



APIL EXETER FORUM

- COSTS ISSUES

- GARY BARKER

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- COSTS AND FUNDING SIG



JACKSON REVIEW

- Success Fee and ATE not recoverable.
- Cap on Success Fee - 25% of damages, (excluding future care or losses).
- One way costs shifting.
- Fixed fees in Fast Track.

JACKSON REVIEW

- RTA – Fast Track Fixed Fees
- Pre Allocation £1,750 + 20%
- Pre Listing £2,450 + 20%
- Pre Trial £3,200 + 20%



USE OF CFA

- *Buildability Ltd v O'Donnell Developments Ltd [2009] EWHC 3196 (TCC)*
- The Costs Practice Direction (paragraph 11.4 - 11.9) gave guidance where there was a conditional fee agreement.
- On the evidence, it was wholly inappropriate and unreasonable for any success fee to be allowed in the instant proceedings.



USE OF CFA

- *Sousa v London Borough of Waltham Forest [2010] EW Misc 1 (EWCC) (Leeds)*
- Under CPR 44.4 it must be reasonable for the Claimant to enter into a Conditional Fee Agreement and to incur the potential liability of a success fee.



USE OF CFA

- *Sousa v London Borough of Waltham Forest* [2010] EW Misc 1 (EWCC) (Leeds)
- Under paragraph 11.8 of the Practice Direction the Court is bound to take into account what other methods of funding the costs are available to the Claimant.

USE OF CFA

- *Sousa v London Borough of Waltham Forest [2010] EW Misc 1 (EWCC) (Leeds)*
- It is however not seriously arguable that a Union member is acting unreasonably in taking advantage of the funding provided by the Union under the CFA.



SUCCESS FEES

- *Success Fees in publication cases.*
- Statutory Instrument placed before Parliament on 8 March 2010 to limit success fees in publication cases to a maximum of 10%.



SUCCESS FEES

- *The Damages-Based Agreements Regulations 2010*
- Statutory Instrument coming into force on 1 April to limit contingency fees in employment cases to a maximum of 35%.

SUCCESS FEES

- *Oliver v Whipps Cross University Hospital NHS Trust [2009] EWHC 1104 (QB)*
- A solicitor is entitled to enter an agreement at an early stage. It follows inevitably from that entitlement that he will be in a position of ignorance compared with that when he has the medical records and expert advice.



SUCCESS FEES

- *Oliver v Whipps Cross University Hospital NHS Trust [2009] EWHC 1104 (QB)*
- But he is likely to be experienced in the field and he will have some knowledge of the claim. His 'ignorance' is relative. He may have taken on a winner: he does not know. But equally he may have taken on a case where greater knowledge would show the chances were well below 50 percent.



SUCCESS FEES

- *McCarthy v Essex Rivers Healthcare NHS Trust [2009] EWHC QB 13 November*
- A court would look with care at what was agreed in a conditional fee agreement when considering the question of reasonableness of an uplift, and it was trite law that following CPR 44.4(2) the court would resolve any doubts in favour of the paying party.



SUCCESS FEES

- *McCarthy v Essex Rivers Healthcare NHS Trust [2009] EWHC QB 13 November*
- In the instant case the master correctly accepted the 50 per cent assessment of risk at the time that the agreement was entered into, but he did so expressly on the basis that so little was known about the merits of the claim at that time.



SUCCESS FEES

- *McCarthy v Essex Rivers Healthcare NHS Trust [2009] EWHC QB 13 November*
- The solicitors would, as a matter of high probability, retain claims which would fall into a range of cases with something like a 50 to 80 per cent chance of success, all of which would still have a 100 per cent uplift.



SUCCESS FEES

- *McCarthy v Essex Rivers Healthcare NHS Trust [2009] EWHC QB 13 November*
- Given that the termination clause could be used judiciously, it was apparent that the likelihood was that in assessing what success fee would be payable, a higher uplift would be applied to longer-running winners in order to pay for shorter-running losers.



ATE PREMIUM

*Burgess v J Breheny Contracts Ltd [2009]
EWHC 90131 (Costs)*

- Whilst the “deconstruction approach” took place in *Claims Direct Test Cases* the Court of Appeal and the SCCO respectively stated that such an approach should only take place in exceptional cases.



ATE PREMIUM

*Burgess v J Breheny Contracts Ltd [2009]
EWHC 90131 (Costs)*

- There was no indication whatsoever that this case was exceptional; in fact it was remarkably unexceptional. Accordingly, there was no requirement to deconstruct the premium, assess any commission element



ATE PREMIUM

*Burgess v J Breheny Contracts Ltd [2009]
EWHC 90131 (Costs)*

- and the Court could assess the whole of the premium in “...*broad brush terms*...” based upon its own knowledge and experience of such matters.



COSTS ASSESSMENT

- *O'Beirne v Hudson* [2010] EWCA Civ 52
- In a case suitable for allocation to the small claims track, if an order for costs is made by consent, the court assessing those costs may have regard to the rules applicable to small claims.



COSTS ASSESSMENT

- *Drew v Whitbread PLC* [2010] EWCA Civ 53
- In a case allocated to the multi-track, a refusal by the trial court to make a special order because of exaggeration does not prevent the costs judge assessing costs having regard to the costs appropriate to a case allocated to the fast track.



INTEREST ON COSTS

*Hanley v Smith & MIB [2009] EWHC
90144*

- The entitlement to be paid interest arose from the Judgment not from the contract between the solicitors and the client.
- The fact that a party had entered into a CFA did not justify a departure from the general principle that interest on costs runs from the date of Judgment.



NOTIFICATION

- Pre October 2009 the Pre Action Practice Direction states that where a proposed claimant has entered into the CFA notice of this *should* be given to the proposed defendant.



NOTIFICATION

- Post October 2009 the Pre Action Practice Direction states that where a proposed claimant has entered into the CFA notice of this *must* be given to the proposed defendant.



COSTS DISCLOSURE

*Hutchings v British Transport Police [2006]
EWHC 900064 (Costs)*

It is legitimate for Defendants to enquire about funding, even for cases to post November 2005 cases, by way of Part 18 questions. However, those questions are limited to:

1. Does the Claimant have insurance?
2. With whom?
3. Does the Claimant have any LEI?



COSTS DISCLOSURE

*Findlay v Cantor Index [2008] EWHC
90116 (Costs)*

The CFA in question had been signed after 31 October 2005 and the CFA Regulations (2000) did not apply to it.

Accordingly there was no obligation on the claimant to disclose the risk assessment under Costs Practice Direction Section 32.5(1)(b).

COSTS DISCLOSURE

- From 6 April - Cost PD 32.5(1)(c)
- where the conditional fee agreement was entered into on or after 1st November 2005 (except in cases where the percentage increase is fixed by CPR Part 45, sections II to V), either a statement of the reasons for the percentage increase or a copy of the risk assessment prepared at the time that the conditional fee agreement was entered into;



COSTS DISCLOSURE

- Cost PD 32.5(1)(d)
- if the conditional fee agreement is not disclosed (and the Court of Appeal has indicated that it should be the usual practice for a conditional fee agreement, redacted where appropriate, to be disclosed for the purpose of costs proceedings in which a success fee is claimed),



COSTS DISCLOSURE

- Cost PD 32.5(1)(d)
- a statement setting out the following information contained in the conditional fee agreement so as to enable the paying party and the court to determine the level of risk undertaken by the solicitor—



COSTS DISCLOSURE

- (i) the definition of ‘win’ and, if applicable, ‘lose’;
- (ii) details of the receiving party’s liability to pay costs if that party wins or loses; and
- (iii) details of the receiving party’s liability to pay costs if that party fails to obtain a judgment more advantageous than a Part 36 offer.

COST OF FUNDING

- *Bollito v Aviva [2009] EWHC 90136 (Costs)*
I have a discretion in these matters and there was no hard and fast rule laid down by a court which is binding on me.
- I was told that at a rough estimate the costs of funding in this case came to about £5,000.

COST OF FUNDING

- *Bollito v Aviva [2009] EWHC 90136 (Costs)*

It seemed to me that even in a bill of this size this was not a negligible sum and that in my discretion it would be right to award those costs to the Claimant which is what I did.

EXAGGERATION

- *Ul Haq v Shah [2008] EWHC 1896 (QB)*
- Exercise of the court's power to award indemnity costs against Mr Ul-Haq and Mrs Parveen deprives them of any practical benefit from the bringing of proceedings, and thus effectively forfeits their genuine claims to damages.
- This outcome justly reflects the seriousness of their breaches of the overriding objective, and there is no additional need to strike out their claims.



EXAGGERATION

- *Widlake v BAA Ltd [2009] EWCA Civ 1256*
- At trial the judge found that W had deliberately concealed her previous medical history from the experts in the hope of increasing her damages.
- Here the starting point was that W should get her costs because she beat the Part 36 payment and was the successful party.



EXAGGERATION

- *Widlake v BAA Ltd [2009] EWCA Civ 1256*
- However pursuing her claim in the exaggerated way she did had the result that this became heavily contested litigation whereas it might have settled. Her dishonesty had to be penalised. Her failure to negotiate had also to be recognised.
- Balancing the factors the right order was no order for costs.



- THE END