable in relation to those proceedings (“the risk assessment”);
- (b) his assessment of the amount of the percentage increase in relation to those proceedings, having regard to the risk assessment; and
- (c) the reasons, by reference to the risk assessment, for setting the percentage increase at that level.”

The CCFA being considered echoed the wording of the Regulations in the following terms:

“5.2 When accepting instructions in relation to any specific proceedings Thompsons must prepare and retain a written statement containing:

- 5.2.1 their assessment of the probability of the circumstances arising in which the success fee will become payable in relation to those proceedings (“the risk assessment”);
- 5.2.2 their assessment of the amount of the success fee in relation to those proceedings, having regard to the risk assessment; and
- 5.2.3 the reasons, by reference to the risk assessment, for setting the success fee at that level.”

The Defendants alleged that the Claimants' solicitors, Thompsons, had breached the Regulations by failing to prepare a three-stage risk assessment in respect of each Claimant in the form envisaged by the Regulations and as required by the CCFA itself. They alleged that this was a material breach of the Regulations such as to render the retainer invalid. Alternatively that the performance of this contractual provision was a condition of the enforceability of the implemented CCFA or that the preparation and retention of a conforming risk assessment was a contractual condition precedent to formation of an individual contract of retainer.

The Claimants' case was that the Regulations simply required the CCFA itself to contain the provision required by Regulation 5(1). There was no actual requirement that individual risk assessments also had to be prepared that complied.

The Judge accepted the Claimant's arguments. In his judgment:

“the natural and ordinary meaning of the regulation is that there must be a provision in a CCFA that complies with the specification set out in the regulation. Regulation 5(1) does not additionally require that the prescribed provision must be performed... As Lord Philips remarked in *Thornley*, there is an obvious reason why the CCFA Regulations are less exacting than the CFA Regulations. In contrast to the latter, whose object is to protect the lay client who is contemplating entering into a CFA, the former are concerned with bulk purchasers of legal services who are less vulnerable.”

In his judgement a breach of the requirement may give rise to a right to the funder to terminate the CCFA, rely on the breach as a defence to a claim by the solicitor for costs and to a right to claim damages. Further, the requirement was not a condition precedent to the formation of an individual contract of retainer but was simply an innominate term. The Judge was satisfied that his conclusions did not produce an absurd result.

The Court of Appeal, when considering whether an alleged breach of the CFA Regulations 2000¹ or the CFA Order 2000² invalidated the retainer, held that the proper test was whether the particular breach “had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice?”. It would therefore appear that when attempting to interpret the purpose of any of the individual CFA or CCFA Regulations this should be done by determining which of these two aims it is designed to cover.

The requirement in Regulation 5(1) of the CCFA Regulations does not appear to serve any obvious purpose in terms of the protection afforded to the client. The provision is surely aimed at the administration of justice in that the preparation of a proper risk assessment is crucial to assist in determining at detailed assessment whether a success fee has been set at a reasonable level at the time the instructions are accepted. The interpretation of the Regulation in *Gower* totally undermines any such protection to the administration of justice. Any contractual right that the funder may have is of no assistance to the Court attempting to assess a success fee in the absence of a proper risk assessment.

If this interpretation is correct it creates an equally surprising result in respect of Regulation 4(2) which states as follows:

"A collective conditional fee agreement must provide that, when accepting instructions in relation to any specific proceedings the legal representative must -

(a) inform the client as to the circumstances in which the client may be liable to pay the costs of the legal representative"

This Regulation closely mirrors Regulation 2(1)(b) of the CFA Regulations and is clearly aimed at the protection afforded to the client. However, the *Gower* interpretation would mean that this Regulation is complied with simply by the CCFA stating that the client will be appropriately informed. There is then no duty to actually give any information at all to the client. This outcome certainly appears to the writer to produce an absurd result. It will be interesting to see if this matter proceeds to the Court of Appeal. Unless and until that happens the CCFA Regulations 2000 are dead in the water so far as defendants are concerned.

¹ When considering CFAs in *Hollins v Russell* [[2003](#)] EWCA Civ 718.

² When considering CCFAs in *Jones v Caradon Catnic Ltd* [[2005](#)] EWCA Civ 1821.

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