Case No: 4RM 00623

IN THE ROMFORD COUNTY COURT

24 October 2005

Between

Carol Gaynor	**Claimant**
-and -	
Central West London Buses Ltd T/a First Transforming Travel	**Defendant**

JUDGEMENT

1. This appeal raises a short but important point on conditional fee agreements (CFAs).

2. The facts of the case are wholly unremarkable. The claimant issued proceedings in February 2004 for damages arising out of a road traffic accident which occurred in November 2002. Liability was admitted and the parties reached a settlement on the issue of quantum which was incorporated in a consent order lodged with the court in April 2004. The order provided that the Defendants would pay the claimant her costs on a standard basis to be subject to detailed assessment if not agreed.

3. Costs were not agreed and the claimant's solicitors lodged their bill for assessment in the Supreme Courts Costs Office. The matter came before Costs Judge Seager Berry on 20th December 2005. A number of preliminary points were taken by the defendant's counsel Mr Gibbs. Only one now concerns me.

4. It in common ground between the parties that the terms of the retainer agreement between the claimant and her solicitors are evidenced by a letter written to her by her solicitors Messers Sherringtons and dated 20th November 2002.

5. The defendant as paying party took the point that it is not liable to pay the claimant any costs for work done by her solicitors on the grounds that the agreement between the claimant and her solicitors is on its true construction a CFA which does not comply with the relevant regulations. Consequently by the operation of the indemnity principle since the claimant would not be liable to pay any costs to her solicitors she cannot in turn could not recover any costs from the defendant.

6. Costs Judge Seager Berry gave a short judgement on 8th February in which he dealt with this point as follows:

> "1. I am not persuaded that this retainer letter was intended to be a conditional fee agreement. It does contain a paragraph in darker type which reads:
>
> > "If your claim is disputed by your opponent and you decide not to pursue your claim then we will not make a charge for the work we have done to date."
>
> 2. I do not consider that this falls within the criteria for a CFA. The earlier paragraph in the letter quite clearly refers to discussing alternative methods of funding the case and mentions legal expense insurance. If the letter were a CFA, which I hold it is not, the various points made by Mr Gibbs would in my judgement take it outside the saving paragraphs in *Hollins v. Russell* [2003] EWCA Civ 178, and in that event the agreement would be invalid and unenforceable. Mr Gibbs has not cleared the hurdle and is therefore not able to benefit from that observation.
>
> 3. If required I can give more detailed reasons if that would be helpful."

7. The defendant's solicitors duly requested more detailed reasons which were delivered in a further judgment handed down on 8th April 2005. This runs to 28 paragraphs. The learned costs judge refers to a number of features of the letter which clearly support the proposition that there was at that stage no intention on the part of either the claimant or her solicitors to enter into a CFA. The crucial passage in the judgement is at paragraph 28 as follows:

> "28. I prefer the submissions of Mr Hopton that there never was an intention by the claimant to enter into a CFA with her solicitors. That submission is wholly consistent with the terms of the retainer letter. I therefore hold that the retainer letter did not amount to a CFA."

8. This finding of fact is challenged by the defendant in the notice of appeal. Mr Gibbs, who appeared before me for the Defendant, sought to challenge the finding of fact by the learned Costs Judge that the parties never intended to enter into a CFA. In my judgement although no evidence was given on the point there was ample evidence to justify this finding from the wording of the retainer letter and on this ground of appeal I uphold the decision of the learned Costs Judge . Mr Gibbs' main point and the true thrust of his case is that the judge has fallen into an error of law by asking himself the wrong question.

9. What he should have done is to determine first whether the claimant and her solicitors had entered into an agreement which gave rise to an obligation by the claimant to pay her solicitors costs. Having decided that there was such an agreement he should then have gone on to ask whether as a matter of law the agreement was a CFA as defined by section 58(2) of the Courts and Legal Services Act 1990 as substituted by section 27 of the Access to Justice Act 1999. If so it must follow that it was an unenforceable agreement.

10. Mr Hopton who appeared for the claimant submits that the judge had adopted the correct approach by deciding simply whether the parties intended to enter into a CFA and, if they did not, then the retainer letter cannot be a CFA.

11. Mr Hopton conceded that if I were against him on this point he could not argue that the agreement might be saved by applying the *Hollins v. Russell* test. He therefore did not seek to challenge the judgement of the learned Costs Judge at paragraph 2 of his judgement on this point that if the agreement were a CFA it would be unenforceable.

12. As the learned Costs Judge has pointed out there appears to be no direct judicial authority on this point. Mr Gibbs has referred me to three publications which lend some support his argument.

13. The first is a Law Society publication 'Payment by Results' dated February 2004 and issued by the Practice Advice Service. This deals at section 1.3 with what are commonly called Thai Trading agreements following the Court of Appeal judgement in *Thai Trading (A Firm) v Taylor* [1998] 3 All ER 608. This section states unequivocally

> "Thai Trading agreements , whether acing speculatively without a success fee or at a discounted rate in a losing case, are now enforceable CFAs and are permissible. The CFA Regulations apply equally to these arrangements."

14. The second is an extract from Cook on Costs. The author His Honour Michael Cook, is certainly widely recognised both by the judiciary and the legal profession as the leading expert on costs and his opinions are therefore deserving of considerable respect. At page 521 appears an equally unequivocal statement

> All CFAs allow a lawyer to act for a client on the basis that he will not charge his client or not charge as much, if an agreed result is not achieved. Any fee agreement

whereby the solicitor is to be paid different sums in different circumstances will amount to a conditional fee agreement under section 58 of the Courts and Legal Services Act 1990 as substituted by s 27 of the Access to Justice Act 1999. There are at least four varieties of fee arrangements which are within this statutory provision. *It must be emphasised that in each of these, the full statutory regime must be followed because each is a CFA.*" (my emphasis)

15. The final authority is Butterworths Costs Service which is edited by a a distinguished team of Editors. Section E at paragraphs [161-170] states under the Heading Contingency Fees "The only fee arrangements, having the effect that the client does not pay the same fee in all circumstances, which are lawful, are agreements which comply with the statutory scheme and are termed conditional fee agreements."

16. The material parts of section 58 of the Courts and Legal Services Act 1990 as amended by the AJA 1999 read as follows:

> "(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; ..... but any other conditional fee agreement shall be unenforceable.
> (2) (a) A conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances;"

17. Mr Gibbs' submission for the Defendant is that there are now effectively only two kinds of fee agreements.

a. If the agreement provides for the fees, or any part of them, to be payable only in specified circumstances then it is a CFA.

b. If the agreement provides for the fees, or any part of them, to be payable regardless of the circumstances then it is not a CFA.

18. I do not accept the second of these propositions. In my judgement it is clear from section 58(2)(a) that if <u>any part of</u> the fees and expenses are payable only in specified circumstances the agreement must be a CFA. A solicitor cannot avoid the CFA regime by agreeing that a particular disbursement will be payable regardless of circumstances, and agreeing that the rest of his fees and disbursements will only be payable in specified circumstances.

19. It follows that the only fee agreement which is not a CFA is one where the whole of the fees and expenses are payable regardless of circumstances.

20. However I do accept Mr Gibbs' basic proposition that as a result of section 58(2)(a) there are now only two kinds of fee agreements, those which fall outside the terms of section 58(2)(a) and those which fall within the terms of that section. As Mr Gibbs points out there is simply no requirement either in the Act or in the CFA Regulations 2000 that the parties must intend to enter into a CFA in order to create one.

21. Mr Hopton's argument is effectively that there are three types of agreement, non CFAs, CFAs and agreements which although they appear to fall within the provisions of section 58(2)(a) fall outside the CFA regime by reason of the lack of any intention to enter into a CFA. In my judgement such a proposition amounts to a new kind of common law agreement. Although the judgement of the Court of Appeal in Thai Trading had opened the door to such developments this door is now firmly closed. The current position is set out by Brooke LJ in the judgment of the Court of Appeal in *Hollins v Russell* at para 14 of the judgement.

> "14. ..... In *Awwad v Geraghty* [2001] QB 570 it [sc the Court of Appeal] refused to follow *Thai Trading* and made it clear that there would no longer be any common law

developments in this field. Now that Parliament had modified the law which had prohibited all arrangements for receiving a contingency fee in relation to litigation services, there was no room for the court to go beyond that which Parliament had now permitted (per May LJ with whom Lord Bingham of Cornhill CJ agreed, at p 600 D-E."

22. There is no dispute that the terms of the retainer letter in this case do provide for the fees of the solicitor to be payable only in certain circumstances. It must follow that it is a CFA as defined by section 58(2)(a) and in my judgement the learned Costs Judge erred in law in holding that an intention to enter into a CFA was a necessary element of the agreement.

23. For these reasons the appeal must be allowed. Judgement will be pronounced at 9.30 a.m on 10th November 2005. My provisional view is that the Defendant's having succeeded on the appeal are entitled to their costs of the appeal on a standard basis. I will hear any argument on costs and proceed to a summary assessment immediately after judgment has been pronounced. If the claimant does not wish to argue the costs issue **and** the parties have agreed the amount of the costs before the hearing they may send in a consent order and neither party need attend for pronouncement of judgement.

His Honour Judge Platt.