Update: costs

Simon Gibbs considers the ongoing challenges to CFAs and whether a recent High Court judgment may offer a potential solution

THE TAIL-END of challenges to conditional fee agreements (CFAs) entered into when the (now revoked) CFA Regulations 2000 were still in place continues to wag with surprising rigour.

A materially adverse effect

The Court of Appeal in *Hollins v Russell* [2003] EWCA Civ 718, tried to kill off the majority of such challenges by introducing the test of 'materiality'. A CFA would not be held to be invalid simply because there was a technical breach of the regulations. To be found invalid would require the breach to have "had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice". Although this test was clearly designed to reduce the number of challenges mounted, it still begged the question as to what would amount, in any given case, to a 'material' breach. Several years of continuous litigation followed trying to answer this question.

One strand of these challenges centred around the issue of whether there had been a breach of reg.4(2)(e)(ii), which required the legal representative to inform the client:

"(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 held to be invalid a CFA where the solicitors had failed to inform the client that they had an interest in recommending an after-the-event (ATE) insurance policy. This was because, 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the policy, because if they did not recommend that particular policy they would have their panel membership withdrawn and lose the opportunity to receive further case referrals. It was this failure that amounted to a material breach of the regulations because the client did not know the solicitors were recommending the policy because this was dictated by their financial interest.

CFAs can be found to be invalid if the solicitor fails to declare his interest in recommending a policy

This judgment potentially affected dozens of other claims management style schemes and the question that arose was the extent to which other schemes could distinguish themselves from that in *Garrett*.

Anything to declare?

The issue came back to the Court of Appeal in the recent Accident Line Protect (ALP) test cases (reported as *Tankard v John Fredricks Plastics Ltd* [2008] EWCA Civ 1375). Under the ALP scheme, the standardised CFAs recommended that the client obtain an ATE policy with ALP and stated that the solicitor did "not have an interest in recommending this particular insurance agreement".

The key facts of the scheme were: the scheme included a referral service of potential clients to the solicitors; the scheme's operating manual required the solicitors to issue an ALP policy in all eligible CFA cases; and the solicitors could have their membership terminated if they breached any of the procedures in the operating manual. The similarities with the facts in *Garrett* are obvious.

The crucial issue the Court of Appeal had to decide was what amounted to an "interest" within the meaning of reg.4(2)(e)(ii). The court concluded that the proper test was: "A solicitor has an interest if a reasonable person with knowledge of the relevant facts would think that the existence of the interest

might affect the advice given by the solicitor to his client."

The regulation was "concerned with giving the client who is considering entering into a CFA sufficient information and advice to enable him to take a properly informed and considered decision. He can only do so if he is given information and advice which are not in any way affected by the solicitor's self-interest."

Applying this test to the facts in the test cases, the court distinguished the ALP scheme from that in *Garrett*.

They concluded:

- mere membership of a panel would not necessarily amount to an interest;
- Ashley Ainsworth, in *Garrett*, were "claims farmers", unlike the ALP scheme;
- the solicitors in *Garrett* had a "substantial" dependency on Ashley Ainsworth through the referrals they received from them, unlike the solicitors in these test cases; and
- in the three cases considered in *Tankard* the overriding consideration for the ATE recommendation was "the quality of the Accident Line ATE policy. That was why the solicitors subscribed to the scheme and recommended the policy to their clients." The prospect of referrals was "an incidental matter".

The court concluded that "in the absence of particular facts, such as, say, very significant dependence on the scheme for a firm's revenue (which would have to be examined on the facts of the particular case) there is no conflict of interest between the client and his or her solicitors if the test set out above is applied". Given their findings, the court held that there had been no interest to declare, there was no breach of the regulations and the CFAs were valid.

Nothing but uncertainty

Although a collective sigh of relief will have gone up from panel members of the ALP scheme, the decision has done little or nothing to limit the scope for challenges to other schemes or to introduce any greater certainty. *Hollins* introduced the vague (and often shifting) concept of the 'material' breach and *Tankard* has introduced the even more unhelpful 'reasonable person' test. Although this appears to represent a common sense approach it actually produces nothing but uncertainty.

If you asked the 'reasonable person' whether he thought that a scheme that provided only 1 per cent of a firm's revenue might affect the advice it gave then the answer would probably be no. However, if you informed the same person that an interest amounted to £50,000 a year you would possibly get an entirely different answer. Of course, it is quite possible that one per cent of a given firm's revenue is indeed £50,000 a year. Would two judges give the same answer to this set of facts? Equally, £50,000 for some firms would be irrelevant but for others it would represent the difference between profit and loss. This new test will mean that there may have been a breach of the regulations by one firm when advising a client, but no breach by the firm next door giving exactly the same advice on the same scheme.

Regardless of these uncertainties, it would be a mistake for those solicitors involved in schemes other than ALP to think they are now on firmer ground.

Since the *Tankard* judgment there have been at least two further judgments on the enforceability of other schemes.

The nature of the benefits

The first was a decision of the senior costs judge, Master Hurst, in *Findley v Jones* [2009] EWHC 90130 (Costs). That case concerned The Accident Group (TAG) scheme. It was held that there was a disclosable interest in the TAG policy and the solicitors had failed to disclose that interest. The CFA was held to be invalid.

The second decision was from another master in the Supreme Court Costs Office, Master Simons, in *Ibbertson v Sampson* [2009] EWHC 90132 (Costs).

The scheme in question was Freeclaim IDC. The CFA had stated that the solicitors did not have an interest in recommending the ATE policy. In a separate letter to the claimant it had been explained that "Freeclaim IDC does refer some cases to this firm".

The master explained the difficulty he had in ascertaining the nature, if any, of the solicitor's interest given the very limited information contained within the solicitor's witness statement. He accepted that the duty of the solicitor was to disclose to the client the true nature of the interest they had in recommending the particular ATE policy, and that this would entail explaining to the client the nature of the benefits to the solicitor in receiving recommendations from Freeclaim IDC and that the solicitors had failed to do that. The CFA was therefore held to be invalid.

It is now beginning to look as though the ALP scheme was saved purely because it was viewed as being primarily a scheme designed to make available a legitimate ATE product. Typical 'claims farmer' schemes are unlikely to pass this test. Patrick Allen, writing in advance of the Tankard decision (see *Solicitor's Journal* 'Practice trends: personal injury' 152/16, 22 April 2008), hoped that the Court of Appeal would use this judgment to "kill off" challenges to CFAs. The judgment has done anything but that.

So what is a solicitor to do if he thinks he has an invalid CFA? If this is not discovered until after the conclusion of the substantive claim, the answer is almost certainly nothing. By that point it will be too late and all previous attempts before the courts to rectify defective CFAs after a claim has settled have failed. Just hope the other side fails to notice the possible breach.

If the problem is discovered before the case settles, the answer may be surprisingly simple. All you need to do, according to the decision of Mr Justice Christopher Clark in *Birmingham City Council v Forde* [2009] EWHC 12 (QB), is to enter into a new retrospective CFA. The first CFA can remain 'live' to be relied on in case the second CFA is held to be invalid. Further, disagreeing with a previous decision of the senior costs judge, there is not even a problem with recovering a retrospective success fee.

This judgment is neither short nor straightforward and a detailed analysis is not possible in this article, but it potentially raises more questions than it manages to answer.

No retrospective revocation

However, it might be premature for solicitors to start rushing out to replace any potentially defective CFAs with new agreements. Mr Justice Christopher Clarke brushes aside rather too lightly the idea that there is anything wrong with a CFA replacing a previously defective CFA and recovering the costs for the same period when the earlier, defective, CFA was in place.

The revocation of the CFA Regulations 2000 was expressly stated in the Revocation Regulations not to be retrospective. The CFA Regulations 2000 were revoked precisely because of the perceived injustice in a solicitor losing all their costs because their CFA was held to be invalid. However, a public policy decision was obviously made not to make the revocation retrospective with the full knowledge that costs would remain irrecoverable for older defective CFAs. It must be questionable whether those consequences can be so easily circumvented by the device of a retrospective agreement.

If, and when, this issue reaches the Court of Appeal, a different conclusion may be reached. Quite where that would leave solicitors who had replaced their old CFAs with retrospective ones is anyone's guess.

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