An end to all this nonsense?

Of the various accomplishments of the Court of Appeal, its ability to send our mixed messages must rate as one of its greatest. It is now over three years since the Court's landmark decision in *Hollins v Russell* [2003] EWCA Civ 718 which was meant to bring an end to the technical challenges relating to CFAs brought by naughty defendant insurers. During the hearing relating to the costs of that test case, Lord Justice Brooke gave warning to defendants "to stop all this nonsense" and that if they did not "we may have to get people up here and warn them off". Unfortunately, or fortunately depending on your point of view, this decision was not quite an end to the costs war.

Barely had the ink dried on that judgment than the Court was asked to rule on a challenge brought in the case of *Spencer v Wood* [2004] EWCA Civ 352. This challenge was based upon the fact that the CFA was inherently confusing as to what part of the success fee related to postponement, and was thus recoverable from the client. Lord Justice Brooke, giving the judgment of the Court, was, despite his previous comments, prepared to find that this was a material breach of the CFA Regulations as it had an adverse effects upon the protection afforded to the claimant. The CFA was thus held to be invalid and unenforceable.

Since that date the lower courts have been increasingly willing, in appropriate cases, to accept technical challenges to CFAs and find agreements invalid. The most productive area as been that relating to failure to properly consider funding alternatives before CFAs are entered into (breaches of *Regulation 4(2)(c)*). Notable examples have included the Senior Costs Judge's decisions in *Samonini v London General Transport Services Ltd* [SCCO, 19/1/05] and *Richards v Davis* [SCCO, 25/11/05].

However, the Court of Appeal's current willingness to entertain such challenges also remains undiminished. In *Jones v Caradon Catnic Ltd* [2005] EWCA Civ 1821 they were faced with a CCFA where the risk assessment set the success fee at 120%, despite the regulations making it clear that the maximum success fee recoverable is 100%. It was recognised that there was no adverse effect to the protection afforded to the claimant as the claimant was never going to be liable for the success fee. Although the two lower courts were satisfied that there had been no material breach, the Court of Appeal held that there had been a materially adverse effect upon the administration of justice as the maximum success fee allowable was central to the regime. This was so even if, as was recognised, it could be shown that no-one was the loser as a result of the breach. The CCFA was therefore invalid. This decision appeared to represent a watering-down of the Court's earlier guidance in *Hollins* concerning what amounted to a material breach.

The Court's virtually complete backtracking of its previous attitude towards technical challenges has come with two recent decisions heard at the same time - *Garrett v Halton Borough Council* and *Myatt v National Coal Board* [2006] EWCA Civ 1017. These two cases centred on a review of the *Hollins* judgment and whether the test of "materiality", developed in that case, requires a court to consider whether the client has suffered actual prejudice as a result of an alleged failure to satisfy the rules. A related question was whether the enforceability of a CFA was to be judged by reference to the circumstances existing at the time when it is entered into, or by reference to the circumstances known to exist at the time when the question arises for decision.

The Court concluded that the "focus on the adverse effect was on the *protection* afforded to the client, not whether, as a matter of fact, the client had actually suffered any prejudice". The scheme was "designed to protect clients and to encourage solicitors to comply with detailed statutory requirements which are clearly intended to achieve that purpose". The "focus of the scheme was on whether the CFA satisfied the applicable conditions, not on the actual consequences of a breach of one of the requirements of the scheme". Therefore, whether a client has actually suffered prejudice is irrelevant as to whether there has been a material breach of the rules. The time for determining whether there has been a breach is at the date of the CFA and not some later point.

In the *Myatt* case the Court concluded that because the Claimants' solicitors had failed to properly explore whether alternative funding existed this was a material breach even though it was later shown that none of the Claimants actually did have such funding available. The Court then gave some general guidance as to the appropriate steps a solicitor should have taken to comply with the regulations but had to recognise that the guidance they were giving did not provide certainty or minimise the risk of the very satellite litigation they had previously sought to avoid.

In the *Garrett* case the Court held that simply stating that a firm was on a claim management company's (CMC's) panel, when recommending their insurance, was insufficient to comply with the duty to inform the client whether the solicitor had an interest in so doing. This was because the solicitor actually had a clear financial interest as a failure to recommend the policy would have resulted in them ceasing to receive referrals from the CMC. This decision is likely to lead to sleepless nights for a number of claimant solicitors because the wording in that case was typical of what appears in many other CFAs involving CMCs.

Therefore, three years after the *Hollins* judgment and the stinging criticism of technical challenges brought by defendants, the Court of Appeal appears to be more than willing to strike down defective CFAs on a wide number of grounds. Although defendants may be more selective with the challenges they bring, the continued justification for their stance is the substantial savings they have been able to achieve.

The one comfort to claimant solicitors is the Court's refusal to allow defendants to have sight of claimant solicitors' attendance notes, in relation to *Regulations 4(2)(c)* issues, unless they can already show that there are grounds to suspect that there may have been a breach. Perversely, the Court is therefore recognising the legitimacy of such challenges but refusing defendants the right to see the relevant evidence to enable them to mount attacks in the first place.

Despite this one consolation, many claimant solicitors will be grateful when their outstanding caseload only contains post-November 2005 cases where the old CFA Regulations no longer apply.

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