Costs Law Brief

In a new monthly column, the costs team at **Kings Chambers** in Manchester and Leeds round up developments on costs law. In this issue the team consider the issues left unresolved by *Atack v Lee*

The judgments in *Atack v Lee* and *Ellerton v Harris* [2004] EWCA Civ 1712 help clarify the law on success fees but there remain unresolved issues.

The history of success fees

Success fees became recoverable on 1 April 2000. Save for imposing a cap on the maximum percentage uplift, very little guidance was initially available as to how a success fee should be quantified.

A common practice quickly emerged: Success fees were assessed on the basis that those cases which were won would pay for those lost—the so-called 'insurance principle'. The calculation of the success fee was usually carried out on the basis of a 'ready reckoner', this was a convenient way of applying the mathematical formula of $s = (f \div (1-f)) \times 100$, where s is the success fee and f is risk (expressed as a decimal) of the case being lost.

Success fees varied widely, especially in respect of straightforward road traffic accident (RTA) claims. The Court of Appeal considered for the first time how such cases should be dealt with in *Callery v Gray (No 1)* [2001] EWCA Civ 1117. There was little reliable data upon which the Court of Appeal could base its decision, and as a result, it gave guidance that was qualified (per Lord Woolf at paras 104 and 105).

"…[W]e have concluded that where a CFA is agreed at the outset in such cases, 20% is the maximum uplift that can reasonably be agreed… We wish to emphasise two matters… The first is that it assumes that there is no special feature that raises apprehension that the claim may not prove to be sound. Where there is such a feature, the appropriate uplift will be higher, but it may not be reasonable to attempt to assess that uplift until further information about the defendant's response is to hand. The second matter is that our conclusion is based on very limited data. In particular, it is too early to see what effect the new costs regime is having on the rate of settlement… It will be desirable to review our conclusion once sufficient data is available…"

Callery also heralded the introduction of two-stage success fees. In *Atack* the Court of Appeal noted that the experience of costs judges was that solicitors were not tending to agree two-stage success fees, but that they were regularly agreeing a 20% single-stage success fee even in the simplest of claims.

It was perhaps because of this perception that the Court of Appeal delivered its widely misunderstood judgment in *Halloran v Delaney* [2002] EWCA Civ 1258 (per Brooke LJ at para 36):

"… we consider that judges concerned with questions relating to the recoverability of a success fee in claims as simple as this which are settled without the need to commence proceedings should now ordinarily decide to allow an uplift of 5% on the claimant's lawyers' costs.… This policy should be adopted in relation to all CFAs, however, they are structured, which are entered into on and after 1 August 2001…"

Brooke LJ was unhappy with the way in which the profession interpreted his judgment in *Halloran*. In re *Claims Direct Test Cases* [2003] EWCA Civ 136 [2003] 4 All ER 505 Brooke LJ said:

"Subsequent events have shown that I should have expressed myself with greater clarity [in *Halloran*]. The type of case to which I was referring was… [a case in which] the prospects of success are virtually 100%. The two-step fee advocated by the court in [*Callery v Gray (No 1)*] is apt to allow a solicitor in such a case to cater for the wholly unexpected risk lurking below the limpid waters of the simplest of claims. It did not require any research evidence or submissions from other parties in the industry to persuade the court that in this type of extremely simple claim a success fee of over 5% was no longer tenable in all the circumstances. The guidance given in that judgment was not intended to have any wider application."

In the meantime, statistically reliable data were becoming available. The Civil Justice Council commissioned research to assist in the determination of 'reasonable' success fees in RTA cases. The result of this was the report by Paul Fenn and Neil Rickman dated October 2003 entitled: *Calculating 'reasonable' success fees for RTA claims*. This was followed by a similar report dealing with employers' liability claims.

While the statistical methods used by Fenn and Rickman were much more sophisticated than the simple mathematical formula mentioned above, the approach was broadly the same. Fenn and Rickman were attempting to calculate the success fee, which (for a particular class of cases) would give rise to 'revenue-neutral' remuneration over a large number of claims.

This data has helped the profession to come to agreement concerning the level of success fees that ought to be allowed for certain classes of claims. In respect of most RTA claims and some employers' liability claims, these agreements have been embodied in CPR Part 45. For claims for some accidents that took place after certain dates (6 October 2003 for RTA claims and 1 October 2004 for employers' liability claims), fixed success fees will now apply.

It is against this background that the Court of Appeal considered the cases of *Atack* and *Ellerton*.

Atack and *Ellerton*

The Court of Appeal held that the new fixed success fees should not apply to "old" cases (ie cases in which the accident took place before the prescribed dates).

In *Atack*, the claimant was a motorcyclist who claimed that his injuries were sustained when the defendant drove his lorry negligently on a roundabout. This claim went all the way to trail, and settled only after the judge had made his ruling on liability.

It is worth looking at the facts in detail. The lorry remained on the left hand side and Mr Atack expected it to leave the roundabout at the second exit. He pulled in front of the lorry to take that exit. The lorry unexpectedly continued around the roundabout and the result was that Mr Atack had to take evasive action. Mr Atack claimed that the lorry was wrongfully positioned on the roundabout and was not signalling.

This case was unusual because the defendant's evidence was made known to Mr Atack well before the CFA was incepted. The defendant's insurers denied liability and sought to rely on a witness (an off duty policeman) who was approaching the roundabout from the third exit. In answer to

the question "Who in your opinion was to blame?" the witness had said "Motorcyclist. Tried to cut in front of tipper for exit." He added that the motorcyclist could have been patient and reduced his speed.

It was against this background that Mr Atack's solicitors claimed success fee of 100%.

The Deputy District Judge reduced the success fee to 50%. On appeal, the Circuit Judge refused to interfere.

The Court of Appeal refused to disturb the decisions below. It found that some judges might reasonably have allowed a single-stage success fee of up to 67%, but the success fee of 50% was within the acceptable range.

It is the means by which the Court of Appeal arrived at this conclusion that is important. The Court of Appeal methodically considered all of the information that was available to Mr Atack's solicitor at the time the CFA was entered into (as is required by CPD s 11.7), but it went a step further than many judges would have gone. This is because they analysed that information in quite a sophisticated way. For example, the Court of Appeal gave weight to the fact that the off duty police officer could not have posed a particularly great threat to Mr Atack's case as his view was partially obscured by an island on the roundabout.

While the facts of *Atack* may not match those of many other cases, the method used by the Court of Appeal in assessing the success fee will have general applicability; the risks must be properly scrutinised.

Ellerton concerned injuries received by an elderly lady when the defendant's vehicle reversed into her while she was walking across a supermarket car park. The driver took off after the accident, but sufficient information was gleaned for him to be identified.

This case settled before trial, but only after a defence was filed. The CFA was incepted before the defendant had indicated whether liability was accepted.

An important feature of *Ellerton* is that the CFA provided that in the event of a Part 36 payment being rejected on her solicitors' advice, her solicitors would not be paid for any subsequent work if the defendant beat the offer at trail. Put another way, Mrs Ellerton's CFA provided for a "quantum risk".

The CFA in *Ellerton* claimed a success fee of 60%, but this was restricted to a claim of 30% by the time the matter came to assessment. The District Judge was concerned about the fact that the driver took off after the accident, and as a result, he allowed a success fee of 30%.

The Court of Appeal disagreed with this. It concluded that the uncertainty about the identity of the driver could have been resolved by a single telephone call to the police, and that the quantum risk was one of the rare risks which justified a success fee set as high as 20% in the simplest of claims. The Court of Appeal reduced the success fee to 20%.

Atack and *Ellerton* have clarified the law, but there are issues which remain unresolved. These are described below.

Data on revenue neutrality

The Court of Appeal is encouraging the use of data on revenue neutrality (per Brooke LJ at para 11 of *Atack*):

"This material will no doubt inform the approach to be adopted by solicitors in determining henceforward what level of success fee it is reasonable to agree in a CFA in an 'old regime' case, and by district judges and costs judges when deciding the reasonableness of a success fee in an RTA case which was agreed between the solicitor and the client after the date of this judgment."

The extent to which such data can be taken into account when considering CFAs which were entered into before the judgment in *Atack* was handed down is not clear. It could be argued that the court must use the most recent and reliable data. If, for example, a defendant was able to prove by reference to statistical data that 99% of claims of a particular class settle, it would be odd for this data to be excluded from the assessment merely because it was not available at the time the risk assessment was drawn up.

In respect of new cases, the profession and judges should take data on revenue neutrality into account. Claimant firms who do CFA work might wish to modify their risk assessments accordingly.

Quantum risks

At first glance, it might seem that the Court of Appeal has found that a quantum risk is a minor risk that is capable of justifying only a modest increment in the success fee. That might well be correct in the majority of cases, but it is important to bear in mind that *Ellerton* was not a case in which the risks on quantum were particularly great.

It is worth noting that the Court of Appeal was assisted by the advice of its assessor, Master O'Hare, who was also an assessor in *Edwards v Smiths Docks Ltd* [2004] EWHC 1116 (QB). In *Edwards*, Crane J refused to interfere with a success fee of 87% in which the majority of the risks related to quantum. It is unlikely that the Master gave contradictory advice, so these cases are unlikely to be in conflict with each other.

The proper analysis is probably that there is no conflict between *Edwards* and *Ellerton*: if the risks on quantum are not unusually high, then only a modest part of the success fee will be attributable to that risk, but if a case turns quantum, then a large part of the success fee might relate to quantum.

This leaves undecided the issue of how to assess a success fee where the risk relates to quantum. This is likely to become an important point because "CFAs Lite" can give rise to very significant quantum risks. The Court of Appeal refused the defendant in *Edwards* permission to argue this point, but it is likely that at some stage this mathematically difficult issue will have to be dealt with.

Two-stage success fees

The Court of Appeal is keen to see the profession embrace two-stage success fees. There will be an appeal in the Court of Appeal this term which will deal with whether it is permissible on the assessment of costs for a judge to have recourse to para 11.8(2) of the Practice Direction and to set a two-stage success fee when no such fee was contained in the CFA.