APIL

EAST MIDLANDS REGIONAL MEETING

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STRATHDON HOTEL
NOTTINGHAM

"COSTS UPDATE AFTER MYATT, GARRETT ETC"

BY

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1. CFAs PRE-1st NOVEMBER 2005

1.1 It is important to remember that the cases of ***Myatt v NCB*** and ***Garrett v Halton Borough Council*** – very important though they are – do not apply to all of a solicitors' work in progress.

1.2 They do not apply to

(i) cases conducted under a Collective Conditional Fee Agreement (see Regulation 7 of the CCFA Regulations 2000)

(ii) CFA Lites made pursuant to the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003

(iii) the profit costs incurred in a predictable costs case (see ***Nizami v Butt***)

(iv) to CFAs entered into on or after 1st November 2005

1.3 They do however apply to all CFA "heavy" cases where the CFA was entered into on or before 31st October 2005

1.4 For reasons which will become apparent the Court of Appeal themselves thought that the impact of their decision in ***Garrett*** would be considerably ameliorated for CFAs entered into on or after 14th January 2005

2 Disclosure of Costs Material

2.1 Note this from paragraph 79 of the judgment in ***Myatt***

> "What we have said… should not be interpreted as giving encouragement to Defendants to embark on fishing expeditions in the hope that, if they ask a sufficient number of questions, they may be able to show that the Claimant's solicitor did not discharge his Regulation 4(2)(c) duty. We refer to the salutary words of this Court in ***Hollins v Russell*** at paragraph 81 that the Court should not require further disclosure unless there is a genuine issue as to whether there has been compliance with Regulation 4".

2.2 In ***Hollins v Russell*** at paragraph 81 the Court of Appeal said this

> "The Appellants in the present cases also seek disclosure of the attendance notes prepared by the receiving party's solicitors as showing compliance with Regulation 4. We do not consider these should ordinarily be disclosed. We consider that the Costs Judge should not require these to be disclosed unless there is a genuine issue as to whether there has been compliance with Regulation 4. The measure of explanation given to the client is largely a matter of

fact and we consider that it is, therefore, appropriate that the paying party should have to rebut the presumption arising from the fact that the receiving party's solicitor, an Officer of the Court, has signed the certificate of accuracy".

2.3 These remarks hark back to ***Bailey v IBC Vehicles*** in which Lord Justice Henry said

> "[The then Order 62 Rule 29(7)(c)(iii)] requires the solicitor who brings the proceedings for [detailed assessment] to sign the Bill of Costs. In so signing he certifies that the contents of the Bill are correct. That signature is no empty formality. …The Court can (and should unless there is evidence to the contrary) assume that a signature to the Bill of Costs shows that the indemnity principle has not been offended"

2.4 Disclosure of reams of costs information, file notes and suchlike or indeed of whole operating manuals – in the belief that you are fireproof – seems to me to be the worst possible course of action to take when faced with extensive requests for disclosure of costs material. Questions from costs muppets seeking this should be met with the quotes from the cases that I have outlined above. It could be said that had solicitors generally taken this attitude over the whole length of the sorry saga of CFAs then many of the cases with which we are concerned could have been avoided.

2.5 The key remaining question therefore is "Should you produce your CFA and if so at what stage?"

2.6 It may come as a surprise, to some, that there is no authority that says that you are obliged to produce your CFA. What the Court of Appeal said about this in ***Hollins*** is as follows

> "As we have explained above, we consider that the Costs Judge has ample powers which he should normally exercise to put the receiving party to her election as to whether to produce a copy of the CFA to the paying party".
> "We conclude, therefore, that if in costs proceedings, a party seeks to rely on the CFA, as a matter of fairness she should ordinarily be put to her election under the ***Pamplin*** procedure".

2.7 The ***Pamplin*** procedure is a reference to the case of ***Pamplin v Express Newspapers***.

2.8 In ***Hollins*** the Court of Appeal went on to say

"Although the procedure envisages that the Costs Judge will put a party to her election as to the disclosure of CFA… we hope that receiving parties will disclose the CFAs without more ado".

2.9 Therefore the first question one must ask is "Does one produce a copy of the CFA or does one use the ***Pamplin*** election to prove the retainer by other means?" It seems to me that one perfectly feasible course is to produce a redacted version of the CFA (front page and signatures only) and indicate to the costs muppets that, should the matter proceed to detailed assessment, this redacted CFA will be supported by a witness statement – the Statement of Truth from yourself – reciting how the CFA was prepared and executed and that this will be produced to the Court only. Such a witness statement would deal with the question of how the CFA was prepared and executed and – in a BTE enquiry situation – the questions that were asked of the client along the lines of the considerations in ***Myatt***.

2.10 This, our first line of defence, is it seems to me by far and away our best line of defence. As the cases demonstrate the CFA regime pre 01/11/05 is an entirely draconian regime. It is said, anecdotally, that insurers still have dozens or scores of yet further technical points to take.

2.11 It seems to me that there is no hope of government intervention in the issues to be described. The wealth or poverty of solicitors' practices is not perceived to be an issue for government intervention. The Civil Justice Council will, it seems to me, be highly unlikely to be able to mediate such matters as there is no incentive for the insurance industry to enter into any such mediation. Petitions for permission to appeal to the House of Lords, in ***Garrett*** and ***Myatt,*** may or may not be successful. Even if successful – whether in these cases or in another case yet to be decided – the views of the House of Lords remain completely unknown. It is "self help time" people and as it seems to me there is no reliable hope of intervention on any wider level.

3 **The Relevant Regulations – CFA Regs 2000**

3.1 The relevant regulations for ***Myatt*** and ***Garrett*** cases were Regulation 4(2)(c) and (e) as follows

> "4(1) before a Conditional Fee Agreement is made the legal representative must –
>
> (a) inform the client about the following matters…
>
> (2) those matters are…

(b) whether the legal representative considers that the client's risk of incurring liability for costs in respect of the proceedings to which the agreement relates is insured against under an existing contract of insurance and
(c) whether other methods of financing those costs are available, and if so, how they apply to the client and the proceedings in question, and
(d) whether the legal representative considers that any particular method or methods of financing any or all of those costs is appropriate, and if he considers that a contract of insurance is appropriate or recommends a particular such contract –

(i) his reasons for doing so, and
(ii) whether he has an interest in doing so"

4 **Myatt v NCB**

4.1 ***Myatt*** is hopefully one of the closing chapters in the great "BTE crusade" the Defendants are on. It is the latest in a long line of cases on this including ***Sarwar v Alam, Culshaw v Goodliffe, Jackson v Tierney, Pratt v Bull, Coulson v Griffiths and Samonini v London General Transport***.

4.2 ***Pratt v Bull*** (part of ***Hollins v Russell*** in the Court of Appeal) probably remains good law. In ***Pratt*** the Claimant was an 80 year old woman who gave instructions to a solicitor whilst she was in hospital having been severely injured. The Court of Appeal said at paragraph 138 of their judgment

> "There are limits as to what can reasonably be expected in the interchange between solicitor and client in circumstances such as these. It would be ridiculous to expect a solicitor dealing with a seriously ill old woman in hospital to delay making a CFA whilst her home insurance policy was found and checked".

4.3 In ***Coulson*** Master Campbell (Supreme Court Costs Office) held the CFA was enforceable where the client had no BTE and the solicitor did not ask the client for copies of her policies. He took the view that if there was no BTE then nothing would have been provided to the solicitor if they had asked the question. He held that whilst technically there was a breach that the breach was not material on the ***Hollins*** test and therefore the CFA was enforceable.

4.4 It seems to me that ***Coulson v Griffiths*** is now entirely overruled by ***Myatt***.

4.5 In ***Myatt*** four Claimants brought industrial deafness claims against ***NCB***. Each bought an ATE policy for £1,522.50 and claimed 100% success fee. All of the cases settled very quickly without the need for proceedings for amounts I think that were between £3,000 and £5,000 in relation to damages in each case. The Claimants solicitors produced full details of their systems. Although it seems to me (entirely personally) that the solicitors in that case had asked the question many times and in lots of different ways (some wider than others) the Court of Appeal proceeded on the basis that the client had been asked whether he had 'legal expenses insurance in respect of the contemplated claim i.e. the claim for noise induced hearing loss against their former employer the National Coal Board'.

4.6 The Court of Appeal identified 3 different approaches

(i) "One approach is that the solicitor should ask the client whether he has any home, credit card or motor insurance and whether he is a member of a Trade Union. If the answer is "yes" then the solicitor should ask the client to send in the policy to enable him to consider whether the risk of costs is covered by a BTE". (the first question)

(ii) The second approach is for the solicitor to ask the client whether he has any legal expenses insurance at all. If the answer is "yes" or "I do not know" then the solicitor should ask to see the policy. If the answer is no then no further steps should be taken. (the second question)

(iii) "The third possible approach is that the solicitor should ask the client whether he has any legal expenses insurance which will cover the costs in respect of the proposed claim. The solicitor should ask to see the policy only if the client answers that he does not know or is not sure". (the third question)

4.7 Because the Claimants solicitors in ***Myatt*** had (so the Court of Appeal decided) asked the third question the Court of Appeal held that they had asked the wrong question. "They should not have asked these ex-miners to decide whether they had BTEs which would cover their risks as to costs in respect of their claims. Since they asked the wrong question, they did not take reasonable steps to ascertain the true insurance position so as to enable them to inform their clients whether they considered the risk was already insured". (paragraph 62 of the judgment)

4.8 They continued (at paragraph 63)

> "It follows that in our view the Master was right to hold that [the Claimant's solicitors] failed to inform the four Claimants whether they considered the risks of incurring liability for costs

in respect of their proposed claims was insured under a BTE. *Although none of the four had BTE* which would cover his claim, for reasons explained…above we would hold that there was a material breach of Regulation 4(2)(c)".

4.9 Note that here the Court of Appeal were making reference to their decision that, for the breach to be material, it did not matter whether or not the client actually had BTE. It mattered not that the client had suffered no loss or prejudice. The materiality or otherwise of a breach did not require consideration of actual detriment. This was (said the Court of Appeal at paragraph 30 of their judgment) because "Parliament considered that the need to safeguard the interests of clients was so important that it should be secured by providing that, if any of the conditions were not satisfied, the CFA would not be enforceable and the solicitor would not be paid. To use the words of Lord Nicholls again, this is an approach of punishing solicitors pour encourager les autres. Such a policy is tough, but it is not irrational".

4.10 The Court of Appeal went on to give guidance as to what solicitors should do in the BTE search. They backed off a little (at paragraph 70) from the standard ***Sarwar*** practice. They said

> "In particular, the statement at paragraph 45 of ***Sarwar*** that a solicitor should normally invite a client to bring to the first interview any relevant policy should be treated with considerable caution. It has no application in high volume low value litigation conducted by solicitors on referral by claims management companies".

4.11 Then at paragraphs 72-76 the Court of Appeal set out a *non-exhaustive* list of a number of relevant factors. They emphasised that what is reasonably required of a solicitor depends on all the circumstances of a case. The factors they listed were however as follows:

(i) First, the nature of the client. If the client is evidently intelligent and has a real knowledge and understanding of insurance matters it may be reasonable for the solicitor to ask him the first question, second question and third question. Mr Myatt did not fall into such a category and few litigants would.

(ii) The circumstances in which the solicitor was instructed may be relevant to the nature of the enquiries that it is reasonable to expect the solicitor to undertake. They referred to ***Pratt v Bull*** (the 80 year old woman in hospital).

(iii) The nature of the claim may be relevant. If the claim is one in respect of which it is unlikely that the standard

insurance policies would provide legal expenses cover this may be a further reason why it may be reasonable for a solicitor to take fewer steps to ascertain the position than might otherwise be the case.

(iv) The cost of the ATE premium. In the Court's judgment this was as relevant to a breach of 4(2)(c) as it was to Part 44 reasonableness.

(v) If the Claimant had been referred to solicitors who are on a panel it may be relevant that the referring body has already investigated the question of the availability of BTE. Whether it is reasonable to rely on any conclusion already reached would be a matter on which the panel solicitor must exercise his own judgment.

4.12 The result in ***Myatt*** however was that the CFA was unenforceable: no costs at all.

5 **Garrett v Halton Borough Council**

5.1 In ***Garrett*** the Claimant's solicitors were on the panel of a claims management company called Ashley Ainsworth. CFA entered into was with a success fee of 70%. Claim settled for £3,800. All costs disallowed on detailed assessment because in breach of Regulation 4(2)(e)(ii) the solicitors had recommended an ATE policy without informing her as to whether they had an interest in doing so. It had been explained to her that they were on Ashley Ainsworth's panel but the CFA stated that they did not have any interest in recommending the particular After the Event that they had recommended.

5.2 The Court below (His Honour Judge Stewart Liverpool County Court 5th April 2005) had held that the panel membership in those circumstances amounted to an interest which should be declared in that it was a condition of membership of the panel that policies should be used and failure to use the policy would in all probability lead to the termination of the panel membership. "Although this was not a direct financial interest, it would be a perfectly understandable financial incentive, if by not recommending a particular policy, a solicitor was taken off a panel of solicitors where there was a not insubstantial amount of work fed through to them because they were members of that panel. In short this was a discloseable interest".

5.3 It was not necessary to examine whether the policy was good, bad or indifferent. The question was not whether the client would have been better or worse off with a different policy. Rather the provision was a consumer protection provision.

5.4 The Court of Appeal agreed entirely with the Judge below. They cited a Lord Chancellor's Consultation Paper February 2000 which talked about panel membership being a possible interest in recommending a policy.

5.5 The Court of Appeal held that merely telling the client they were on the particular claims farmers panel was not the same as telling the client that they had an interest [i.e. future receipt of cases from the same claims farmer] in recommending that policy.

5.6 As an aside, it seems that the problem in ***Garrett*** arose from perhaps an incomplete or inadequate answer to the Defendants Points of Dispute. Although Replies to Points of Dispute are, strictly speaking, optional it is my firm view that full and detailed Replies to Points of Dispute must be served in each and every case. The finding of fact in ***Garrett***, by the original Deputy District Judge was that there had been a lack of response by the Claimants to the Point of Dispute that failure to recommend the policy would have led to termination of panel membership. Had a different finding been made before the Deputy District Judge then the Court of Appeal could not have disallowed all fees (although oddly disbursements would be allowed if the client has paid them as they go along and even more oddly the ATE premium was allowed).

5.7 The question which remains extraordinarily difficult to answer is "How far reaching is the ***Garrett*** decision?" It seems to me that it inevitably applies if a claims referral scheme comes with any tied or compulsory insurance product but that is not an end to the matter. So far as the Accident Line scheme is concerned it seems inevitable that, because (as I understand it) of the exclusivity clause in the Accident Line scheme that cases referred by Accident Line to solicitors who then take out the ATE recommended on an exclusive basis for those referrals, that they are inevitably caught by the ***Garrett*** decision. However it is at least arguable I think that cases going the other way (under an exclusivity deal) might also be caught by ***Garrett.*** I think it also applies to any of the old Accident Group cases. The real issue for the future will be the fear or uncertainty about the breadth of interpretation of "interest" and what is or is not a "genuine compliance issue".

6 **<u>14th January 2005</u>**

6.1 We are all of course familiar with this date!

6.2 It was on this date that the Solicitors Financial Services (Conduct of Business) Rules 2001 were amended by the Law Society. The regs are made under the Financial Services and Markets Act 2000.

6.3 It is these regs that require "Demands and Needs" statement be provided to the client every time an ATE policy is proposed. The contents of the Demands and Needs statement include a specific obligation to tell the client whether or not you have conducted a fair analysis of the ATE insurance market and to go on and say whether you are contractually obliged to undertake the ATE with one or more insurance undertakings. (Arranging ATE policies is an insurance mediation activity as defined in the European Directive on Insurance Mediation 2002/92/EC. It includes activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance).

6.4 Thus, from 14th January 2005 a solicitor who proposes that his client should enter into an ATE insurance policy, and who recommends a particular policy because it is the only policy which, consistently with his firm's membership of a panel he is allowed to recommend, must tell the client that he is contractually obliged to recommend a policy with that insurer. This, the Court of Appeal said in ***Garrett,*** would give the client notice of a particular interest which the firm has in recommending the policy whereas just to tell the client that the firm is on a particular panel does not convey that information.

6.5 The Court of Appeal observed confidently that since all solicitors would be complying with that obligation from 14th January 2005 the problem that they had to consider in relation to the ***Garrett*** case would not have arisen from that date onwards even before the revocation of the CFA regs on 1st November 2005.

6.6 It seems to me that non-compliance with the Solicitors Financial Services (Conduct of Business) Rules 2001 means that the arranging of an ATE policy would be a criminal offence under the Financial Services and Markets Act 2000. Equally it seems to me that such illegality would taint the whole retainer with the client, to the extent that no costs would be recoverable.

6.7 I will discuss below the linked issue of the Solicitors Costs Information and Client Care Code 1999, and non-compliance therewith and the lead case on that issue of ***Garbutt v Edwards*** but it seems to me that there is a material distinction between the two.

7 **Rogers v Merthyr Tydfil County Borough Council (Court of Appeal 31st July 2006)**

7.1 This case concerned the recoverability of staged or stepped ATE premium in a DAS 80e case. The premium was payable at £450 at the outset, £900 more on the issue of proceedings (those being block-rated) and an individually assessed further amount of £3,510.60 payable 3 weeks before Trial.

7.2 It was an Occupiers' Liability case where a child was injured by a protruding peg in a play area. Damages were agreed at £3,105. The case went to Trial on liability only and the Claimant succeeded. The Deputy District Judge assessed the costs and allowed insurance premiums totalling £5,103 inccluding insurance premium tax. On appeal the Circuit Judge reduced this amount to £900 relying upon reading Litigation Funding magazine which suggested that ATE insurance was available at a cost between £450 and £1,350. The Court of Appeal designated this as a test case and invited interventions from the ATE and liability insurers and the Law Society. The Court identified 3 key areas for their decision (at paragraph 96 of their judgment)

(i) What is the proper approach to proportionality in a small personal injury case where the ATE premium may appear large in comparison with the amount of damages reasonably claimed?
(ii) What is the proper approach to evidence of reasonableness the choice and with the amount of ATE premium in such cases?
(iii) Are both staged (or stepped) premiums and single premiums for ATE insurance legitimate for the purposes of recoverability of an ATE premium by a successful claimant, and is it reasonable that such premiums should be wholly or partially block-rated?

Held

7.3 Proportionality did not require that the premium be compared to the damages at issue. If the staged premium was necessary it would be proportionate.

7.4 The size of the premium, once deconstructed, was found to be reasonable. Indeed, in fact it was too low.

7.5 Staged (and indeed block-rated) premiums were both proper methods of an ATE provider rating its risk. It was quite legitimate for a Claimant's solicitor to take into account such things as service levels of the ATE provider and such things as their willingness to pay out on lost cases, their financial stability and other such matters. Procedures to prevent "cherry picking" and to ensure that the very many low risk cases were available to ATE providers as a counter-weight to the few

high risk cases were perfectly acceptable. (how this fits with ***Garrett*** one struggles to comprehend)

7.6 On the question of procedure at detailed assessment, they said

> "If an issue arises about the size of a second or third stage premium it would ordinarily be sufficient for the Claimant's solicitor to write a brief note for the purposes of the costs assessment explaining how he came to choose the particular ATE product for his client and the basis of which the premium is rated – whether block-rated or individually rated. District Judges and Costs Judges do not, as Lord Hoffman had observed in ***Callery v Gray***, have the expertise to judge the reasonableness of a premium except in very broad brush terms, and the viability of the ATE market will be imperilled if they regard themselves (without the assistance of expert evidence) as better qualified than the underwriter to rate the financial risk the insurer faces. Although the Claimant very often does not have to pay the premium himself, this does not mean that there are no competitive or other pressures at all in the market. As the evidence… shows it is not in an insurers interest to fix a premium at a level which will attract frequent challenges".

7.7 Finally the Court of Appeal confirmed that as the law now stands it is permissible and reasonable for the premium itself to be insured by the policy. They said that this had been decided by the Court in ***Callery v Gray (No.2)***.

7.8 One issue which the Court identified in ***Rogers*** but did not decide was whether an ATE premium which 'buys' certain benefits that are not directly linked to financial risk – whether that element of the premium, if identifiable, should be properly chargeable to the unsuccessful Defendant must await the outcome of a wider enquiry.

7.9 The evidence from DAS's books indicated that 5% of all slip/trip cases went to Trial and of those 70% failed. Of personal injury trials in general it was said that 50% failed. This provoked an annex to the Judgment by Lady Justice Smith in which she chided Claimant lawyers and ATE insurers for 'insufficiently robust' risk assessment.

7.10 The Court of Appeal gave clear guidance that the opponent must be put on notice, in advance, that it is a staged policy and must be told, in advance, of the trigger points that make the additional premium payable.

8 **A Terrifying Prospect**

8.1 In ***Ghannouchi v Houni Limited (Supreme Court Costs Office, Master Sager Berry, 4th March 2004)*** held that the Law Society Model CFA was in breach of Regulation 3(2)(c) of the CFA regs in that the Law Society Model breached those regs in a situation where a lower success fee was agreed between the parties than had been specified in the CFA; as compared to where a lower success fee was imposed by the Court in place of the success fee specified in the CFA. He therefore held that the Law Society Model CFA was in breach of the regulations.

8.2 However Master Sager Berry went on to hold that the validity of the CFA should be judged at the time of the detailed assessment and that as a consequence "By the time the client has achieved success it is unlikely that minor shortcomings will amount to a material breach". Therefore Master Sager Berry went on to hold that although the Law Society Model CFA was in breach of the regulations the breach was not material and the CFA was therefore enforceable and therefore costs would be paid.

8.3 In ***Myatt*** and ***Garrett*** however the Court of Appeal have authoritatively decided that the CFA must be judged as at the date that it was entered into. This undermines the crucial finding of Master Sager Berry, by which he was able to find that the breach was immaterial.

8.4 Further, Lord Justice Dyson's "black letter of the law" approach to the regulations and the "It does not matter if the client suffers a detriment – what matters is if the regs were complied with" approach leaves open now the terrifying possibility that all Law Society Model CFAs will now in fact be unenforceable.

8.5 It has already come to my attention that some costs muppets are re-opening the ***Ghannouchi*** question, *especially if it is your firm's practice to make the client pay any shortfall of any sort*.

8.6 It does not need Brain of Britain to work out what the effect would be if all CFAs on the Law Society Model were unenforceable.

9 **The Retreat from Hollins v Russell Materiality**

9.1 Black letter of the law man that he is Lord Justice Dyson, in his judgment in ***Myatt/Garrett*** seems, to me at least, to have rubbished the well known ***Hollins v Russell*** materiality test. As the point made

above in relation to ***Ghannouchi*** shows, this could hold serious trouble for the future.

9.2 He suggested that ***Hollins*** did no more than apply the maxim "de minimis non curat lex".

9.3 Note this from paragraph 27 of the judgment in ***Myatt/Garrett***

> "The starting point must be the language of section 58(1) and (3) of the 1990 Act. It is clear and uncompromising: if one or more of the applicable conditions is not satisfied, then the CFA is unenforceable. Parliament could have adopted a different model. It could, for example, have provided that were one or more applicable conditions not satisfied, the CFA will only be enforceable with the permission of the Court or upon such terms as the Court thinks fit. There is nothing inherently improbable in the statutory scheme which provides that, if the applicable conditions are not satisfied, the CFA shall be unenforceable with the consequence that the solicitor will not be entitled to payment for his services. Such a scheme can yield harsh results in certain circumstances, especially if the client has not suffered any losses as a result of the breach. It could also produce results which, at first sight may seem odd:…But the scheme is designed to protect clients and to encourage solicitors to comply with detailed statutory requirements which are clearly intended to achieve that purpose. The fact that it may produce harsh or surprising results in individual cases is not necessarily a good reason for construing the statutory provisions in such a way as will avoid such results".

9.4 And then from paragraph 31 of his judgment

> "The only mitigation of this strict approach, as was made clear in ***Hollins v Russell*** the breach must be material in the sense described at paragraph 107 of the judgment [in ***Hollins***]. Thus, literal but trivial and immaterial departures from the statutory requirements did not amount to a failure to satisfy the statutory conditions. It is unnecessary to decide whether the test stated at paragraph 107 [of ***Hollins***] was no more than an application of the principle that the law is not concerned with very small things".

9.5 Therefore there are two key areas in which Lord Justice Dyson has tightened the law

(i) Departures from statutory requirements must be "trivial" or "immaterial" or "minor technical breaches" and not more, and

(ii) The validity of the CFA is to be judged at the time that it was entered into and the materiality of the breach is not judged by its consequences so that the fact there was no actual loss is immaterial and did not rescue a defective CFA.

9.6 However whilst the higher Courts appear deeply unsympathetic there may be hope at Supreme Court Costs Office or District Judge level e.g. ***White v Revell (Supreme Court Costs Office Master Wright, Costs Judge 8th September 2006)*** in which apart from effectively accepting a solicitors evidence – as an Officer of the Court – the Costs Judge also held that neither the Act or the Regulations require the solicitor to give the Regulation 4 advice at the time the CFA was signed. The Costs Judge said that the regulation required it to be "before the CFA". In the ***White*** case this had been done and the period which elapsed between the Regulation 4 advice and the signing of the CFA which appears to have been some months. Note that in ***White*** the hearing had taken place prior to the judgment in ***Myatt/Garrett*** but the judgment was delivered after. At paragraph 104 of his judgment Master Wright gives himself a degree of common sense flexibility in interpreting the ***Garrett*** and ***Myatt*** reasonable steps to be taken in terms of BTE search.

10 **"Backdating the CFA"**

10.1 There has been debate, in the past, on whether backdating a CFA works.

10.2 In ***Adam Musa King v Telegraph Group (Supreme Court Costs Office, Senior Costs Judge Hurst 2nd December 2005)*** the Claimant brought a libel case where the Claimant's solicitors incurred about £17,000 in costs investigating the case before signing up to a CFA some 3 weeks later. The CFA dated 11th September said the basic charges were "For work done by us from the date you consulted us on 22nd August…".

10.3 Senior Costs Judge Hurst clearly found that there was no prohibition in the legislation against backdating a CFA and found that by signing a CFA worded like this the Claimant was ratifying what had gone before.

10.4 However since the obligation serve an N251 did not arise until the CFA was signed it was wrong, and contrary to public policy, to permit the Claimant's solicitors to recover a success fee for the work done prior to the signing of the CFA.

10.5 Note that in ***King*** the document itself was dated on the date that it was actually signed but, using the words above, was expressed to apply from an earlier date.

10.6 This is to be contrasted with the situation in ***Holmes v Alfred McAlpine Homes (Yorkshire) Limited [2006] EWHC 110 (QB) – Mr Justice Stanley Burnton with Assessors 7th February 2006.***

10.7 An interesting aside about this case is that the CFA was signed by the Claimant's wife, not the Claimant himself, by reason of his injuries in apparent breach of Regulation 5(1) of the CFA regs. The Master at first instance found that this was not a material breach and the Defendants did not appeal that point.

10.8 It must now be a very moot point indeed whether the Court would, in the light of the retreat from ***Hollins***, now take the same view on that point.

10.9 On the main issue itself the Claimant's wife had signed the CFA on 25th August 2000 but the CFA itself was dated 15th July 2000. Notwithstanding earlier indications that the success fee would be set at 0% the CFA itself set the success fee at 25%.

10.10 The High Court Judge had some strong words on the subject of backdating

> "Backdating is at best due to incompetence or lack of thought, and at worst to dishonesty. It should not be done".

10.11 However, he found that the backdating, because it was apparent from the files provided to the Costs Master and was noticed by him had not had a material effect on the administration of justice and had not impacted upon the protection afforded to the client.

10.12 Similarly, and turning to consider the other alleged breach of the regulations, namely the failure to explain the uplift, (by which he meant success fee) the High Court Judge found the documentation to be wanting. However on the facts the percentage was set out prominently in the agreement and an attendance note, which said that the agreement had been discussed clause by clause, could not honestly have been made without the uplift having been discussed. There being no imputation at all as to the honesty of the Claimant's solicitor, it had been wrong of the Costs Master to conclude that the uplift had been entered in error and not noticed or discussed.

10.13 Whether the decision in ***Holmes*** would now be the same again (post ***Myatt/Garrett***) seems to me to be eminently debateable.

11 **Solicitors Costs Information and Client Care Code 1999 – Client's Ability to Pay**

11.1 This is the old Rule 15 but is now sub-rule (j) of this code which says

> "The Solicitor should discuss with the client, how, when and by whom any costs are to be met and consider:
>
> (i)….
>
> (ii) Whether the client's liability for their own costs may be covered by insurance;
>
> (iii) Whether the client's liability for another party's costs may be covered by pre-purchased insurance and if not, whether it would be advisable for the client's liability for another party's costs to be covered by after the event insurance (including in every case where a conditional Fee or contingency fee arrangement is proposed); and
>
> (iv) Whether the client's liability for costs, including costs of another party, may be met by another person e.g. an employer or Trade Union".

11.2 The Code of course appears in Volume 2 of the White Book.

11.3 Now that the CFA Regs 2000 are revoked (with effect 1st November 2005) Defendants are starting to argue that this Code introduced similar requirements by a different route.

11.4 The argument goes that the Solicitors Costs Information and Client Care Code 1999 is made by way of secondary legislation under the authority of the Solicitors Act 1974 and thus a breach of the requirements of the Code amount to non-compliance with legislation rendering the retainer wholly unenforceable and that unless the Defendants can be satisfied as to its compliance, then no costs should be paid.

11.5 This is an evil little argument. It was the then Master of the Rolls who agreed with the suggestion made by APIL and who championed the suggestion that consumer protection requirements should be by way of a professional obligation and not applicable inter-partes.

11.6 Fortunately the point has been authoritatively decided in ***Garbutt v Edwards [2005] EWCA Civ 1206 (Court of Appeal 27th October 2005)*** in which the failure of a solicitor to give the client an estimate of costs in accordance with the Code did not render the contract of retainer unenforceable. The sanction for the breach of the Code was disciplinary. This point is of the highest importance for CFAs from 1st November 2005 onwards.

12 **Robinson –v- Doselle (Milton Keynes County Court 19th December 2005)**

12.1 This case concerned both the scope of BTE enquiries and the extent to which the indemnity principle, which of course underpins all such technical challenges, applies to the predictable costs scheme.

12.2 The Claimant was a passenger on a bus which was struck by a vehicle the Defendant was driving.

12.3 The Defendant made an offer of £3,000 and confirmed "in addition we will pay your predictable costs". The Claimant responded stating "we confirm that the Claimant would be prepared to accept the sum of £3,250 in settlement of their claim for personal injuries….". The matter was compromised on a payment of this sum.

12.4 The Defendant contended the Claimant had available a BTE policy which was provided as an extension to the motor insurance policy of the bus company on whose vehicle the Claimant had been travelling when the accident occurred.

12.5 The Claimant contended that this type of enquiry was "a treasure hunt" and that, in any event, the indemnity principle should not apply to cases dealt with under the predictable costs scheme.

12.6 The District Judge held, as a preliminary point, that predictable costs remain subject to the indemnity principle. That meant, on the Defendant's substantive point, the judge had to consider whether there had been a breach of the Conditional Fee Agreements Regulations 2000 in order to determine whether the indemnity principle had indeed been breached.

12.7 After reviewing the cases (including ***Sarwar, Hollins & Samonini***) the judge held that the solicitor must act reasonably. Hence it was not sufficient simply to ask the client about legal expenses insurance and rely on the answer, the only example given of an exception being a client who was a barrister specialising in motor insurance claims.

12.8 However, the Court should still only declare an agreement unenforceable if the breach mattered, and the client could have relied on it successfully against his solicitor. Here the Claimant's solicitors could easily have asked the bus operator about the availability of insurance cover and the failure to do so did prejudice the client who proceeded without ATE cover, leaving her with a potential liability for disbursements incurred which she would not have had under BTE cover.

12.9 This decision is certainly wrong on the indemnity principle point and is probably wrong on the BTE enquiries point as the following cases illustrate.

13. Butt -v- Nizami (SCCO Nos 05/380 & 383)

13.1 The background was that the Claimant suffered injuries in a road traffic accident and pursued his claim against the Defendant under a conditional fee agreement. The claim was settled pre-action. Costs could not be agreed and Part 8 proceedings were commenced. No bill was prepared, the Claimant simply sought predicable costs.

13.2 The Defendant challenged the claim for costs on the basis that the Claimant's Solicitors had failed to check, and give appropriate advice in relation to, BTE insurance. The Claimant's Solicitors provided the Defendant with a copy of the conditional fee agreement but declined to respond further to enquiries about steps taken in relation to BTE insurance or provide a certificate, that the indemnity principle had not been infringed, of the type that would normally be seen on a bill of costs for assessment.

13.3 Essentially, the issue was whether, where predictable costs under Part 45 applied, the indemnity principle still operated.

13.4 At first instance the Master held that:

(i) Entitlement to fixed recoverable costs under Part 45.9 and the success fee under Part 45.11 did not depend upon the existence of a valid and enforceable CFA. This was because:

> "The purpose of the rules was to simplify the payment of costs in small cases, not to make it more complex. The fixed recoverable costs are just that: they are fixed. But they are payable by the Defendant whether or not the Claimant's solicitors retained is valid. An extra 12.5% is payable if the Claimant and his solicitor entered into a CFA, whether that CFA is valid or not."

(ii) Disbursements, as these are not fixed in the same way, were subject to assessment.

13.5 The Defendant appealed, arguing the indemnity principle is fundamental to an order for the recovery of costs and that, regardless of the indemnity principle, a CFA must be lawful before recovery is permitted (based on some general statements in ***Hollins –v- Russell***). The Defendant conceded that if a certificate, in line with the

certificate on a bill of costs, was provided, the paying party could not go behind that.

13.6 On appeal Simon J held that

(i) Technical challenges which had preceded ***Hollins***:

> "had a significantly detrimental effect on the efficient conduct of personal injury litigation and were inconsistent with the overriding objective of enabling the Court to deal with cases justly."

(ii) As Judge LJ noted in ***Bailey –v- IBC Vehicles Limited (1998)***:

> "the Defendant's request that the Plaintiff be required to provide information proving that the indemnity principle has been observed represents pointless satellite litigation".

(iii) The intention underlying the scheme for predictable costs in Part 45 was to provide an agreed scheme of recovery which was certain and easily calculated. It is clear the rules were intended to provide that the indemnity principle should not apply to the figures which were recoverable, hence there is little reason why it should be assumed the indemnity principle has any application to Part 45.

(iv) There is no need for the paying party to be satisfied the conditional fee agreement is compliant with the regulations. Whilst that may result in some non-compliant agreements having effect wasteful arguments about whether or not there has been substantial non-compliance will be avoided in this straightforward type of case.

(v) There is no need for a certificate, relating to the indemnity principle, of the kind suggested by the Defendant in this type of case.

(vi) Accordingly:

> "In cases falling under CPR 45 S.II the receiving party does not have to demonstrate that there is a valid retained between the solicitor and client merely that the conditions laid down under the rules have been complied with."

13.7 The approach recommended in ***Myatt***, to enquiries about BTE insurance, would seem to be rather more flexible than the approach taken in ***Robinson***. Clearly, the specialist barrister could be asked the

third question in ***Myatt*** but it may well be that, in all the circumstances of the case, it would have been sufficient to have asked Mrs Robinson the second question. In ***Myatt*** the Court did not seem to envisage further enquiries and took a broad view of what was, in all the circumstances of the case reasonable.

14. Woollard –v- Fowler(SCCO 050071)

14.1 This was an appeal by the Claimant to Senior Costs Judge Hurst (sitting as a Recorder) against the decision of a Costs Judge (sitting as a Deputy District Judge) disallowing certain fees charged by a medical agency. Specifically, the agency made a charge of £25 for obtaining GP records, £25 for obtaining hospital records and £160 for obtaining a medical report (all in addition to outlays paid to the GP, hospital and expert respectively).

14.2 The procedural and case law background to the decision was that:

(i) Part 45.10, dealing with disbursements in predictable costs claims, allows, amongst other matters, "costs of obtaining….medical records….medical report" and "any other disbursement that has arisen due to a particular feature of the dispute".

(ii) In Butt –v- Nizami Simon J observed that "the whole idea underlying Part 45….is that it should be possible to ascertain the appropriate costs payable without the need for further recourse to the Court".

(iii) In Claims Direct Test Cases Tranche 2 Senior Costs Judge Hurst held that a solicitor could only charge as profit costs work undertaken by his firm or a solicitor agents – so that where tasks were delegated to other non-solicitor bodies any charge would be a disbursement.

(iv) The cost of such a disbursement will be recoverable provided it is carried out at the same or a lower cost than if the solicitor had done it: Stringer –v- Copley. Whilst in that case the Court considered such work could also be treated as done by the solicitors and charged accordingly this was not accepted by Senior Costs Judge Hurst. Conversely it is settled law that the fees of a solicitor's agent cannot be a disbursement and must be part of the profit costs.

14.3 On appeal the Senior Costs Judge held:

(i) It was incorrect that if work normally done by a solicitor was delegated to an agent then the costs of this could not be treated as a disbursement and would be irrecoverable.

(ii) Indeed, on the basis the payment to the agency could not be treated as part of the solicitor's profit costs and would need to be treated as a disbursement. In a non-predictable costs case that only raised the question as to whether the overall cost is less than if the solicitors had carried out the work. In a predictable costs case the position was somewhat different, because the profit costs are fixed and the issue becomes whether the disbursement is allowable in addition.

(iii) In considering what is allowable it is notable Part 45 includes the word "obtaining". Those drafting the rules must have been well aware that obtaining medical reports and medical records involves additional expense and that frequently agencies are used for this purpose.

(iv) Applying the approach in Butt it is important to ascertain costs readily.

(v) If the advent of predictable costs meant the established approach of the Court to agency fees should alter that would mean that, until a case had been settled, the proper approach for the solicitors to take would not be known as it would not be certain whether the predictable costs regime would apply. Thus if the Defendant was correct there would be uncertainty which would impede settlement and lead, possibly, to increased costs if Claimants chose to issue.

(vi) This is also consistent with the approach, under the predictable costs scheme, to Counsel's fees where these can be recovered where one or more of the Claimants is a child or patient. Clearly this is work a solicitor could do if he chose, but there will be no reduction in the fixed profit costs if Counsel is instructed.

(vii) In cases to which predictable costs did not apply there would potentially be greater costs incurred if agencies were not used: on the basis solicitors would undertake the work and charge, in conditional fee cases, a success fee.

Martin Bare
15/10/07

The following is a very brief summary of a number of important recent cases on costs issues.

Dahele v Thomas Bates & Sons Limited [2007] EWHC 90072 (Costs) (SCCO)

"Trial" meant the "date fixed for Trial" and included the settlement on that day.

Gaynor v Central West London Buses Limited [2006] EWCA Civ 1120

A retainer letter that stated no charge would be made for pre-litigation services if the opponent disputed the claim and the client decided not to pursue it was not a CFA because those services were not "litigation services" within the meaning of section 58(2)(a) of the Courts and Legal Services Act 1990.

Crook v Birmingham City Council [2007] EWHC 1415 (QB)

The CFA was enforceable where the discount they had provided for did not amount to the success fee under the agreement and the accompanying explanatory letter sufficiently explained the risks with regard to funding. In other words a discount from normal fees on losing did not mean that full ordinary fees on winning necessarily incorporated the success fee.

Fenton v Holmes [2007] EWHC Ch (6th June)

A CFA unsigned by the client was not enforceable.

Preece v Caerphilly [2007] Cardiff County Court 15th August

A CFA unsigned by the solicitors was not enforceable.

Utting v McBain

£500,000.00 PI case, CFA did not state whether there was any "postponement" element. CFA invalid.

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

Using an ATE policy in order to avoid paying a low user fee charged by the ATE provider amounted to an interest in the policy within the ***Garrett*** sense and CFA invalid.

Foord v American Airlines [2007] EWHC 90076 Costs

Avoiding the ***Garrett*** problem with factual evidence as to the circumstances.

Bevan v Power Panels Electrical Systems Limited [2007] EWHC 90073 (Costs) (SCC0)

23 year old electrician, Accident Advice Helpline panel, CFA invalid.

Wetzel v KBC Fidea [2007] EWHC 90079 SCCO along with ***(Kilby v Gowyth Liverpool County Court HHJ Stewart)*** and ***Peel v Beasley (Leeds County Court HHJ Grenfell)***

Fixed success fee in RTA Predictable Costs not dependent upon carrying out BTE search.

Lamont v Burton [2007] EWCA Civ 429

100% success fee applicable if case goes to Trial and if Claimant loses on Part 36.

Willis v Nicolson [2007] EWCA Civ 199

Costs capping case in which the Court made general observations in relation to costs including

"The very high cost of civil litigation in England and Wales was a matter of concern not merely to the parties in a particular case, but for the litigation system as a whole. One of the elements in the high costs of litigation was undoubtedly *the expectation as to annual income of the professionals who conducted it.* The costs system could do nothing about that but....there remain doubts as to whether further guidance on costs capping, if it were to be given at all, should emanate from a constitution of the Court rather than being formulated by the Civil Procedure Rules Committee, after extensive consultation. It would be for the Civil Procedure Rules Committee to decide whether to take up the issues that had been raised".