Costs law brief

The costs team at **Kings Chambers** in Manchester and Leeds examines the arguments for and against costs draftsmen charging success fees and considers the consequences of a refusal to negotiate

Success fees for draftsmen

KU v Liverpool City Council

- [2005] EWCA Civ 475, [2005] All ER (D) 381 (Apr)

It seems to have taken some time for the argument to gain momentum, but following *KU v Liverpool City Council* increasing numbers of costs draftsmen are arguing they should be awarded a success fee. This is despite the fact that it is rare for costs draftsmen to enter into conditional fee agreements (CFAs) with their instructing solicitors.

The argument for costs draftsmen being awarded success fees is as follows:

- It is clear from *KU* that as a matter of principle a success fee is recoverable on the costs of a detailed assessment.
- A costs draftsman is a lawyer-agent of his instructing solicitor (who is the solicitor-principal), and it is established law that the fees of the lawyer-agent are treated by convention as being fees of the solicitor-principal as if he carried out the work himself (see *Scrace v Whittington* (1823) 2 B & C 11; *Re Ward* (1896) 31 Beay 1 and *In re Pomeroy & Tanner* [1897] 1 Ch 284 at 287d to 288c).
- This law survives the CPR (see Costs Practice Direction Art 4.16(6).
- There is nothing in the Conditional Fee Agreements Regulations 2000, SI 2000/692 (or similar legislation) that prevents lawyers acting under a CFA instructing an agent; indeed, the fact that the legislation specifically refers to "additional legal representatives" suggests otherwise.
- In view of the above, the work done by a costs draftsman can be charged out as if it had been carried out by his instructing solicitor.

Sharratt v London Central Bus Company Ltd

- [2005] EWHC 3018 (QB), [2005] All ER (D) 344 (Dec)

The recent judgment of Ramsey J in *Sharratt v London Central Bus Company Ltd* has confirmed that the older authorities referred to above remain good law, and that those authorities establish that the fees of the solicitor-agent are treated by convention as being fees of the solicitor-principal as if he carried out the work himself. (*Sharratt* dealt with the The Accident Group (TAG) litigation but it did not deal with the TAG scheme itself; only with the costs of litigation.)

An analysis similar to the one set out above seems to have been accepted by HHJ **[AUTH: QUERY HHJ?]** Mars-Jones in *Cannon v Mid Essex Hospitals Services NHS Trust* (unreported, 23 March 2005). In *Cannon* the court was referred to two other cases in which the costs of a person instructed as a solicitor's agent were regarded as being profit costs rather than disbursements: *Smith Graham* v *Lord Chancellor* [1999] 2 Costs LR 1 and *Stringer v Copley* HHJ Cook, unreported, 17 May 2002, Kingston-upon-Thames County Court).

Perhaps because it has not been widely reported, *Cannon* seems not to be the last word on the matter. Indeed, there are those who say that *Cannon* might not have been correctly decided because it is not clear whether HHJ Mars-Jones was taken **[AUTH: SHOWN / AWARE OF]** to the terms of the CFA itself. Moreover, it would seem that there is now a decision at circuit judge level that is in conflict with *Cannon*: see **[AUTH: PLEASE INSERT CASE DETAILS].**

In any event the counter-argument to success fees being allowed on costs draftsmen's fees is as follows:

- It is clear from *KU* that as a matter of principle a success fee is recoverable on the costs of a detailed assessment, but only to the extent that contractual arrangements between the client, the solicitor and the costs draftsman permit such recovery.
- It is possible for a costs draftsman to become a lawyer-agent, but whether or not this is actually the case will depend on the various agreements between the client, the solicitor and the costs draftsman.
- Assuming the costs draftsman has not entered into a separate CFA as an additional legal representative, his fees will be payable by his instructing solicitor regardless of the outcome of the detailed assessment.
- Whether or not these fees are to be treated as being a disbursement or as being base costs will depend on how these fees are dealt with in the CFA between the solicitor and the client.
- It is possible to draft a CFA which treats costs draftsmen's fees as being the fees of an agent, but most CFAs do not make such provision. Most CFAs provide that work done only by a solicitor-agent should be regarded as being work done by an agent.
- Moreover, most CFAs define disbursements as being "payments we [the legal representatives] make on your behalf". Costs draftsmen fees fall squarely within this definition.
- Most CFAs do not permit costs draftsmen to be treated as agents, and their fees are not subject to a success fee.

Regardless of which analysis is correct, costs draftsmen would do well not to place their orders for Ferraris too hastily as, if a success fee is recoverable on the basis that the costs draftsman is an agent of the solicitor, it would be the solicitor who would be entitled to the success fee rather than the costs draftsman himself.

Obligation to negotiate

Hickman v Blake Lapthorn and another

- [2006] EWHC 12 (QB), [2006] All ER (D) 67 (Jan)

In *Hickman v Blake Lapthorn and another* the High Court dealt with the extent to which a party's refusal to negotiate and/or mediate should be reflected in costs.

The claim was against solicitors and counsel for negligence in advising the claimant to settle at an undervalue. The claimant (who had sustained serious head injuries) had not been properly advised of the prospect of a claim for lifelong loss of earnings and care.

Judgment was given in favour of the claimant for £130,000. The barrister was found to be two thirds to blame and his instructing solicitors one third to blame. When it came to costs, it was agreed that the starting point was that liability for the

claimant's costs should be apportioned on a similar basis.

The solicitors argued that the barrister should pay all the costs after a certain date by reason of the barrister's conduct in refusing to negotiate and enter into mediation.

In July 2005 the claimant had offered to settle for £250,000. Subsequently, the solicitors' representatives had written to those of the barrister urging acceptance of that offer and agreeing to pay one third of the liability for damages and costs. They also urged mediation. The representatives of the barrister valued the claim more likely to be at the bottom end of the scale between £62,000 and £115,000. They rejected the offer.

Thereafter, the claimant proposed a settlement that would leave him with £150,000 after payment of his costs. However the claimant was not prepared to settle with one defendant unilaterally. He wished to avoid the prospect of being called as a witness by either of the defendants in the contribution proceedings between them.

Increased financial liability

Again, the barrister was not prepared to settle. With hindsight, although the claimant ultimately recovered less than he had offered to compromise for, the financial liability resulting from the award and costs together was significantly greater than it would have been had the defendants accepted the claimant's lower offer. It was estimated that at the time the claimant offered to settle for such sum as left him with £150,000 after payment of his costs, the combined cost of all three parties were around £230,000. At the time of the costs hearing following the trial it was estimated that the total combined costs were around £435,000.

Between the defendants there were three issues in respect of costs:

(i) liability as between them for the claimant's costs;
(ii) liability as between them for the solicitors' costs and
(iii) liability for the costs of the contribution proceedings.

On the third issue it was agreed that the barrister should pay the solicitors' costs of the contribution proceedings on an indemnity basis from the expiry of a Pt 36 offer in which the solicitors had offered a one third/two thirds apportionment. Prior to that date it was agreed that there should be no order in the contribution proceedings.

Between February and June 2005 the solicitors had increasingly urged the barrister to mediate. The barrister was not prepared to mediate before the experts had met and prepared joint statements. Further, his representatives considered that the claim faced considerable difficulties and was over-inflated.

No prospect of successful mediation?

In respect of the offer of £250,000 the solicitors had told the barrister that they would probably want to accept it because the costs would outweigh any savings that could be made. By that time, the representatives of the barrister had valued the claim in the bracket of £62,000 to £115,000—the consequence being that they thought the prospect of a successful mediation would be negligible because no offer in line with the claimant's expectations was compatible with that valuation.

There was strong disagreement between the defendants on the merits of the claimant's claim. The solicitors pressed the barrister to accept the claimant's offer of £250,000 indicating that they were prepared to pay one third of it and one third of the costs. The barrister did not agree.

In respect of the claimant's offer to settle for such sum as left him with £150,000 after payment of his costs, the solicitors wrote to the barrister stating that they were in no doubt that the offer should be accepted.

The solicitors relied upon the barrister's refusal to agree to mediation and to negotiate. They emphasised the refusal on the part of the barrister to see what could be achieved by negotiation and submitted that this conduct was unreasonable. They also submitted that to rely on the fact that the claimant had in fact received at trial less than he had offered to take ignored the costs that had been expended to achieve that result.

Costs vulnerability

The judge indicated that although this was a factor that could be taken into account, it was one to be watched carefully because it cannot be right that to avoid being vulnerable on costs a defendant should always be prepared to pay more than a claim is worth if the costs saving justifies it. That would enable claimants to put undue pressure on the defendants to settle at a higher figure than the claim merits.

Nonetheless, the judge considered that there was a strong probability that if there had been a mediation or negotiation the claim could have been settled for a figure not far from the judgment sum. The reason that did not take place is that the barrister would not negotiate.

The judge applied the principles in *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576, [2004] 4 All ER 920, although he was not referred to any particular case where a refusal to negotiate had been considered as a ground for making an award of costs which would not otherwise have been made. The judge also observed that it is not an answer that the unsuccessful party could have protected itself by a Pt 36 offer.

Unsurprisingly, the court concluded that the main issue was whether the conduct of the barrister had been unreasonable. While it might be said that negotiation costs nothing and that a party ought to be more prepared to negotiate than to mediate, the judge concluded that the barrister's stance on negotiation and mediation had been reasonable. Having reasonably valued the full value of the claim at between £62,000 and £115,000, plainly it could be understood why a party sincerely holding that view might refuse to negotiate when the level of compromise sought is around £150,000.

Dr M Friston, P Hughes, Professor A McGee and M Smith. Email: *costs@kingschambers.com*