- The Defendant Costs Specialists

Costs Law Update – 19/8/08

Court of Appeal does it again

In *KU v Liverpool City Council* [2005] EWCA Civ 475 the Court of Appeal held that a court did not have the power to award a success fee at different levels for different periods in the claim where the Conditional Fee Agreement (CFA) in question only allowed for one success fee throughout. It is therefore not open to paying parties to seek to reduce success fees for the period in proceedings, for example, after liability has been admitted. The Court of Appeal confirmed that this approach was correct, and that it applied equally to the success fee that was to be allowed in detailed assessment proceedings, in *Crane v Canons Leisure Centre* [2007] EWCA Civ 1352 – ie it was to be the same success fee as was to be allowed in the main proceedings.

So what exactly was a differently constituted Court of Appeal trying to say in *Birmingham City Council v Lee* [2008] EWCA Civ 891? They commented, without any reference to these previous decisions:

> "It does not follow, as it seems to us on first impression at least, that the same level of success fee appropriate to litigation is necessarily appropriate to the making of the protocol claim. It might be, but that will depend on the realities of the position, and the risk undertaken, as at the time of advancing the claim."

Can it now be argued that a different success fee can be applied to the pre-proceedings stage? It is this kind of ill considered judgment that itself generates so much costs litigation, but the courts continually blame defendant lawyers and insurers, rather than themselves, for these problems.

Idiot-proof CFAs - tested to destruction by idiots

Since the CFA Regulations 2000 were revoked, on 1st November 2005, it should now be virtually impossible to enter into a defective CFA. Generally the only requirements for a CFA to be valid are that it is in writing and the success fee does not exceed 100%.

GWS were recently instructed to advise in relation to a claim funded by a post-November 2005 CFA. The agreement followed standard wording but the space in the document where the amount of the success fee was to be inserted had been left blank. Notwithstanding this, the Claimant's solicitors initially claimed a success fee of 25%, this being an EL claim to which fixed success fees apply. The Claimant's solicitors conceded the success fee at an early stage but maintained the claim for the balance of their costs.

GWS advised the Defendant that the CFA was defective because it is a requirement of s58(4)(b) of the *Courts and Legal Services Act 1990* for a CFA which provides for a success fee to state the level of the success fee. It was clear from the CFA in question that it was indeed intended to provide for a success fee, but that amount had simply not been inserted. GWS drafted a detailed skeleton argument in support of the argument that the CFA was invalid and this was served on the other side. In due course the Claimant's solicitors conceded that the CFA was indeed defective and dropped their claim for costs entirely.

Clearly the new CFA regime is still too onerous for some claimant lawyers. How soon before we hear demands for further simplification? Quite how much more simple it can get is hard to see.

Accident Line Protect

In our recent *Costs Law Updates* we have been following the progress of challenges to the validity of CFAs entered into through the Law Society approved Accident Line Protect (ALP) Scheme.

These challenges centre around the issue of whether there had been a breach of Regulation 4(2)(e)(ii) of the now revoked CFA Regulations 2000, which required the legal representative to inform the client before a CFA was entered into:

> "(e) whether the legal representative considers that any particular method or methods of financing any or all of those costs is appropriate and, if he considers that a contract of insurance is appropriate or recommends a particular such contract -
>
> (ii) whether he has an interest in doing so."

In *Garrett v Halton Borough Council* [2006] EWCA Civ 1017 the Court of Appeal had held to be invalid a CFA where the solicitors had failed to inform the client that they had an interest in recommending an insurance policy. This was on the basis that, although the solicitors had told their client that they were on a claims management company's panel, they had failed to inform the client that they thereby had an indirect financial interest in recommending the policy, because if they did not do so they would have their panel membership withdrawn. The Court concluded that the profit generated by cases referred was likely to be of greater significance to the solicitors than any commissions that might be paid on insurance premiums. It was this failure to disclose to the client that they had a financial interest in remaining on the panel, which would be lost if the client did not accept their recommendation that they enter into this specific After-the-Event (ATE) policy, that amounted to a material breach of the Regulations, as the client did not know that the solicitors were recommending the policy because this was dictated by their financial interest.

Under the ALP Scheme, the standardised CFAs recommended that the client obtain an ATE policy with Accident Line Protect and stated that the solicitor did "not have an interest in recommending this particular insurance agreement".

The relevant facts of the Scheme were that:

- The Scheme included a referral service of potential clients to the solicitors.
- The Scheme's operating manual required the solicitors to comply with all requirements in the manual.
- The manual required the solicitors to issue an Accident Line Protect insurance policy in all eligible CFA cases, whether or not the client had been referred by the Scheme.
- The solicitors could have their membership terminated if they breached any of the procedures in the operating manual.
- The solicitors were entitled to a discount on their ALP membership fee if they issued more than a certain number of ALP policies each year.

The similarities with the facts in *Garrett* can be seen in that solicitors failed to notify their clients of the financial interest they had in the recommending the particular ATE policy, namely their continued membership of the Scheme and the future referrals that might be lost if they did not use this policy. Nor had they informed the clients that they were obliged to recommend the policy in all cases.

What has been interesting about the various decisions to date has been the enormous inconsistencies between the various judgments on what were, for the most part, virtually identical facts.

We thought it would be useful to list the decisions to date:

Case	Decision
McFadyen v Liverpool City Council	There was a declarable interest and there had been a material breach of the Regulations by failing to declare it. **CFA invalid.**
Myers v Bonnington (Cavendish Hotel) Ltd	There was a declarable interest and therefore there had been a breach of the Regulations. However, the breach was not material as disclosure of the interest would not have made any difference to the Claimant's actions. Further, the breach was not material as the interest was "de minimis". **CFA valid.**
Elstone v Knowles	The potential for case referrrals was periphal to the scheme and therefore there was no interest to declare. However, if wrong about that, then any breach would have been material. **CFA valid.**
Janman v Timber Store Plc	There was a declarable interest and there had been a material breach of the Regulations by failing to declare it. **CFA invalid.**
Puksis v Brumby	The solicitors had departed from the normal procedure in such cases and had written a letter to the Claimant explaining they did have an interest. Therefore, on the facts of the case, the judge was satisfied there had not been

	a breach. **CFA valid.**
Tankard v John Frederick Plastics Ltd	There was a declarable interest and there had been a material breach of the Regulations by failing to declare it. **CFA invalid.**
Jones v Attrill	There was a declarable interest and there had been a material breach of the Regulations by failing to declare it. Judge cast doubt on the validity of the "de minimis" argument. **CFA invalid.**
Gray v BMC East Ltd	The solicitors had explained that they were members of the ALP scheme and that the ATE policy was the only one that could be used. This was sufficient to comply with the Regulations. **CFA valid.**
Marsden v Rider Holdings Ltd	There was a declarable interest and there had been a breach of the Regulations by failing to declare it. However, the breach was not material as the interest was "de minimis". **CFA valid.**
Hibberd v Fawcett Old Ltd	The potential for case referrrals was periphal to the scheme and therefore there was no interest to declare. No breach of the Regulations. **CFA valid.**

The difficulty that legal representatives have in advising their clients in these types of cases is obvious in light of the inconsistent decisions coming out of the Courts. This also highlights the irony of the criticism from some parts of the judiciary as to the "satellite litigation" surrounding costs. Without clear and consistent court decisions, continuing litigation is inevitable.

As we previously predicted, this issue is now to be resolved by the Court of Appeal with a number of ALP cases to be jointly heard on 17th November 2008.

The price of justice: gratis

The case of *Berry v Spousals (Midlands) Limited & Cape Darlington* – (Birmingham CC) 24/4/07 concerned an asbestos related claim which settled for £5,000. The sticking point was the costs. As the judge commented on the subsequent costs appeal:

> "I will wager that the parties here, their lawyers, have spent more time dealing with and worrying about costs than about Mr Berry's claim for damages. … On 5th May a notice of commencement and a bill of costs were sent to the Defendants seeking costs of £39,007.95. This included a success fee of 100 per cent. Mr Berry might have thought perhaps that there was more merit in being a solicitor than being compensated for an asbestos related injury."

Fortunately the story had a happy ending and the Claimant's solicitors, Irwin Mitchell, were found to have a defective CFA and their costs were disallowed.

Contact

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