LEM-V1

IN THE MANCHESTER COUNTY COURT **CASE NO: 0BI10050**

BETWEEN:

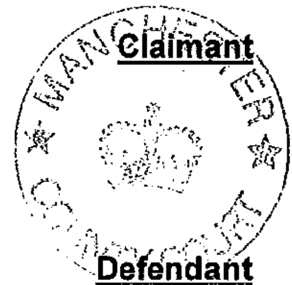
ANDREW HURLEY

Claimant

-and-

TAWANDA MAKUNI

Defendant



Representation:

For the Claimant: John Meehan, Law Costs Draftsman

For the Defendant: Nathan Adams, Counsel

DRAFT JUDGMENT

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1. This is the judgment on a preliminary point in detailed assessment proceedings concerning the application of The Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 to a conditional fee agreement (CFA) that limits the costs that the solicitor can recover from his client to the amount that is recovered from the losing party.

2. The Claimant brought a claim for personal injuries arising out of a road traffic accident on 6th March 2010. The parties settled the damages claim for £2,634.97 by a consent order dated 23rd February 2011. The order provides for the Defendant to pay the Claimant's reasonable costs to be assessed by detailed assessment in default of agreement.

3. The Claimant commenced proceedings for detailed assessment of its bill of costs in the sum of £8,340.64, including additional liabilities. Points of dispute were served which included 5 preliminary points. Replies were served and the Claimant requested a detailed assessment hearing on 28th July 2011.

4. On 29th September 2011 the parties were directed to confer and if necessary meet to try to narrow issues. A joint statement was filed in accordance with the order and a detailed assessment hearing was listed for 23rd January 2012.

5. On the 19th January, one clear day before the hearing, the Defendant filed and served a supplemental point of dispute. In it the Defendant contends that no costs are recoverable by reason of a failure by the Claimant's solicitors to give their client notice of his right to cancel the agreement required by the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008 ("the 2008 Regulations"). Because the Claimant had not had proper opportunity to consider the point, the Deputy District Judge adjourned the detailed assessment and directed it to be relisted before a Regional Costs Judge. The parties were also directed to file and serve skeleton arguments on the effect of the 2008 Regulations on the retainer between the Claimant and his solicitors.

6. The case was released by the Regional Costs Judge. I heard submissions from law costs draftsman, Mr Meehan for the Claimant (the receiving party) and from Mr Adams, counsel for the Defendant (the paying party) both of whom produced skeleton arguments.

Issue

7. The point arises from a claim within the bill for time spent attending the Claimant at his home on 23rd March 2010 when a representative of the solicitors went through forms and advised with regard to law, procedure and funding. The CFA is also dated 23rd March 2010. The issue is whether the Claimant should have been given notice of the cancellation rights to which a consumer is entitled under the 2008 Regulations where certain contracts are made at his home or place of work. If it was not given, the Defendant says the CFA is unenforceable as between the Claimant and his solicitors and the Defendant has no liability to pay any costs whatsoever.

8. The Claimant's skeleton argument confirms that the Claimant's solicitors received instructions and that the CFA was concluded during the visit to the Claimant's home by a "client liaison officer" employed by them. It is also accepted that no written notice of the right to cancel the agreement was given in any form within 7 days or at all.

<u>The Cancellation of Contracts Made in a Consumer's Home or Place of Work etc. Regulations 2008</u>

9. The 2008 Regulations provide as follows:

Scope of Application

5. These Regulations apply to a contract, including a consumer credit agreement, between a consumer and a trader which is for the supply of goods or services to the consumer by a trader and which is made –

(a) during a visit by the trader to the consumer's home or place of work, or to the home of another individual;

(b) during an excursion organised by the trader away from his business premises; or

(c) after an offer made by the consumer during such a visit or excursion.

6. (1)These Regulations do not apply to –

(a) any contracts listed in Schedule 3 (Excepted Contracts);

Right to Cancel a Contract to Which These Regulations Apply

7. (1)A consumer has the right to cancel a contract to which these Regulations apply within the cancellation period.

(2) The trader must give the consumer a written notice of his right to cancel the contract and such notice must be given at the time the contract is made except in the case of a contract to which Regulation 5(c) applies in which case the notice must be given at the time the offer is made by the consumer.

(3) The notice must –

(a) be dated;

(b) indicate the right of the consumer to cancel the contract within the cancellation period;

(c) be easily legible;

(d) contain –

(i) the information set out in part 1 of schedule 4; and

(ii) a cancellation form in the form set out in Part II of that Schedule provided as a detachable slip and completed by or on behalf of the trader in accordance with the notes; and

(e) ...

(4) ...

(5)…

(6) A contract to which these Regulations apply shall not be enforceable against the consumer unless the trader has given the consumer a notice of the right to cancel and the information required in accordance with this regulation.

10. The list of the Excepted Contracts for the purposes of Regulation 6(1)(a) is at Schedule 3. They include:-

    6. Any contract not falling within paragraph 5 under which the total payments to be made by the consumer do not exceed £35.

11. The Defendant's contention is that the CFA entered into on 23rd March 2010, between the Claimant (a consumer) and his solicitors (a trader) is one to which the 2008 Regulations applied. They maintain that it is not enforceable by the solicitors against the Claimant by application of Regulation 7(6), no notice of the required right to cancel having been given.

12. The CFA contains the following terms:

    "If you win your case we will be entitled to be paid for the work that we have done, but as you will be the winning party you are entitled to recover your reasonable legal costs from the losing party. We will only charge you for our fees and expenses (including disbursements) to the extent that they are actually recovered, either from the losing party or from any policy of insurance which you have to recovery (sic) *such items. Put in simple terms, not merely will we cap our charges at whatever figure is recoverable (whether from the other party or agreement or under court order or whether from an insurance policy) but we will also not be entitled to receive anything more than is actually recovered from the other party and from any insurance policy."*

13. The Claimant's solicitors rely firstly on Regulation 6 and paragraph 6 in the list of Excepted Contracts in Schedule 3, which excludes contracts under which the total payments to be made by the consumer do not exceed £35. The Claimant's solicitors' submission is that, because they agreed not to charge the Claimant more than they recovered from the losing party, the CFA was a contract under which the total payments to be made by the Claimant did not exceed £35. In reality they say that there will be no payment at all by the Claimant to his solicitors because all payments are to be made by the unsuccessful opponent. It is therefore an excepted contract under Schedule 3 of the 2008 Regulations.

14. The second argument is explained in these terms in the Claimant's skeleton argument:

"10. The Claimant points out that the CFA between Camps [the Claimant's solicitors] and the Claimant is what is colloquially referred to an a "CFA lite", i.e. they limit a Claimant's liability for his solicitors' costs to those which are recovered 'by way of costs or otherwise'

11. Such agreement are provided for by Section 31 of the Access to Justice Act 1999 and costs are recoverable under them as set out at CPR 43.2(3).

12. The CFA lite effectively has two 'conditions' for the solicitor to be able to obtain his fees. The first is that the case must be 'Won' and the second is that any costs must be 'recovered' from some source other than the Claimant.

13. Such CFAs have historically been exempt from consumer protection regulation. During the currency [of] the Conditional Fee Agreement Regulations 2000 they were exempt from the effects of those regulations by virtue of Regulation 2 of the Condition Fee Agreements (Miscellaneous Amendments) Regulations 2003 SI 1240. The Claimant submits that the rationale behind such statutory exemption is that the Claimant did not need protection afforded by the Regulations where they were not being personally required to pay the costs from their own funds."

15. Mr Meehan accepted that, but for the provision that the solicitors will only charge for fees and expenses actually recovered, the CFA would be caught by the 2008 Regulations. In other words had the solicitors retained an entitlement to charge their client more than they recovered in some circumstances, the CFA would not fall within the list of excepted contracts. It was not argued before me that the 2008 Regulations do not apply to contracts between solicitors and their clients made at the client's home. The issue is whether the CFA in this case is excluded from the 2008 Regulations either because it limits the charges that the solicitor can recover to the amount which the client can recover from the losing party or because it is a CFA lite which are outside consumer protection legislation.

Discussion

16. The indemnity principle requires there to be primary liability on the receiving party to pay his own solicitor. A receiving party cannot recover more from a paying party than the receiving party is liable to pay his advisers.

17. The principle is as set out in Section 60(3) of the Solicitors Act 1974 which provides:-

"A client shall not be entitled to recover from any other person under an order for the payment of any costs to which a contentious business

agreement relates more than the amount payable by him to his solicitor in respect of those costs under the agreement"

18. The Courts and Legal Services Act 1990, section 58 permitted solicitors and clients to enter into CFAs where the payment the lawyer received varied depending on the outcome of litigation provided the agreement satisfied a number of conditions.

19. The Conditional Fee Agreement Regulations 2000 ("the 2000 Regulations") set out requirements as to the content of CFAs and information to be given by the solicitor to the client before the agreement was made.

20. The Conditional Fee Agreement Regulations 2003 (the 2003 Regulations") amended the 2000 Regulations so as to remove some of the requirements and make compliance more straightforward.

21. The effect of the introduction of the CFA regulations on the indemnity principle is set out in volume 2 of the White Book, 2012, Section 7 A – 2 (page 2141) as follows:

    "The indemnity principle, as affirmed in **Gundry v Sainsbury [1910] I K.B.645** and referred to in many cases since, has been amended as a result of government policy. The policy was announced in the government's response to the Collective Conditional Fee Agreement consultation paper in September 2000 following extensive consultation with the profession.

    Section 31 of the Access to Justice Act 1999 amends S.51 of the Senior Courts Act 1981 by inserting at the end of subs.(2) the words:

        "or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs".

    The effect of this is to enable the court to disregard funding arrangements between solicitor and client when assessing the amount of costs to be recovered from a paying party.

    Section 31 of the 1999 Act was brought into force on 2nd June, 2003 (Access to Justice Act 1999 (Commencement no.10) Order 2003 (SI 2003/1241))."

22. The change to the rules on which the Claimant relies is at CPR Part 43.2(3) which provides:

    "Where advocacy or litigation services are provided to a client under a conditional fee agreement, costs are recoverable under Parts 44 to 48 notwithstanding that the client is liable to pay his legal representative's fees and expenses only to the extent that

sums are recovered in respect of the proceedings, whether by way of costs or otherwise."

23. Under the heading "The Indemnity Principle and CFAs" the notes in the White Book at 43.2.1.1 explain the position in these terms:

    "Put simply the indemnity principle ensures that an unsuccessful party cannot be held liable to pay costs to a successful party who is not legally liable to pay them. Costs payable by a client to the solicitor belong to the solicitor: Costs recovered between the parties belong to the client. It follows that the latter cannot exceed the former. This principle worked satisfactorily pre-CPR and in the day of widely available legal aid. However conditional fee agreements have become the normal way of funding much litigation, especially personal injury litigation. The indemnity principle and the CFA do not logically sit together. The rule and regulation changes recognise this and take a sensible and simple approach of abrogating the indemnity principle in appropriate cases. Thus solicitors can lawfully agree with clients not to seek to recover by way of costs anything in excess of costs agreed with, or ordered to be paid by the other party. Rules 43.2(3) and (4) as amended provide that costs whose recovery is limited in this way are recoverable costs for the purposes of CPR Pts 44 to 48."

24. The effect is described in **<u>Cook on Costs (2012 edition) Michael Cook</u>** (at page 762) as not abolishing the indemnity principle but delegating its curtailment to the Civil Procedure Rules.

25. CPR Part 43.2(3) therefore provides that solicitors and their clients can agree that the solicitor will not seek to recover from his client more than the client is able to recover from the losing party. The indemnity principle has not been abolished by the change to the rules made pursuant to Section 31 of the Access to Justice Act 1999. CPR Part 43.2(3) simply enables a party to recover costs from an unsuccessful party even though the liability of the client to his solicitor is limited to the amount of the recoverable costs in the litigation.

26. The position remains that the costs recovered belong to the client and the indemnity principle required the client to have a liability to pay the solicitor's charges. That appears to be why the CFA in this case provides that the Claimant, if he wins and is therefore entitled to recover his costs from the losing party, will be charged costs if only to the extent that they are actually recovered. The form of wording used, and specifically the provision for the solicitors to "charge" the client, appears to have been included so that the agreement complies with the indemnity principle and places the primary liability on the client to pay his own solicitors' charges. Those charges are then limited to or "capped" at the amount that is recovered from the losing party.

27. The Claimant's solicitors contend that the effect of that provision in the CFA is that all payments under the agreement will be made by someone other than the Claimant (the consumer), so that the payment by the

consumer for the purposes of the 2008 Consumer Regulations will not exceed £35. However the effect of the provision in this CFA is not such as to place responsibility for the payment of costs on someone other than the consumer (and who is not a party to the agreement). It is to place the primary liability on the Claimant, and then to limit it to the amount recovered from the unsuccessful Defendant.

28. Mr Adams takes issue with the description of the Conditional Fee Agreement in this case as a "CFA lite". He states that the term CFA lite is an expression generally used to refer to CFAs entered into after the 2003 Regulations came into force, the 2000 Regulations having led to CFAs being the subject of so many technical challenges. The 2003 Regulations were less onerous and, where the client's liability was limited to sums recovered from the unsuccessful party, enabled CFAs to be simpler than was permissible to be compliant with the 2000 Regulations. Hence the use of the term CFA lite. Both the 2000 and the 2003 Regulations were revoked in November 2005. Mr Adams contends that this CFA, made some years after the revocation of the 2000 and the 2003 Regulations, cannot properly be categorised as a CFA lite, because by 2010 the only practical restriction was as to the amount of the success fee and the type of proceedings in which CFAs could be used.

29. It does not seem to me to matter whether the CFA in this case is properly described as a CFA lite. The 2003 Regulations made it permissible for solicitors and clients to agree, as here, that the solicitor will accept the amount of costs recovered from the losing party. That is expressly provided for in CPR part 43.2(3). The agreement is a valid CFA under the 2003 CFA regulations, whether or not this agreement is properly described as a CFA lite. However there is nothing in the 2008 Regulations which excludes CFA lites or any other type of CFA or retainer between solicitors and their clients (who come within the definition of consumers) from their application where it is made at the client's home.

Conclusion

30. The CFA between the Claimant and his solicitors is one to which the 2008 Regulations apply. There is no written notice of the right to cancel. The charge to the client is the amount to be recovered from the paying party. Although it is not quantified at the time of the CFA the charge will plainly exceed £35. It must therefore follow that the agreement is not enforceable as between the Claimant and his solicitors. The Claimant is not entitled to recover costs from the Defendant and the bill must be assessed at nil.

31. I have considered a Law Society practice note on cancellation of contracts dated 2nd March 2010. I have also been referred to a note issued by the Association of Personal Injury Lawyers which anticipates that where personal injury lawyers go out to see their client in their own home and the client is asked to sign a Conditional Fee Agreement or

other contractual document it will be subject to the 2008 Regulations. Neither note addresses the application of the 2008 Regulations to those CFAs where the solicitor has agreed that the client will only be liable for costs recovered from the losing party.

32. I have not been referred to documentation relating to the retainer between the Claimant and his solicitors other than the CFA. I have not been told what information was given to the Claimant by his solicitors to comply with the client care requirements. Were such information to have provided for payment of charges by the Claimant to his solicitors in the event that the Claimant or the solicitors terminated the CFA for some reason, then that might be a further reason why this agreement would fall outside the exclusion that is relied on. I emphasise however that I have concluded that the agreement does not fall within the excepted contracts for the other reasons set out above.

33. It follows that the Defendant is successful on this preliminary point. The Conditional Fee Agreement is unenforceable as between the Claimant and his solicitors there is no liability for costs on the part of the paying party for the reasons that I have given.

September 2012

D. MOSS (DISTRICT JUDGE)