Costs law brief

The costs team at **Kings Chambers** in Manchester and Leeds considers some recent developments on materiality and the burden of proof

Materiality

- *Jones v Caradon Catnic* [2005] EWCA Civ 1821

Mr Jones brought an employers' liability claim arising out of a repetitive strain injury. His claim was successful and he was awarded costs. He was initially funded by his union on a private client basis. From June 2001 Mr Jones's union and his solicitors entered into a Collective Conditional Fee Agreement (CCFA). His solicitors completed a risk assessment; the constituent parts of which came to 120%. This was the success fee claimed in the bill of costs.

> *"The paying party argued...that if a solicitor claims a success fee of over 100%, then there are risks to the administration of justice"*

Despite the fact that the paying party promptly drew Mr Jones's attention to the error, it took eight months after service of the notice of commencement for Mr Jones to make a concession that the maximum recoverable success fee was 100%. The paying party contended that there had been a material breach of s 58(4)(c) of the Courts and Legal Services Act 1990 (CLSA 1990) (as amended) in that the success fee exceeded the maximum permissible (which, of course, is 100%).

Clear breach

Mr Jones's primary argument was that because the corpus of the CCFA said that the success fee will "in no case…be more than 100%" there was a cap, and as such the success fee was limited to 100%. This analysis was accepted in the courts below, but the Court of Appeal was not attracted by this argument. Brooke LJ found that despite the putative cap in the CCFA, there was a clear breach in having a statement of a success fee which exceeded 100%.

The next issue was materiality. Because there was no realistic prospect of Mr Jones personally suffering as a result of the breach, it was (effectively) conceded during argument that there was no materially adverse effect on the consumer protection afforded to the client.

The paying party argued, however, that if a solicitor claims a success fee of over 100%, then there are risks to the administration of justice. It was said that the paying party might not have an eye on the limit of 100%, and that, as a result, the paying party might agree to pay costs which were too high. It was also said that if the receiving party had created a problem of this kind, one ran into the difficulty that there had to be a preliminary issue relating to the indemnity principle; this took out the resources of the court unnecessarily. The paying party submitted that above all, if a breach such as this was held to be immaterial, then the statutory regime would be rendered a dead letter because any breach would be treated as immaterial.

Mr Jones's arguments were based on the contention that there was no prospect of the client suffering, there was no prospect of the paying party suffering (because they would spot the mistake straight away), and in those circumstances the court should hold that the breach was immaterial.

Brooke LJ preferred the paying party's submissions. He found that the breach in *Jones* was on any showing a more serious breach than some of the trivial breaches which came before the court in *Hollins v Russell* [2003] EWCA Civ 718, [2003] 4 All ER 590. Accordingly, the CCFA was unenforceable.

Those who are interested in materiality might like to read what Laws LJ said when he followed Brooke LJ with a few observations of his own. Laws LJ emphasised the need to respect the regime on whose terms the legislature has accepted the legality of conditional fee agreements (CFAs). He observed that the approach propounded in *Hollins* must not be allowed to undermine the force of s 58(1) CLSA 1990. He described the breaches in *Hollins* as being of a "relatively marginal nature"; he went on to say that he could "not categorise as marginal the failure in the present case to respect the statute".

There are those who say that *Jones* indicates that the courts are now adopting a less liberal approach to the construction of CFAs than in *Hollins*. That may or may not be so; what is certain, however, is that there are limits to the extent to which the concept of materiality will rescue an otherwise defective CFA.

(We apologise for the delay in reporting *Jones*, but the Court of Appeal has only recently approved the transcript of the judgment).

- *Harmieson v Northumbrian Water Limited* (unreported, HHJ Walton, Newcastle-upon-Tyne County Court, 1 March 2006)

The judgment is notable for what it says about the burden of proving whether a breach of the regulations is material.

Mr Harmieson had successfully claimed damages for personal injury following an accident in which he twisted his ankle. The claim was settled two days before trial. The claim had, though not initially, been funded by way of a CFA providing for a success fee.

Union funding?

Costs proceedings followed the settlement. Mr Harmieson was required to prove compliance with the Conditional Fee Agreements Regulations 2000 (SI 2000/692) (the regulations). In particular, the paying party said that Mr Harmieson was probably a member of a union, and that it was therefore likely that he could have funded the matter by way of union funding. Mr Harmieson did not give a definitive response to the paying party's assertions. The matter therefore proceeded on the rather unsatisfactory basis that the court did not actually know whether Mr Harmieson was a member of a union.

During the assessment itself, Mr Harmieson's costs draftsman handed up to the district judge various documents relating to compliance with reg 4 of the regulations. The district judge found that the file notes were extremely brief. The investigation of other funding appeared to consist of a very short telephone call during which Mr Harmieson had said that he did not have union funding or legal expense insurance. The documents shown to the district judge seemed to pre-suppose that Mr Harmieson would be best served by entering into a CFA in preference to any other form of funding.

Breach and certificate

Although he identified no specific breach, the district judge concluded that there was a material breach of the regulations and that the CFA was unenforceable.

The first ground of appeal was that the district judge should not have gone beyond the certificate on the bill. HHJ Walton concluded that Mr Harmieson had chosen to produce documents in support of his argument that there was no breach of the indemnity principle, and that as a result he could not now argue that the district judge should have ignored those documents.

The next ground of appeal was that the district judge had been wrong to find a breach of the regulations. The argument followed the well trodden path concerning the obligations imposed by the use of the word "considers" in regs 4(2)(c) and (e) of the regulations. Mr Harmieson argued that it was sufficient for him to say that he did not have legal expense insurance or union funding. He argued that the solicitors had "considered" his reply in the sense that they took note of it and that this was a sufficient discharge of the obligations under the regulations. To the extent that a number of cases had decided otherwise, he submitted that they were wrong.

As might be expected, the paying party argued that the word "considers" imposes an obligation to give considered advice. The paying party argued that Mr Harmieson's solicitors should have made specific enquiry whether the claimant would qualify for union legal aid.

HHJ Walton accepted that the prevailing force of the authorities favoured the paying party's argument. He concluded that it appeared that Mr Harmieson's solicitors had chosen not to make any further enquiries into alternative methods of funding because they believed that their CFA was as good a form of funding as any. As to the enquiries relating to union funding, HHJ Walton said:

"Here it seems to me, as it did to the district judge, quite insufficient for the solicitor to record the claimant's statement that he did not have union cover without exploring whether he did not have cover because he was not a union member at all, or because for some reason his union did not offer cover that was relevant."

HHJ Walton found that there had been a breach of the regulations.

Materiality and the burden of proof

The third ground of appeal was the main one. The argument was that if there was a breach, it was not a material breach. Mr Harmieson relied heavily on the fact that the CFA was a "no cost to you" agreement (whereby he would not be responsible for paying any shortfall in the recovery of costs from the paying party).

In essence, the paying party's argument was that the terms of the CFA were less favourable than union legal aid (if, indeed, Mr Harmieson was a member of a union and had union legal aid). The paying party also argued that regardless of whether he was a member of a union, Mr Harmieson should have been given a fair survey of all the methods of funding that he might have had available to him, and that a failure to do this had a materially adverse effect on the consumer protection afforded to him.

In response, Mr Harmieson argued that there was not any evidence to show that he was a member of a union, still less any evidence that he actually had union legal aid. He said that the paying party had failed to discharge its burden of proof in this regard.

Contrary to that argument, HHJ Walton concluded that the evidential burden in relation to materiality lay with Mr Harmieson. He said:

"[Placing the burden of proof on the receiving party] seems to me to accord with common sense to the extent that it places the burden of proof on the party actually under the statutory duty to consider what other methods of financing the action may be available. It would seem a surprising result that such a party could fail to comply with the statutory duty and then pray in aid its own ignorance of the funding available to resist the suggestion that the agreement in fact entered into was unenforceable. It follows that, in my judgment, once the issue of materiality arose, it was for the claimant to show that union funding had not been available, or if available, would have been no more favourable than the CFA in fact entered."

CFA unenforceable

Accordingly, once the issue of materiality had arisen, the evidential burden lay with the receiving party to prove that the breach did not have a materially adverse effect. Mr Harmieson was unable to discharge that burden and as a result, his CFA was found to be unenforceable.

It is worth observing that HHJ Walton did not hear any sophisticated arguments on the burden of proof. In particular, he was not asked to distinguish between the legal burden of proof and the evidential burden. In view of this, it is perhaps best not to over-interpret his judgment. That said, it would seem fair to say that if the ball falls squarely in the receiving party's court, the receiving party would be ill-advised just to leave it there: if proof is available, produce it (or at least explain why it cannot be produced).

Some cheer for receiving parties

It is not all doom and gloom for receiving parties. The decision of Simon J in *Butt v Nizami* [2006] All ER (D) 116 (Feb) has confirmed Master O'Hare's earlier finding that recovery of fixed profit costs under CPR Pt 45 is not dependent on the existence of an enforceable retainer.

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