DEVELOPMENTS IN CFAs SINCE GARRETT & MYATT

GARY BARKER

CONDITIONAL FEES

- *Garrett v Halton Borough Council; Myatt v National Coal Board [2006] EWCA Civ 1017*
- Unenforceable CFA – failure to adequately check for BTE

  There was no basis for interpreting the statutory provisions relating to conditional fee agreements as requiring a court to hold that, however egregious a breach of the statutory requirements, it was not material if it had not in fact caused the client to suffer any loss.

CONDITIONAL FEES

- *Garrett v Halton Borough Council; Myatt v National Coal Board [2006] EWCA Civ 1017*
- Costs order
- The fair and just order was to order the claimants' solicitors to pay 50% of the defendant's costs of the appeal.

CONDITIONAL FEES

- *Garrett v Halton Borough Council; Myatt v National Coal Board [2006] EWCA Civ 1017*
- In arriving at that percentage, account had been taken of the fact the claimants' had had a real financial interest in the success of the appeal, with regard to the disbursements, and that the solicitors had not been given warning until the appeals had been dismissed that an application for a costs order might made against them.

CONDITIONAL FEES

Barlow v Perks [2007] EWHC 90087 (Costs)

- Transfer of case from firm funded by BTE to firm not on BTE panel. Client not given full information about situation when entering into CFA. CFA invalid.
- (Insurance Companies (Legal Expenses and Insurance) Regulations 1990 Reg 6 not used).

CONDITIONAL FEES

Fenton v Holmes [2007] EWHC CH 6 June

- The policy behind demanding that a party to a CFA had signed the contractual documentation comprising the agreement was clearly rooted in concerns relating both to consumer protection and the proper administration of justice. Accordingly, the CFA at issue in the instant case was unenforceable.

CONDITIONAL FEES

Kashmiri v Ejaz [2007] EWHC 90074 (Costs)

In *Myatt* the Court of Appeal emphasised that what is reasonably required of a solicitor depends on all the circumstances of the case.

CONDITIONAL FEES

Kashmiri v Ejaz [2007] EWHC 90074 (Costs)

In this case there are a number of reasons why the steps that should have been taken in *Myatt* do not necessarily have to have been followed in this case. In *Myatt* the claims were being made by ex-miners and their solicitors were speaking to the claimants over the telephone with a checklist in front of them.

In *Myatt* the Court of Appeal emphasised that what is reasonably required of a solicitor depends on all the circumstances of the case.

CONDITIONAL FEES

Kashmiri v Ejaz [2007] EWHC 90074 (Costs)

In this particular case the defendants were facing what proved to be an unmeritorious claim for damages in respect of a dilapidations claim relating to their former occupancy of business premises which they had vacated more than two years earlier. Consequently one could not readily assume that BTE insurance cover would be available to the defendants through credit cards, motor insurance or household policies.

CONDITIONAL FEES

Galitzky v Vizards Wyeth [2007] EWHC 90083 (Costs)

The Claimant was elderly and English was not his first language. The Claimant was "not the brightest client but was not stupid either".

The solicitor specifically asked him whether he had legal expenses insurance and to check the household policy. Requiring a translation or requiring the policy to be checked by a Belgian lawyer would be unreasonable.

CONDITIONAL FEES

- *Cochrane v Chauffeurs [2007] Central London CC 22 June*
- Claim against a bus company. Claimant's solicitors did not ask the bus company whether they had LEI insurance that would cover a claim against them by a passenger. This was a breach of the Regulations and the CFA was unenforceable.

CONDITIONAL FEES

- *Dole v ECT Recycling Ltd [2007] EWHC 90086 (Costs)*
- Passenger on bus. LEI of bus company not used. Held it was not common knowledge in July 2004 that bus companies commonly held LEI for passengers.
- In Cochrane it was decided that in November 2004 it was common knowledge that bus companies held LEI for their passengers.

CONDITIONAL FEES

- *Jones v Wrexham BC*
- *In Court of Appeal – 22 October 2007*
- This case concerns the definition of a "CFA Lite" and compliance with the CFA Regulations.

CONDITIONAL FEES

- *Gloucester CC v Evans*
- *In Court of Appeal - January 2008*
- A case which turns on the interpretation of s58(4) Courts and Legal Services Act 1990.
- Maximum percentage allowable where discounted fees payable if claim fails.

SUCCESS FEE

- *Spiralstem Ltd v Marks & Spencer PLC [2007] EWHC 90084 (Costs)*
- The success fee should not be modified to take into account the change in risk over the life of the case. Neither should it be reduced because there will be a split trial which meant that for a significant part of the case there was no risk on liability.

FIXED FEES

- *Butt v Nizami [2006] EWHC 159 (QB)*
- In cases falling under Section II of CPR Pt 45 the receiving party did not have to demonstrate that there was a valid retainer between the solicitor and client, merely that the conditions laid down under the Rules had been complied with.

FIXED FEES

- *Wetzel v KBC Fidea [2007] EWHC 90079 (Costs)*
- Argued that Nizami only applies to the question of whether the costs were incurred, i.e. the indemnity principle and that Nizami does not exclude challenges as to the reasonableness of the costs claimed. – Rejected.

FIXED FEES

- *Kilby v Gawith*
- *In Court of Appeal – 20 November 2007*
- This case raised similar issues to Wetzel v Fidea and reached the same result: the fixed success fee payable in cases to which CPR Part 45 Section II applies remains payable even where the Claimant may have had Before the Event insurance cover for the claim.

ATE INSURANCE

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

Whilst *Garrett* clearly established basic principles, all the cases depend on their own particular facts. The principle set out in *Garrett* was that financial interests had to be disclosed. Not all arrangements are the same.

ATE INSURANCE

Bevan v Power Panels Electrical Systems Limited [2007] EWHC 90073 (Costs)

Regulation 4(2)(5) requires that the explanation as to whether the solicitor has an interest in recommending the policy should be given in writing as well as orally. It is very difficult to see why Parliament should have expressly required this written explanation if a written explanation which stated the position incorrectly could be put right by an oral explanation.

ATE INSURANCE

Bevan v Power Panels Electrical Systems Limited [2007] EWHC 90073 (Costs)

For Regulation 4(2)(c) the question “Do you or your family have any insurance” was not sufficient. The question most likely to produce a correct answer would have added words which focussed on the sorts of documents there might have been such as credit cards, motor insurance or household insurance and whether the client or any of his family had trade union membership.

ATE INSURANCE

King v Halton Borough Council [2006] Chester CC 14 November

The CFA stated that the solicitors had no interest in recommending the insurance policy. The court stated that *Garrett* had created a rebuttable presumption that membership of a panel created an interest in recommending the policy. However, in this case the panel member did not have to use the scheme ATE policy. (CBUK scheme)

ATE INSURANCE

Andrews v Harrison Taylor Scaffolding [2007] EWHC 9 February SCCO

CFA stated no interest in recommending policy. The scheme obliged the solicitors to use the policy but there was no evidence that the solicitors would have lost their membership of the scheme if they had recommended other policies. However, work from this panel constituted 95% of the work of the firm. The CFA was unenforceable. (Ashley Ainsworth scheme)

ATE INSURANCE

McFadyn v Liverpool City Council [2007] EWHC 9 May SCCO

Solicitors stated no interest. Solicitors member of the ALP scheme, but this case not referred to them by ALP. Solicitors recommended the ALP ATE. If the solicitors did fewer that 75 cases in a year they had to pay a fee of £1000. The court held that this meant that they had an interest in recommending the policy and therefore the CFA was unenforceable.

ATE INSURANCE

Myers v Bonnington [2007] EWHC 6 July SCCO

Solicitors stated that they had no interest in recommending the policy. Members of the ALP scheme but only used that policy in 15% of cases despite obligation under the scheme to use the policy in all eligible claims.

The court held that there was an obligation to disclose an interest but it was de minimis. Also the claimant was 80 year old. CFA enforceable.

PUTTING IT RIGHT?

Morrish v Noone [2002] Leeds CC 4 November

Defendant's name and date of accident omitted from CFA to be completed later when information confirmed. Not ever completed. Claimant's solicitors issued Part 8 application for rectification. Heard at same time as assessment and granted. CFA enforceable.

PUTTING IT RIGHT?

Preece v Caerphilly [2007] Cardiff CC 15 August

Claimant's solicitors failed to sign CFA. Breach of regulations. CFA unenforceable. (Rectification not attempted in this case)

PUTTING IT RIGHT?

- *Oyston v Royal Bank of Scotland Plc [2006] EWHC (SCCO) 16 May*
- A CFA that provided for a 100 per cent success fee and payment of a bonus if the client recovered damages in excess of a certain amount was in clear breach of the 1990 Act. A subsequent deed of variation was ineffective to rectify the situation and severance would not accord with either the statutory framework or with the correct approach to public policy.

PUTTING IT RIGHT?

- *Holmes v Alfred McAlpine Homes (Yorkshire) Ltd [2006] EWHC 110 (QB)* The CFA was signed on 25 August but dated 15 July and included a claim for a success fee of 25% of basic costs. The backdating of documents should not be done. If it was agreed that a written agreement should apply to work done before it was entered into, it should be correctly dated with the date on which it was signed and expressed to have retrospective effect.

PUTTING IT RIGHT?

- *King v Telegraph Group Ltd [2005] EWHC 90015 (Costs)*
- There is no doubt that, as between the Claimant's solicitors and their client, the CFA may be backdated. The client by signing the CFA is ratifying what has gone before. There seems no doubt therefore that the Claimant is entitled to recover base costs from the date when he instructed his solicitors until the signing of the CFA.

PUTTING IT RIGHT?

- *King v Telegraph Group Ltd [2005] EWHC 90015 (Costs)* Although there is no prohibition in the legislation against backdating a success fee, such backdating seems to me to fly in the face of the CFA Regulations and the CPR. The solicitors are placed under a strict duty to explain the position to their client, which they did not do until shortly before the CFA was signed.

PUTTING IT RIGHT?

- *King v Telegraph Group Ltd [2005] EWHC 90015 (Costs)*
- The solicitors do not assume any risks under the CFA until it is signed.
- The solicitors are under no duty to give notice of funding until the CFA has been signed. It is of great importance that an opposing party should be aware of any additional liability as early as possible.

PUTTING IT RIGHT?

Kitchen v Burwell Reed [2005] EWHC 3 August QB

Case started with private retainer but two weeks later claimant's solicitors entered into CCFA with claimant's Trade Union. The claimant was not told of the new arrangement for a year. The court held that such a variation was valid. However, if the variation had been to remedy a defect in the CFA, that may not have been to the claimant's advantage and may not have been valid.

PUTTING IT RIGHT?

Brierley v Prescott [2006] EWHC 31 March SCCO

CFA incorrectly identified the defendant. The defendant challenged the validity of the retainer for this action. Claimant then entered into a new, correct, CFA. The judge, obiter, said that a CFA could not be varied after the proceedings fr public policy reasons. *Arkin v Borchard Lines Ltd [2001]* said that it was contrary to allow CFAs to provide for costs after the case was won.

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.

COSTS DISCLOSURE

Pre November 2005: CFA

Hollins v Russell [2003] EWCA

We consider that it should become normal practice for a CFA to be disclosed for the purpose of costs proceedings in which a success fee is claimed. If the CFA contains confidential information relating to other proceedings, it may be suitably redacted before disclosure takes place.

COSTS DISCLOSURE

Pre November 2005: CFA

Vinayak v Lovegrove & Eliot [2007] EWHC 10 July SCCO

The court may hear the application any time after Detailed Assessment hearing applied for.

Court has no power to order disclosure. It can only order the Claimant to elect to disclose or produce evidence in another form.

COSTS DISCLOSURE

Pre November 2005: Attendance notes/correspondence

Hollins v Russell [2003] EWCA

Attendance notes and other correspondence should not ordinarily be disclosed, but the judge conducting the assessment may require the disclosure of material of this kind if a genuine issue is raised.

COSTS DISCLOSURE

Pre November 2005: Attendance notes/correspondence

Hollins v Russell [2003] EWCA

A genuine issue is one in which there is a real chance that the CFA is unenforceable as a result of failure to satisfy the applicable conditions.

COSTS DISCLOSURE

Pre November 2005: Attendance notes/correspondence

London & Cambridge Properties v Bradbury [2007] CC 2 February

The Claimant's bill included an 18 minute attendance advising about BTE enquiries. Defendant sought disclosure of the relevant attendance note, arguing that 18 minutes was not long enough to carry out the Regulation 4 advice.

COSTS DISCLOSURE

Pre November 2005: Attendance notes/correspondence

London & Cambridge Properties v Bradbury [2007] CC 2 February

The court held that, following *Hollins v Russell* that this did not amount to a genuine issue and refused disclosure. Note, however that PD 47 para 40.14 not referred to in this case.

COSTS DISCLOSURE NOW

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?

- THE END