Is it possible to recover retrospective success fees?

Simon Gibbs finds out where the judges stand

Despite recoverable success fees being with us for over a decade, there has been a surprising lack of guidance surrounding the issue of retrospective conditional fee agreements (CFAs) and recovery of success fees on work undertaken before a CFA is entered into.

The first, brief, consideration of the issue appears to have been by Lord Hoffmann in *Callery v Gray* [2002] UKHL 28, where he suggested that entering into a CFA at the very outset of a claim was perhaps "the only practical way of achieving" recovery of costs for work undertaken at the outset. This seemed to imply that a retrospective CFA was not an available option.

When the matter came before Senior Costs Judge Master Hurst in *King v Telegraph Group Ltd* [2005] EWHC 90015 (Costs), he held that a CFA could be retrospective and "there seems no doubt therefore that the claimant is entitled to recover base costs from the date when he instructed his solicitors until the signing of the CFA".

However, he held that: "Although there is no prohibition in the legislation against backdating a success fee, such backdating seems to me to fly in the face of the CFA Regulations and the CPR… The solicitors do not assume any risks under the CFA until it is signed… The solicitors are under no duty to give notice of funding until the CFA has been signed… It seems to me therefore to be quite wrong, and contrary to public policy, to permit the claimant's solicitors to recover a success fee prior to the signing of the CFA."

In *Birmingham City Council v Forde* [2009] EWHC 12 (QB), Mr Justice Christopher Clarke held: "In agreement with Master Hurst, I see no reason why a CFA, at any rate if it does not have a success fee, cannot be retrospective."

He went on (obiter): "The fact that the parties may agree such a fee does not, of course, mean it will be allowed on a detailed assessment… I do not regard it as necessary to hold that a retrospective success fee is per se contrary to public policy… In some, perhaps many, circumstances a retrospective success fee, or its amount, may be unreasonable, either as between the parties or as between solicitor and client. But this will not always be so. The court has, in my opinion, enough weapons in its armoury, in the form of the criteria applicable on a detailed assessment and the provisions of the costs practice direction and the practice direction on protocols, to disallow or reduce retrospective fees that are unreasonable, as in this case."

> **"The court has enough weapons in its armoury… to disallow or reduce retrospective fees that are unreasonable"**

On the issue of whether a CFA actually is retrospective Master Hurst said in *Motto & Ors v Trafigura Ltd & Anor* [2011] EWHC 90201 (Costs): "With regard to the period prior to the signing of the CFA for each claimant, this depends on the particular wording of the CFA in use. Those CFAs which run 'from the date you first instructed us' cover the cost from the first meeting. [CFAs] which state that they run 'from the date of this agreement' would, in my judgment, include the meeting with the client immediately prior to the signing of the CFA, during which the CFA explanation was given, and the client finally signed the agreement."

'Not reasonably incurred'

Further guidance on the issue of recovery of retrospective success fees comes from a recent decision from the Senior Courts Costs Office. *JN Dairies Ltd v Johal Dairies Ltd & Anor* [2011] EWHC 90211 (Costs) concerned the claimant's costs in relation an appeal being brought by the defendant. Until shortly before the appeal was due to be heard, the claimant was charged by its solicitors on a conventional basis. Because of funding difficulties a CFA was entered into with the solicitors which covered "any work we carry out or expenses we incur both before and after the date of the agreement in relation to the claim". In the event of a win, the claimant was liable to pay the solicitors' basic costs and a success fee of 100 per cent. A retrospective CFA with counsel was also entered into.

Master Gordon-Saker held, although recognising that each case must be decided on its own facts: "While it may or may not have been reasonable as between [the solicitors] and the claimant and as between [the solicitors] and leading and junior counsel to enter into bargains which amount to 'double or quits' in respect of work already done, in my judgment it was not reasonable as between the parties. It was not reasonable to incur, overnight, a liability to pay significant sums – to pay almost twice as much as would otherwise have been payable had these arrangements not been entered into… Accordingly the success fees on work done before the conditional fee agreements were entered into are not allowed, on the ground that they were not reasonably incurred."

Taken together, these decisions support recovery of retrospective base costs but suggest recovery of retrospective success fees may be considerably more difficult to achieve.

Simon Gibbs is a costs lawyer with defendant costs consultants Gibbs Wyatt Stone and writes their legal costs blog (www.gwslaw.co.uk/blog)