



Rescuing a potentially unenforceable Conditional Fee Agreement

The introduction of the Conditional Fee Agreements Regulations 2000 brought with them extensive problems for those Solicitors attempting to provide their services, and access to justice, to clients under Conditional Fee Agreements.

The profession was (and continues) to be plagued by satellite litigation regarding the enforceability of Conditional Fee Agreements entered into before the 1st November 2005, on which date the 2000 Regulations were revoked.

The most recent and fruitful area of attack for paying parties has been from Solicitors' failure to comply with Reg. 4(2)(e)(ii) of the Regulations i.e. a failure to inform the client of any "interest" the Solicitors may have in recommending a particular insurer. As the decision in ***Garrett -v- Halton Borough Council [2006] EWCA Civ 1017*** revealed such an "interest" does not necessarily need to be a direct financial interest e.g. the receiving of commissions from the Insurers.

In ***Jones -v- Wrexham Borough Council [2007] EWCA Civ 1356*** the Court of Appeal was faced with a Conditional Fee Agreement that had been held, on a first stage appeal, to be unenforceable by reason of non-compliance with Reg. 4(2)(e)(ii) with the Judge ruling, inter alia, that a Rule 15 Client Care Letter was not an admissible resource when construing the Conditional Fee Agreement.

At the initial Hearing before the District Judge the Claimant's Solicitors had argued, successfully, that the Conditional Fee Agreement, in conjunction with the Rule 15 Client Care Letter, entered into was a "CFA Lite" i.e. a Conditional Fee Agreement to which the **Conditional Fee Agreement (Miscellaneous Amendments) Regulations 2003** applied.

The significance of the 2003 Regulations, which came into force on the **2nd June 2003**, is that, inter alia, the provisions of Reg. 4 of the Conditional Fee Agreements Regulations 2000 were disapplied and making clear that it was permissible for clients to enter into agreements with their Solicitors that provided for their liability in costs to be no more than was recovered from the other side.

The brief facts of the Jones case were:-

- a. **01.09.02** – Accident
- b. **16.05.03** – Loan Agreement and Insurance Policy with Claims Bureau UK
- c. **02.06.03** – Rule 15 Client Care Letter including enclosed Conditional Fee Agreement
- d. **19.06.03** – Conditional Fee Agreement signed
- e. **21.06.03** – Rule 15 Client Care Letter signed

Whilst there is no substitute for full consideration of the Judgment of the Court of Appeal and the extracts that are provided therein from the Conditional Fee Agreement and the Rule 15 Client Care Letter it is clear that:-

- a. The Conditional Fee Agreement in this matter appears to have been in a standard form that would have been commonplace in Conditional Fee Agreements produced in **2001**.
- b. The Rule 15 Client Care Letter contained terms that resulted in the client's liability for costs (including success fee) arising only upon a success being achieved, with such costs thereafter being recoverable from the losing party.

The basic decision of the Court of Appeal was:-

1. The correct approach to construing a Conditional Fee Agreement was to look at the whole package produced by the Solicitor i.e. the Conditional Fee Agreement, the Client Care Letter explaining the effect of the agreement and the insurance policy recommended by the Solicitor.
2. It was necessary to ask whether the solicitor had produced an arrangement under which the client would not be liable for any own-sided costs or expenses (apart from circumstances where the client failed to co-operate with the legal representative, failed to attend any medical or expert examination or court hearing, failed to give necessary instructions or withdrew instructions) other than costs that were actually recovered from the other side or from insurers.
3. The agreement in the present case was, correctly construed, that there would be a waiver of the client's liability in costs, except to the extent that there was recovery either from a losing Defendant or under an insurance policy. The client, in effect, had no liability for costs unless she withdrew instructions.
4. The Conditional Fee Agreement in this case was a "CFA Lite".
5. In the absence of the Conditional Fee Agreement in this matter being a "CFA Lite" it would have been unenforceable as a result of a breach of Reg. 4(2)(e)(ii) of the Conditional Fee Agreements Regulations 2000.

There can be little doubt that all organisations (receiving and paying party representatives) should review this decision and their own individual cases in detail as cases involving Conditional Fee Agreements that appear to be unenforceable on their face may have been thrown a lifeline.