IN THE HIGH COURT OF JUSTICE
(SUPREME COURT COSTS OFFICE)

HQ07X02947.

Supreme Court Costs Office,
Clifford's Inn,
Fetter Lane,
London EC4A 1DQ.

Monday, 13th July 2009.

Before:

MASTER GORDON-SAKER

B R I A N P R I E S T — Claimant

- v -

C M T E N G I N E E R I N G I N S U L A T I O N L T D — Defendants

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MR V. SACHDEVA *(instructed by Corries Solicitors Ltd)* appeared on behalf of the Claimant.

MR S. GIBBS *(instructed by Plexus Law)* appeared on behalf of the Defendants.

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JUDGMENT
*(Approved)*

Monday, 13th July 2009.

JUDGMENT:

MASTER GORDON-SAKER:

01 The issue which arises on this appeal by the Defendant is whether the Conditional Fee Agreements entered into by the Claimant's counsel, Miss Elizabeth O'Hare and Mr Stephen Snowdon, are invalid.

02 The background to this matter briefly is that the Claimant developed asbestosis over the course of his employment with the Defendants. In November 2005 or thereabouts he instructed solicitors to act on his behalf, and they agreed to act for him under a Conditional Fee Agreement which is dated 21st November 2005. That agreement provided under the heading *'Paying Us'*:

> *'If your claim for compensation is finally decided in your favour, whether by court decision or an agreement to pay you compensation, you pay our basic charges, our disbursements, and a success fee.'*

The agreement also provided that:

> *'The Law Society conditions below are part of this agreement.'*

Quite what that refers to is not clear. There are only two provisions in the agreement which followed the apparent incorporation of the conditions, and they deal with the solicitor's responsibilities, and the success fee, and what is provided under the heading *'The Success Fee'* is:

> *'In exchange for us taking the risk of not being paid for any of our work if you are unsuccessful, we are entitled to a success fee if you win, i.e. on your behalf if we obtain an agreement from your opponent to pay or a court awards compensation in your favour.'*

03 The following month a Conditional Fee Agreement was entered into between the solicitors and Mr Simon Thorpe of counsel, and that agreement appears to be in the then current APIL PIBA model form. Counsel was defined as meaning:

> *'Mr Simon Thorpe and any other counsel either from Chambers or recommended by counsel in accordance with Clause 25 who signs this agreement at any time at the solicitors' request.'*

Clause 25 covers counsel's responsibility to find a replacement in the event that he is unavailable. The agreement, which is dated 16th December 2005, was not in fact signed by counsel but signed by his Clerk with his authority.

04 Proceedings were issued on 24th August 2007 and a default judgment was entered on 12th November that year. It is not immediately clear whether the judgment was in default of

Defence or Acknowledgement of Service, and I have not seen a copy of the judgment; but Mr Gibbs, who represents the Defendant, recalls seeing it and he has recited the terms in para. 4 of his skeleton argument:

> *'It is ordered that the Defendants must pay the Claimant an amount which the court will decide and costs.'*

Following that default judgment, work was done by Miss O'Hare, who is in the same Chambers as Mr Thorpe, in July 2008, and work was done by Mr Snowdon, who is in different Chambers, in October 2008.

05 The claim was settled on the basis that the Defendants would pay the Claimant £70,000 by way of provisional damages and costs. That was provided by a consent order made on 23rd October 2008. The agreed Statement of Facts dated 21st October 2008 records that the Claimant had developed asbestosis and diffuse pleural thickening, and the provisional damages were agreed on the assumptions that the Claimant would not at a future date develop mesothelioma or asbestos-induced lung cancer. The consent order also provided that the Defendants would pay the Claimant's costs of the action to be assessed in default of agreement.

06 The Defendants' contention is that at the time that Miss O'Hare came on board and at the time of Mr Snowdon's Conditional Fee Agreement, a copy of which has not been produced to the court or disclosed, the claim had been won, and accordingly such arrangements as there were between counsel and the Claimant's solicitors were not Conditional Fee Agreements. Section 58(2) Courts and Legal Services Act 1990 provides that:

> *'For the purposes of this Section, and Section 58(A): (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, and (b) a Conditional Fee Agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased in specified circumstances above the amount which would be payable if it were not payable only in specified circumstances.'*

07 Mr Gibbs points to the standard APIL PIBA CFA wording, which defines 'success' as the same as 'win' in the Conditional Fee Agreement between the solicitor and the client and he then points to the Law Society model agreement which in his skeleton argument he assumes was used in this case in the CFA between the solicitors and the Claimant:

> *'Your claim for damages is finally decided in your favour whether by a court decision or an agreement to pay you damages or in any way that you derive benefit from pursuing the claim.'*

That formulation is, as I understand it, the current wording of the Law Society model terms. What we do not know in this case is whether that wording was actually incorporated into the solicitors' Conditional Fee Agreement. The difference between the current wording and the previous wording would appear to be the addition of the words *'or in any way that you derive benefit from pursuing the claim.'* As Mr Gibbs' arguments

in relation to that have not been foreshadowed in the skeleton argument, it seemed to me that the Claimant's solicitors should have an opportunity, if he were to pursue an argument based on those words, of putting in evidence as to precisely what terms, if any, were incorporated from the Law Society conditions, and on that basis he elected not to pursue his argument on those grounds.

08 I proceed therefore on the footing that the definition of 'win' – if there *was* a definition of 'win' in this Conditional Fee Agreement – is something along the lines of *'your claim for damages is finally decided in your favour whether by a court decision or an agreement to pay you damages'* and I derive support for that approach from the term of the Conditional Fee Agreement which I read out earlier under the heading *'Paying Us'*:

> *'If your claim for compensation is finally decided in your favour, whether by a court's decision or an agreement to pay you compensation, you pay our basic charges, our disbursements and a success fee.'*

I think it likely that that is the only definition of 'win' in this agreement for it would be rather odd if there were a different definition in any incorporated terms. The question therefore is whether the default judgment obtained in November 2007 was a final decision in the Claimant's favour to pay him compensation.

09 It is difficult, in my judgment, to view a default judgment – whether a judgment in default of Acknowledgement of Service or a judgment in default of Defence – as a final decision. Some limited assistance may be obtained from the Practice Direction to Part 52 Civil Procedure Rules 1998 which at para. 2A.3 provides:

> *'A decision of a court is to be treated as a final decision for routes of appeal purposes where it (i) is made at the conclusion of part of a hearing or trial which has been split into parts and (ii) would if it had been made at the conclusion of that hearing or trial have been a final decision. Accordingly, a judgment on liability at the end of a split trial is a final decision for this purpose and the judgment at the conclusion of the assessment of damages following a judgment on liability is also a final decision for this purpose.'*

10 The preceding paragraph, para. 2A.2 provides:

> *'A final decision is a decision of a court that would finally determine the entire proceedings whichever way the court decided the issues before it. Decisions made on an application to strike out or for summary judgment are not final decisions for the purpose of determining the appropriate route of appeal.'*

It then goes on to provide accordingly that summary judgments, case management decisions, and striking out, are not final decisions for that purpose.

11 There is no reference, as far as I am aware, in the Practice Direction to default judgments. I suspect the reason for that is a default judgment would rarely, if ever, be the subject of an appeal. A default judgment is an administrative act; if it has been obtained inappropriately, the remedy is to apply to set it aside rather than to appeal it. It seems to

me that a default judgment is not obviously an event which could be described as 'finally deciding' the proceedings in the Claimant's favour.

12 Further, in my judgment, a default judgment for damages to be assessed or a judgment for an amount which the court will decide subsequently, is not a court decision to pay the Claimant compensation. It may be when it comes to the assessment of damages that the Claimant will not be able to satisfy the court that he has suffered an injury. It may be that the damages would be assessed at nil, so that no compensation would be payable. It seems to me that the Claimant's solicitors under the terms of their Conditional Fee Agreement would only be entitled to payment following an order or an agreement that the Defendants will pay an amount which has been defined in that order or agreement. Accordingly, it seems to me that at the time of the work done by these two counsel and at the time of their respective Conditional Fee Agreements the claim had not been finally decided in the Claimant's favour by a court decision or an agreement to pay compensation, and accordingly their Conditional Fee Agreements are not invalid by reason of there having been a success or 'win' before the agreements were entered into.

13 It follows therefore that it is not necessary for me to consider whether Miss O'Hare entered into a separate Conditional Fee Agreement to that entered into by Mr Thorpe or whether she was a party to the Conditional Fee Agreement entered into by Mr Thorpe in December 2005.

14 The Defendants' appeal is therefore dismissed.

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