MINUTES OF APIL MEETING
(EAST MIDLANDS REGIONAL GROUP)
26TH MARCH 2001
THE ROYAL MOAT HOUSE, NOTTINGHAM

Jane Williams the Regional Co-ordinator for the East Midlands Group began the meeting and confirmed that one hours worth of continuing professional development points were available for the meeting and all members should therefore sign the appropriate attendance form.

Thereafter Jane Williams confirmed that Rob Pettit (the previous Secretary for the East Midlands Group) had left the law and that Julie Walker of **freeth**cartwright solicitors had been put forward as Secretary and went uncontested. Julie was therefore formally introduced to the Group as Secretary.

Thereafter Jane Williams handed over to Nigel Tomkins, Associate Professor of the College of Law and Consultant with **freeth**cartwright solicitors who gave a presentation on the current state of Conditional Fee Agreements and the uncertainty which still exists.

WHAT IS A CFA

Reference should be made to the Costs Practice Direction of 3 July 2000 which confirms the definition of a Conditional Fee Agreement. This confirms that a Conditional Fee Agreement is an agreement with a person providing advocacy which provides for his fees which are payable only in certain circumstances. A success fee is not required for a Conditional Fee Agreement to be in place.

The most common form of agreement would be an agreement in place for costs together with a success fee or percentage uplift. However, there are also discounted fee agreements which means that only the normal fee is payable if successful.

It was emphasised that any party to an action could run the case on a Conditional Fee Agreement which includes both Defendants and Part 30 Defendants. Those who ran CFA's on a collective basis would ordinarily be practices who had bulk basic work and it was emphasised that there were marketing options and opportunities available in this regard.

THE BAR AND CFA's

It was confirmed that the Bar did not always understand the workings of CFA Agreements and that it will be difficult for Counsel to recover costs under an agreement if he does not comply with the regulations. The only valid agreement which Counsel can enter into is APIL PIBA 5 and if Counsel does not work via a CFA in this format the insurance indemnity will be voided. It was stressed to all Solicitors present that Counsel's fees were not considered to be a disbursement under a CFA and Counsel is therefore required to have an entirely separate agreement in place with the Solicitor. The following documents must be sent to Counsel for consideration:-

1 Conditional Fee Agreement
2 Terms and Conditions relating to that agreement
3 Written confirmation in respect of the insurance policy in place or an explanation as to why insurance is not in place
4 Copy correspondence between the Insurers and Solicitors where there is a multi Defendant action

5 All relevant papers and risk assessment material (ie Expert's reports, previous Counsel's advice if one has formally been involved)
6 The client's confirmed acceptance or the Litigation Friend's confirmed acceptance of the APIL PIBA 5 Agreement being in place
7 Confirmation that no other methods of finance are available or that other methods of finance are available but are not appropriate and therefore the case must run on a CFA
8 Solicitor must also confirm their self-compliance with Regulation 4 of the CFA Regulation 2000 no. 692 and the client is also required to confirm this. Failure to comply with any of the aforementioned invalidates Counsel's agreement.

The continuing obligations of the Instructing Solicitor are to comply with the Civil Procedure Rules and any relevant directions and also to comply with protocols and directions given by the court together with any subsequent variations of the same.

RECOVERABILITY

Recoverability from the Defendants is only in relation to the percentage risk in relation to the case and nothing is provided for subsidy or the cost of funding the case. The CFA will need to reflect any percentage charged in this regard.

The opponent must be notified of a funding agreement. In accordance with the pre-action protocols where a CFA has been entered parties must be advised that the same is in place. Whilst there is nothing within the rules which confirms the point at which notification must be given a Claimant's Solicitor runs a risk that he will not be able to recover a percentage uplift until such time as he is given notice of the agreement.

Section 19 of the Practice Direction deals with the detail which is to be given to Defendants and advises that whilst notification must be given that a percentage uplift is in place there is no need to advise as to the actual percentage until it falls to be assessed. The issue of proceedings is the last point at which to give notice and form N251 must be filed with the court for service on all parties. If the Defendants are running the case by way of a CFA then they will advise with the first court document filed which will usually be the Acknowledgement of Service or the Defence.

There must also be a service of a Notice of Change if the status of the arrangement alters (to be filed within seven days) and if the insurance cover is invalidated at any stage it needs to be notified to all parties even if re-insurance is arranged.

The name of the insurance company and the date of the policy can be given to the Defendants but the court will not assess any additional liability until the case is finished or that particular part of the proceedings has finished. The Order for Costs includes the additional liability and no separate Order is required in this regard.

When is comes to assessment the documents which need to be lodged in order to seek the additional liability are the bill, the Notice of Commencement, and details of the additional liability which includes the costs agreed and the percentage applicable to the Bill of Costs. It has been suggested that when costs negotiations are entered the base costs are agreed at the outset and thereafter you move onto the percentage uplift. You do not disclose the percentage uplift before costs have been agreed as this should be dealt with as a separate issue. A statement of the reasons for the percentage uplift will also need to be filed with the court as will a copy of the insurance certificate including details of the amount of premium paid and the maximum extent of that cover.

FACTORS TAKEN INTO ACCOUNT

Section 11 (4) and Section 11 (5) of Rule 44.5 confirms that the court will consider the amount of any additional liability separately from the base costs. This is an argument which can be reiterated with costs negotiators when providing them with base cost details only before moving on to uplift. The court is to have regard to the facts/circumstances as they reasonably appeared at the time of the risk assessment.

Counsel also has his own risk assessment within the agreement which is a different assessment to the Claimant's Solicitors as it takes place at a different point in time. It is possible that the risk will also be higher as Counsel is ordinarily used when litigation is pending.

Section 11 (8) (2) of the Practice Directions advises that the court has the power to allow a different percentage uplift for different items or different periods of time. This totally contradicts the rules which say that the court cannot exercise hindsight. The contra argument to this would be that if the Defendants defend a case then the Claimant's Solicitors are entitled to increase our uplift from the original assessment which is unlikely to succeed.

When considering the reasonableness of insurance Solicitors must not just look at the premium but also the amount of cover given as we may need to purchase additional slices of cover in due course which make the claim less cost effective. Solicitors must look at protection for the whole case. The earlier insurance is taken out the cheaper the premiums tend to be and it is therefore better to insure at the outset.

Dealing with the issue of Legal Expense Insurers and the use of Panel Solicitors, they are only able to dictate a Panel Solicitor deal with the case pre-issue. There is a suggestion that this is an infringement of the client's right to choose and it is hoped that the courts will agree that the right to refuse Legal Expense Insurance in these circumstances and go into a Conditional Fee Agreement in order to choose representatives is appropriate.

In considering the actual risk assessment, liability, causation and quantum must all be taken into account. Every head of damage is effectively a risk particularly with regard to failing to beat a Part 36 offer. Don't be afraid to spend time investigating a case before signing up to a CFA.

In relation to the recoverability of insurance premiums the government believe that premiums taken out on policies before proceedings are issued are recoverable and the idea is to look at the intention behind the legislation. A Civil Judge in Chester County Court recently held that an insurance premium could be recovered in pre-issue cases on the basis that the definition of proceedings includes the contemplation of proceedings. It is likely that this matter will be taken to the Court of Appeal on an expedited basis.

OTHER MATTERS

Following the conclusion of the presentation Jane Williams reminded all members of the APIL Conference taking place in Newport on 26/27 April 2001 and confirmed that the proposed speaker for the June meeting would be Nigel Chapman who is the Coroner for Nottingham who would be discussing the role of the Coroner and conduct at Inquests.

No further matters to report.