MEETING NOTES

Date: **19 May 2009, 5-8pm**
Subject: **APIL East Anglia Regional Group Meeting and Costs and Funding SIG**

Location: Best Western Cambridge Quy Mill Hotel, Stow-Cum-Quy, Cambridge.

Attendees: **Gary Barker (speaker), Richard Barr, Mark Copley, Simon Davis, John Fellows, Robert Gair, Brian Jarvis, John McQuater (speaker), Siobhan McWhinney, Justina Molloy, Jan Parry, Sylvia Phillips, Anthony Mitty, Daryl Robinson, Hannah Rutterford (Regional Co-ordinator), Paul Taylor, Mick Upton (Regional Secretary), Michael Wangerman, Geof Youne,**

1. INTRODUCTION

Hannah Rutterford (HR) welcomed attendees and briefly introduced the speakers, Gary Barker and John McQuater. A discussion about costs problems and solutions would be held, John McQuater would the provide an update on the claims process and an EC update and finally Gary Barker would present a costs update.

2. A DISCUSSION OF COSTS PROBLEMS AND SOLUTIONS (GARY BARKER – (GB))

The discussion began, focusing on problems people had experienced using the Law Society Model CFA. Most people were using the Model CFA.

GB asked whether there had been any problems with CFA's and how people were dealing with those problems. One attendee had come across CFAs used by previous solicitors which breached the CFA Regulations 2000 but he had had some success in stating that the agreements fell within the Conditional Fee Agreement (Miscellaneous Amendments) Regulations 2003 because there were assurances in the client care letter that a client would not be faced with charges so the agreements had been held enforceable. GB said that the case of *Jones v Wrexham Borough Council,* which considered the issue of whether a pre-November 2005 CFA amounted to a "CFA Lite", was useful in this regard. In that case the importance of the issue rested on the fact that Regulation 4 of the CFA Regulations 2000 required solicitors to inform clients as to whether they had an interest in recommending a particular ATE policy but if it was a CFA Lite these obligations did not apply. If the agreement was a CFA Lite it did not impact on the validity of the CFA if the information was given to the client. In *Jones* the CFA was supported by a client care letter outlining the Claimant's minimal exposure. The Court held that the CFA and the letter could be considered as a whole in outlining the Claimant's liability and therefore the agreement was seen as a CFA Lite so there was no requirement to fulfil the Regulation 4 obligations.

There was discussion on how the 2003 Regulations provide scope to rectify old CFAs which may be in breach of the 2000 Regulations.

Concerns were expressed about The Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 which could affect the validity of funding agreements if signed at a person's home or place of work. GB stressed these were aimed at double glazing salesmen but have caught lawyers too. One attendee said that he now provides all of his clients the right to cancel contract within 7 days of signing the agreement at home or work but others tended to avoid having the agreements signed in their presence.

There was a lively debate about the potential impact of the funding review by Lord Justice Jackson.

Some concerns were expressed, for example that costs shifting could lead to Defendants arguing that Claimants take on hopeless cases and it could lead to PI becoming separated from other forms of litigation and drive down fees in PI cases. It was felt that insurers have done well in painting a bad picture of PI lawyers and their fees over the last few years and we need to go on the front foot to show that the costs charged are justified. HR indicated that on one of her recent cases she had had a cost estimate from the Defendant which was far higher than her cost estimate. John McQuater asked for anyone who comes across Defendants costs estimates higher than the Claimant's cost estimate was, to provide details to Abby Jennings at the APIL office.

There were questions raised about how Part 36 would apply if cost shifting took place. GB outlined that it was possible that there may be exceptions to costs shifting in certain circumstances, such as where Part 36 applies.

There is a possibility that the review may recommend that additional liabilities are not recovered from the Defendant but from the Claimant. It was suggested that this may lead to clients with small claims not bothering to pursue a claim. GB outlined that, originally, additional liabilities were recovered from the client but there have been cultural changes since then, the main one being that clients now generally expect to receive 100% of their compensation and not to pay fees. It would be difficult to change a client's expectations.

JM felt that changes to who the success fee is recovered from could lead to pressure not to take a success fee but this could then lead to a loss of access to justice.

GB warned about the risks of fixed fees expanding because once they are fixed they are rarely, if ever, reviewed. He felt that it was important that any agreements made about funding need to be tied down and formally agreed so that issues, such as agreement to review fixed costs periodically, are not forgotten.

There was concern expressed that if costs are driven down then some solicitors would find it difficult to take on low level PI cases. JM stressed that those regulating funding would have to strike a balance between enabling solicitors to be paid adequately and having cases deal with appropriately. JM stressed that if cases are going to be dealt with effectively and professionally then firms need to be paid properly.

3. UPDATE ON THE CLAIMS PROCESS (JM)

JM explained that he could not talk about the topics which were the current subject of the Claims Process mediation but he would give a general update.

JM outlined the history and origin of the claims process review.

The fast track has been increased to £25,000.

JM outlined the scope of the claims process (RTA cases only where general damages are worth at least £1,000 and the overall claim is worth £1,000 to £10,000, excluding car hire/repair charges and liability is admitted). JM stated that if the claim ends up falling below £1,000 the scheme may still apply if you can show that there was a reasonable expectation of recovering £1,000.

There are three stages:

1. Notification/Investigations;
2. Negotiations;
3. Assessment by Court.

Stage 1

Stage 1 will include taking a client's instructions, establishing funding, carrying out conflict checks and MID searches and then notifying the insurer of the claim, within 5 days, by an emailed form. Insurers will have 15 working days to respond (30 days for the MIB). The response must indicate the Defendant's stance on liability and on rehabilitation. There are no extensions of time. The admission must admit both liability and at least some causation.

If liability is not admitted or the insurers do not respond by the 15th day the case comes out of the claims process. It is not yet clear whether fixed RTA costs will still apply if the case falls out of the claims process, or whether the fixed costs system will be scrapped. APIL say that the fixed costs system should be scrapped.

If contributory negligence is raised the case will come out of the process unless contributory negligence is raised in relation to failure to wear a seatbelt. There will be standard deductions for failure to wear a seatbelt (25% where the seatbelt would have prevented all injury, 15% where the seatbelt would have made some difference to the injuries sustained and 0% where the seatbelt would not have made a difference). If it is a factual dispute about whether or not a seatbelt was worn then the claim will come out of the process.

Stage 2

A medical report will be obtained (there is no need to jointly select). A template letter of instruction is likely to be provided.

Report will be disclosed to the Defendant and then, within 15 days of getting the report, a settlement pack will be produced which will include a schedule of loss, expert report and an offer of settlement from the Claimant.

The insurers have 15 days to respond, they can then accept or make a counter-offer. Counter-offers must include a figure for each head of loss.

Negotiations then take place if an offer is not agreed.

If a prognosis is not settled another report will be obtained and the insurers will pay an interim payment of "about" £1,000.

Costs will be paid at the end of each stage.

Stage 3

Where cases are not settled an application will be made for a quantum hearing with a District Judge. This process is likely to resemble Part 8 proceedings. The DJ will require the settlement pack (except the offers), any further evidence obtained and final offers made by each party, made in sealed envelopes. It is intended that Part 36-type sanctions will apply to offers at this stage for offers rejected. The mechanism is still being debated.

Costs have not been discussed yet.

The Scheme is likely to commence in April 2010.

There were concerns expressed about children being included in the scheme as child cases are more complicated and costly. JM felt that it would be good for children to be included in the scheme as it will ensure that costs payable to firms are then costed properly.

4. EC UPDATE, JM

APIL are pressing for an employer's liability equivalent of the MIB established as the employer's liability tracing scheme often proves to be ineffective.

The People First campaign was launched in March 2009. This focuses on highlighting people's rights, distinguishing between negligence and mere accidents and stresses the importance of safeguarding people's health and safety.

Fraudulent claims seem to be a problem in some parts of the country. APIL are keen for insurers to provide details of these claims so that Claimant lawyers can spot and avoid such claims.

APIL are pushing for the right to legal aid funding for attendance at inquests so that Claimant families can be represented, not just Defendants. APIL would welcome examples of issues where funding has been a problem for attending inquests.

APIL still want details of third party capture.

The CICA are still under pressure from the government to speed up their processing of claims. Updates are expected.

5. RECENT CFA AND OTHER COSTS DEVELOPMENTS (GB)

Gary Barker gave a useful update on important and helpful costs cases. A comprehensive handout of the slides are available from APIL.

Mick Upton (Solicitor)
East Anglian Regional Secretary
16 June 2009

RECENT CFA AND OTHER COSTS DEVELOPMENTS

GARY BARKER

CPR REQUIREMENTS

- ***Supperstone v Hurst [2008] EWHC 735 (Ch)***
- **The notice of the funding arrangements had been late and not in the appropriate form, relief from sanction ought to be granted on the bases that the claimant's solicitors had mistaken the effective date of the insurance policy, that they had believed e-mail to have been an agreed method for service with the defendants, and that no prejudice had been suffered as a result of the late service.**

CPR REQUIREMENTS

- ***Kutsi v North Middlesex University Hospital Trust (2008) EWHC 90119 (Costs)***
- **The claimant did not serve notice of an after-the-event insurance premium for £84,262.50 taken out long after the case had been settled and when negotiations about the costs of the action were at an advanced stage. Having considered *Supperstone v Hurst* the court held that the mitigating factors advanced by the claimant fell short of a "good explanation" and refused to grant relief.**

CPR REQUIREMENTS

- *Cullen v Chopra [2007] EWHC 90093 (Costs)*
- It is common ground the Clinical Negligence Protocol applies and that it does not require Notice of Funding to be given pre-issue nor does it state when any such notice is to be given.

CPR REQUIREMENTS

- *Cullen v Chopra [2007] EWHC 90093 (Costs)*
- If the draftsman of the pre action practice direction had intended "should" to mean "must", the Practice Direction would have said so, as has been the case with CPD 37.

CPR REQUIREMENTS

- *Cullen v Chopra [2007] EWHC 90093 (Costs)*
- Insurers for prospective defendants on receiving notice pre-issue, would be unlikely to act any differently since the notification in question would not be required to contain any particularisation of the claim, still less its value.

CFA LITE

Foord v American Airlines Inc [2007] EWHC 90076 (Costs)

- The conditions of the CFA and in the correspondence from the solicitors to the client made it clear 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 relevant proceedings ...".*

CFA LITE

Foord v American Airlines Inc [2007] EWHC 90076 (Costs)

- Expenses and disbursements are separate in any event the CFA contains a provision that *"if the amount agreed or allowed by the Court does not cover all our basic charges and our disbursements then you are not required to pay the difference".*

DISCOUNTED CFA

Gloucestershire County Council v Evans and Others [2008] EWCA Civ 21.

The differential rate Conditional Fee Agreement provided for payment of £95.00 on failure and £145.00 on success and in addition had a success fee of 100%.

DISCOUNTED CFA

Gloucestershire County Council v Evans and Others [2008] EWCA Civ 21.

The paying party argued that this breached the Act of Parliament because in relation to the difference between the hourly rate on failure and the hourly rate on success, a success fee of 100% applied to the hourly rate on success gave an hourly rate of 290%.

DISCOUNTED CFA

Gloucestershire County Council v Evans and Others [2008] EWCA Civ 21.

The court concluded that it was perfectly acceptable to apply the success fee to the higher, successful, hourly rate and not to the difference between them.

DEFENDANT'S NAME

- ***Brierley v Prescott [2006] EWHC 90062 (Costs)***
- **Master Gordon-Saker observed that "The Claimant wished to recover compensation for his injuries. He may or may not have been interested in the identity of the person who paid that compensation" and that, as to the agreement between the Claimant and his solicitors, "the intention of the parties is obvious".**

DEFENDANT'S NAME

- *Law v Liverpool City Council & Berrybridge Housing Association [2008] Liverpool County Court.*
- This was a tripping case involving a minor where, under the heading "What is covered by this Agreement?" the CFA stated "Your claim against Liverpool City Council for damages for personal injury suffered on 26 March 2003".

DEFENDANT'S NAME

- *Law v Liverpool City Council & Berrybridge Housing Association [2008] Liverpool County Court.*
- There was no contract between the client and his solicitor to cover the ultimately successful claim against the Housing Association.

UNENFORCEABLE

- ***Tandara v Weightmans (Solicitors) [2008 EWHC 90101 (Costs)***
- **The court assessed profit costs and unpaid disbursements at nil for work undertaken by a solicitor under a defective CFA.**
- **The client was not entitled to a refund in respect of disbursements the solicitor had reasonably paid out on his behalf even though the retainer was unenforceable.**

FIXED COSTS

- *Dahele v Thomas Bates & Son Ltd [2007] EWHC 17 April SCCO*
- A case "concludes at trial" if it settles on the day fixed for trial and Rule 45.25(1)(a) and 45.24(1)(a) must be interpreted in that way.

FIXED COSTS

- *Sitapuria v Khan [2007] Liverpool CC 10 December*
- The argument in Dahele v Thomas Bates and Son was rejected.
- Solicitors were entitled to 12.5% and counsel to 75% if a case settled on the day of trial but before it has been opened.

FIXED COSTS

- ***Kilby v Gawith [2008] EWCA Civ 19 May***
- **The issue arose as to whether was a discretion under CPR 45.11(1) to allow a success fee once the claimant had entered into a conditional fee agreement of a type specified in CPR 43.2(k)(i). Although before the event insurance was important, its general importance could not lead led to the conclusion that CPR 45.11 should be construed differently.**

FIXED COSTS

- *Hosking v Smallshaw [2009] EWHC QB 25 March*
- The Claim was settled but there was a hearing to determine periodic payments.
- Both liability and quantum were agreed and the Claimant's application in relation to periodic payments was 'fine tuning' of the settlement agreed between the parties.

LIABILITY ADMITTED

Avril v Boultby [2008] Nottingham County Court 7CD00195

- The Court determined that whilst liability had been admitted there still remained risks which the Claimant required an indemnity against.
- The ATE insurance premium was reasonably incurred and recoverable.

LIABILITY ADMITTED

Avril v Boultby [2008] Nottingham County Court 7CD00195

- **These risks included that the admission of liability could be withdrawn; there could be adverse costs orders made in the course of the proceedings; there could be an adverse costs order resulting from failing to beat a payment in and the Claimant's failure to recover his disbursements in full.**

LIABILITY ADMITTED

Clarke v Waters [2008] EWCA Civ 1459

There was nothing unreasonable in entering into a simple CFA at a time when liability had been admitted provided that the parties made a proper assessment of the inevitably much reduced risk of failure.

DECLARING AN INTEREST

Overton v Horder [2008] EWHC 90109 (Costs)

There was no evidence that the Solicitors would have lost panel membership if they had failed to recommend the NIG policy nor was it obligatory that they had to do so. Therefore there was no breach of Regulation 4(2)(e)(ii) and the CFA was enforceable.

DECLARING AN INTEREST

Kier Tankard v John Fredricks Plastics Ltd [2008] EWCA Civ 1375

In the context of the ALP scheme, 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 was no conflict of interest between the client and his or her solicitors if the appropriate test was applied.

SELF INSURANCE

Dix v Frizzell Financial Services [2008] EWHC 90117 (Costs)

This judgment addressed two issues on the validity of the retainer:

(1) Whether it was unlawful at common law to include a term in the Conditional Fee Agreement that the solicitors would indemnify their client against the opponent's charges and disbursements were the case to be lost.

SELF INSURANCE

Dix v Frizzell Financial Services [2008] EWHC 90117 (Costs)

(2) Whether such a retainer was unenforceable by reason of Sections 23 and 26 Financial Services and Markets Act 2000 ("FSMA") as an unauthorised "contract of insurance".

SELF INSURANCE

Dix v Frizzell Financial Services [2008] EWHC 90117 (Costs)

On (1) it would be unrealistic to expect a solicitor to keep a clear eye and unbiased judgment, and to maintain that proper distance from the client and the litigation which it is his duty to maintain, when the pressure mounts and ethical decisions are needed the consequences of which for the solicitor may be substantial personal liability under this clause.

SELF INSURANCE

Dix v Frizzell Financial Services [2008] EWHC 90117 (Costs)

As to (2) the court held that the CFA looked at as a whole had, as its primary objective, the supply of legal services on a CFA basis by a client to a solicitor. Accordingly the contract was not "a contract of insurance" and would not have been rendered unenforceable under Section 26 FSMA.

PUTTING IT RIGHT

Kellar v Williams [2004] UKPC 25 June

Where there was an informal arrangement for payment of litigation fees, there was an implied agreement to pay a reasonable rate on a quantum meruit basis.

But an arrangement cannot be made after the decision.

PUTTING IT RIGHT

Forde v Birmingham City Council [2009] EWHC 12 (QB)

C signed a CFA without a success fee; owing to technical challenges C signed a second CFA with a success fee covering the same housing disrepair claim. C's claim succeeded; by consent, she received £5,000 plus her costs, the case settling after issue but before trial.

PUTTING IT RIGHT

Forde v Birmingham City Council [2009] EWHC 12 (QB)

CFA 2 was enforceable despite the fact that it concerned matters contained within CFA 1.

PUTTING IT RIGHT

Forde v Birmingham City Council [2009] EWHC 12 (QB)

Section 58 of the Courts and Legal Services Act 1990 required that a CFA should be in writing, that it should not apply to certain proceedings and that success fee should not exceed 100%. It did not provide a prohibition against retrospectivity and it could not be accepted that one should be implied.

PUTTING IT RIGHT

Forde v Birmingham City Council [2009] EWHC 12 (QB)

- There was nothing in the statutory provisions which invalidated a retrospective CFA. Nor was there any provision that required a retrospective CFA made on or after 1 November 2005, but covering a period prior to then, to comply with reg 4 of the Regulations.

PUTTING IT RIGHT

Forde v Birmingham City Council [2009] EWHC 12 (QB)

- **Retrospective success fees were not contrary to public policy. There was insufficient warrant for effectively precluding solicitor and client from making such an agreement. In some, perhaps many circumstances a retrospective success fee, or its amount, might be unreasonable, either as between the parties or as between solicitor and client. But that would not always be so.**

PUTTING IT RIGHT

Forde v Birmingham City Council [2009] EWHC 12 (QB)

- If that was wrong and a retrospective success fee was contrary to public policy, it did not follow that CFA 2 was vitiated. There would be no reason why the court could not place its blue pencil through the success fee provision, leaving the obligation to pay the basic charges unaffected.

PUTTING IT RIGHT

Forde v Birmingham City Council [2009] EWHC 12 (QB)

- It could not be assumed that the client was compelled by undue influence to enter CFA 2 on much less favourable terms than CFA 1.

PUTTING IT RIGHT

Forde v Birmingham City Council [2009] EWHC 12 (QB)

- The consideration for the second CFA did not consist of not doing something, but of continuing to act, in circumstances where, if the authority had been right in its challenge, the solicitors had no obligation, and the right not, to do so.

PUTTING IT RIGHT

Forde v Birmingham City Council [2009] EWHC 12 (QB)

- If CFA 2 had been unenforceable, the solicitors could still rely on CFA 1 as the replacement of it had been conditional.

PUTTING IT RIGHT

Forde v Birmingham City Council [2009] EWHC 12 (QB)

- No part of Regulation 4 required the legal representative to complete public funding application forms to any particular standard: D's contention that they had been completed in a manner that doomed them to failure was rejected.

COST OF FUNDING ARRANGEMENT

Woolley v Haden Building Services Ltd (No.2)[2008] EWHC 90111 (Costs)

In my judgment, the costs of funding have never been recoverable and nothing has changed as a result of the introduction of CPR or, indeed, as a result of the introduction of the CFA Regulations, and therefore that element of this bill in which the Claimant seeks to recover its funding costs, fails.

PRE ACTION COSTS

- *Roach v Home Office [2009] EWHC 312 (QB)*
  It was held on appeal that the costs of attendance at an inquest were recoverable as costs incidental to subsequent civil proceedings.

•THE END