The risk of limiting disclosure

Providing only some of the information contained in a conditional fee agreement when serving a bill of costs may not amount to compliance, warns **Simon Gibbs**

On the front line of costs disputes between parties is the issue of whether there should be disclosure to the paying party of any conditional fee agreement (CFA) that funded the claim.

The Court of Appeal's guidance, given in 2003 in *Hollins v Russell* [2003] EWCA Civ 718, was: "If the party does not wish to produce the CFA, she can theoretically undertake to prove the terms of the agreement in some other way. However, we doubt whether costs judges will in general be prepared to accept merely oral evidence of the existence of such an agreement and its terms... [We] hope that receiving parties will disclose the CFA without more ado."

This issue is now governed by the costs practice direction at 32.5(1)(d), which deals with the mandatory information to be disclosed when serving a bill of costs: "If the conditional fee agreement is not disclosed (and the Court of Appeal has indicated that it should be the usual practice for a conditional fee agreement, redacted where appropriate, to be disclosed for the purpose of costs proceedings in which a success fee is claimed), a statement setting out the following information contained in the conditional fee agreement so as to enable the paying party and the court to determine the level of risk undertaken by the solicitor –

(i) the definition of 'win' and, if applicable, 'lose';

(ii) details of the receiving party's liability to pay costs if that party wins or loses; and

(iii) details of the receiving party's liability to pay costs if that party fails to obtain a judgment more advantageous than a part 36 offer."

Failure to provide this information results in the success fee being irrecoverable. It has become common practice for those choosing not to disclose the CFA itself to include quotes from the CFA in the belief that this amounts to compliance. An example of the extract from the CFA that might be disclosed in purported compliance with the requirement to provide "details of the receiving party's liability to pay costs if that party wins" might be the following: "If you win your claim, you pay our basic charges, our disbursements and a success fee."

> **"Defining 'win' in isolation from the other terms of the CFA may be virtually meaningless"**

Creating ambiguity

Does this amount to disclosure of "details of the receiving party's liability to pay costs"? In this example, "basic charges" is not defined. The paying party will not know whether these are based on an hourly rate, a fixed fee or some other method. Does the phrase "liability to pay costs" simply mean the circumstances in which costs are payable or does it refer to the details of the costs that will be payable (i.e. the calculation of such costs)? It is certainly arguable that because the statement is meant to provide "information… so as to enable the paying party and the court to determine the level of risk undertaken by the solicitor" that it is limited to the circumstances in which costs are payable rather than information going to the quantum of such costs.

However, some CFAs define basic charges as covering just the work undertaken after the CFA is entered into; others are retrospective in nature and define basic charges as also covering work already undertaken. Without knowing what the CFA covers it is not possible to determine the level of risk being accepted.

In similar fashion, it is common to see the requirement to provide the definition of 'win' being dealt with by extracting the following from the definition section of the CFA: "'Win' – 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."

Again, it is doubtful that this information alone is sufficient. Without further details being provided as to what is covered by the words "your claim" it is not possible to properly understand the nature of the risk being accepted. Is "your claim" limited to one against a named defendant or does it cover any potential defendant that may emerge as the matter progresses? A CFA relating to an accident at work claim limiting the scope of the CFA to a claim against the claimant's actual employer carries a more limited risk to a CFA that also covers a claim against any potential third party and which covers any potential clinical negligence claim if issues arise as to the adequacy of medical treatment.

Further, does the agreement extend to dealing with appeals, costs proceedings or counter-claims? Defining 'win' in isolation from the other terms of the CFA may be virtually meaningless.

Those receiving parties seeking to limit their disclosure to the bare minimum may find they have not done enough to comply with the rules.

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