- The Defendant Costs Specialists

Costs Law Update – Gaynor v Central West London Buses

A recent decision of the Court of Appeal, *Gaynor v Central West London Buses Ltd* [2006] EWCA Civ 1120, has potentially massive significance in terms of costs recoverability in CFA cases. The decision, followed through to its logical conclusion, appears to be that a claimant cannot enter into a CFA, and thereby recover a success fee, unless and until a defendant disputes the claim. To understand this startling conclusion requires a close analysis of the judgment.

The case concerned an otherwise routine personal injury claim. The issue at the heart of the appeal concerned the retainer letter sent to the client at the outset of the case. The wording of the letter was fairly typical except for the final paragraphs which read:

> "Although it is the usual practice of all Solicitors to obtain a payment on account of costs and disbursements in your particular matter we shall not be doing so. If your opponent admits liability his/her insurers will pay your legal costs.
>
> However and where liability is not admitted and you decide to pursue your case further then you may be liable to pay for the cost of medical reports, police reports and other expert reports as are required. If you succeed and recover compensation from your opponent you will be reimbursed your outlay.
>
> If your claim is disputed by your opponent and you wish to pursue your claim through litigation then we will require a payment on account of costs and disbursements. Before requesting any payment we will discuss the alternative methods of funding your case with you. You may have the funds to pay for the cost of litigation. You may wish to enter into a Conditional Fee Agreement with us and apply for after the event legal expenses insurance to cover your opponent's cost in litigation. If you and your partner already have legal expenses insurance, through possibly your household contents policy of insurance, motor car policy of insurance or stand alone before the event legal expenses policy of insurance, tell us and we will assist you in applying to them for cover. In any event and when we next meet please bring along your policies of insurance for us to check through on your behalf.
>
> Were you to meet the cost of litigation from your own funds then we will bill you at regular intervals as your matter progresses and in certain cases we will allow you time for payment of bills or accept an instalment arrangement. Any such arrangement is at the discretion of Mr. Newman.
>
> If your claim is disputed by your opponent and you decide not to pursue your claim then we will not make a charge for the work we have done to date."

Is was argued for the paying party that the final paragraph created a CFA as defined by section 58(2)(a) of the of the *Courts and Legal Services Act 1990*:

> "a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances"

and that because the CFA regulations had not been complied with it was therefore invalid and unenforceable.

At first instance the master accepted the Claimant's submissions that the letter was not a CFA on the basis that there had been no intention to create one. Without such an intention there could be no CFA.

On appeal, the Circuit Judge reversed this decision on the grounds that although there had been no intention to create a CFA the master had asked himself the wrong question. The judge said that, as a result of section 58(2)(a), there are only two kinds of fee agreement: those that fall within section 58(2)(a) and those that fall outside it. There is no scope for a third species of agreement (as was contended on behalf of the Claimant), namely an agreement which, though it appears to fall within section 58(2)(a), in fact falls outside it by reason of a lack of intention to enter into a CFA. He concluded:

> "There is no dispute that the terms of the retainer letter in this case do provide for the fees of the solicitor to be payable only in certain circumstances. It must follow that it is a CFA as defined by section 58(2)(a) and in my judgment the learned Costs Judge erred in law in holding that an intention to enter into a CFA was a necessary element of the agreement."

The decision of the Court of Appeal hinged on the issue of what constitutes a CFA. Dyson LJ, giving the judgment of the Court, rejected the submission that the letter here amounted to an agreement to provide "advocacy or litigation services" as defined by 119(1) of the *Courts and Legal Services Act 1990*. The central question was whether the work "done to date" referred to in the last paragraph of the retainer letter came within definition of "litigation services" which, for the purposes of 119(1), "means any services which it would be reasonable to expect a person who is…contemplating exercising, a right to conduct litigation in relation to… contemplated proceedings, to provide". In his judgment:

> ""contemplated proceedings" are proceedings of which it can be said that there is at least a real likelihood that they will be issued. Until the potential defendant disputes the claim, it is not possible to say that proceedings are contemplated"

This was the dramatic finding in the case which led to the conclusion that the letter was not a CFA. Previously it had been commonly assumed when a client went to a solicitor in relation to a potential claim against a defendant that amounted to "contemplated proceedings" whether or not it was actually necessary to issue proceedings.

The second observation to make is that this interpretation of "contemplated" is directly at odds with the Court of Appeal's earlier judgment in *Callery v Gray* [2001] EWCA Civ 1117. There the Court accepted the Law Society's submissions that an ATE premium should be recoverable where the ATE was purchased at the beginning of a claim and without proceedings ever being issued. This was on the grounds that the ATE was taken out "in contemplation of the commencement of substantive

proceedings". Here the Court had no difficulty in accepting that a claimant could contemplate proceedings before a defendant had disputed the claim.

In *Gaynor*, the Court has taken a different view. The conclusion that pre-dispute work could not be "litigation services" raises the surprising question as to whether it is therefore possible for pre-dispute work to be subject to a CFA, and therefore attract a success fee. The decision in *Gaynor* seems to suggest that the answer is "no". It would also seem to suggest that a CFA could not be entered into at this early stage because there could be no "contemplated proceedings" so early. If this is indeed correct it would have massive implications for claimant solicitors as success fees would not be recoverable in the majority of cases that settle without proceedings being issued and would also not be recoverable for the work done pre-dispute. It would also nullify the effect of CPR 45.11, that allows fixed success fees in Predictable Costs matters, on the basis that such work could not have been subject to a CFA as no "litigation services" can have been provided.

Such a conclusion seems absurd and flies in the face of everyone's previous understanding of CFAs. It would appear that the Court of Appeal, in an effort to do justice in a case concerning an unusual retainer letter, have created a situation with far reaching consequences. It is almost certain that they did not appreciate the impact of their judgment or, at the very least, they would have been far more explicit in their conclusions. On the other hand, the Court of Appeal has never been asked to rule directly on this particular issue and having now done so for the first time it cannot be said that the decision is not good law.

Another example of how the Court does not seem to have properly considered the impact of its decision in relation to earlier authorities is when it considered the public policy issues. It was Dyson LJ's view that his approach to the meaning of "litigation services" was consistent with the statutory purpose of protecting clients, as per the decision in *Hollins v Russell* [2003] EWCA Civ 718. He held:

> "The need for that protection is predicated on the assumption that the solicitor will in fact provide litigation or advocacy services. If such services are not provided, the client has no need of protection…A client who, having received limited pre-litigation services, decides not to pursue a claim by litigation has no need for the panoply of protection afforded by the conditions stated in section 58(3) of the 1990 Act".

However, in *Hollins* the claim had settled without the need for proceedings in the substantive claim. Nevertheless, the Court had clearly proceeded on the assumption that it was possible to enter into a CFA pre-dispute. If the *Gaynor* decision is correct then the simple answer to the challenges brought there, and which succeeded in *Myatt v National Coal Board* [2006] EWCA Civ 1017 which had also settled pre-proceedings, was that the work performed fell outside section 58 and compliance with the regulations was therefore irrelevant.

The *Gaynor* decision did not clarify what would, for the purposes of the retainer letter, amount to a "dispute". Did it apply only to liability or did it extend to causation and quantum? The Court did hold that the last paragraph amounted to an offer to "waive modest pre-litigation services" and that the decision must be taken before proceedings were issued. The fact that the Court proceeded on the basis that pre-litigation work is inevitably "modest" suggests somewhat limited experience of current costs matters.

The one possible interpretation of the *Gaynor* judgment which would avoid the otherwise absurd outcome is that the letter was treated as being a retainer limited to the pre-dispute work and that if the Claimant decided to litigate the claim then a new retainer would be entered into. On the other hand, a traditional CFA is designed to cover both pre and post-litigation work meaning it is valid and legitimate to recover a success fee on all work. Unfortunately this interpretation does not provide an answer as to how it would be possible to enter a CFA at the outset of a claim, in respect of "contemplated proceedings", if, according to *Gaynor*, this was a stage where proceedings could not yet be contemplated. Further, the facts in *Gaynor* do not support this interpretation as proceedings were in fact issued during the claim but no further retainer was entered into. The matter proceeded on the basis of the original retainer letter.

This decision is likely to lead to a considerable period of uncertainty, just when the new CFA regime was meant to bring some certainty to a difficult area. Do not be surprised if this matter needs to return to the Court of Appeal, or indeed the House of Lords, for certainty to be restored.

Contact

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