RECENT CFA AND OTHER COSTS DEVELOPMENTS

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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.

ATE DISCLOSURE

- *Barr v Biffa Waste Services Limited & QBE Insurance (Europe) Limited [2009] EWHC 1033 (TCC)*
  This case confirmed the decision in *Henry v BBC [2005] EWHC 2503 (QB)* that the ATE policy is discloseable, but not the premium.

- THE END