

LawAssist – January 2010

E-News

Yet more on Part 36 as we start a new year with a particularly interesting view of a defendant with a potential counterclaim using the Part 36 provisions relating to claimants. A clinical negligence firm's fourth foray into the courts with its CFA results in a 100% success fee being reduced to 80%. Away from case law we have the lack of details for the April change in road traffic cases, changes to the SRA guidance on referrals and the MoJ's latest consultation document.

- **Sousa v Waltham Forest – CFA in subrogated claim**
- **AF v BG – Part 36 and defendant counterclaim**
- **McCarthy v Essex Rivers Healthcare – clin neg success fee**
- **RTA claims – update on the April 2010 changes**
- **Solicitors' Code on referrals – recent changes to guidance**
- **MoJ consultation on success fees in defamation**

Insurer's subrogated claim – use of CFA: Sousa v Waltham Forest LB [2110] EW Misc 1 (EWCC)

This is a decision of HHJ John Behrens in Leeds County Court dealing with the question of whether a success fee can be recovered in a claim brought in effect by the claimant's insurer. The argument was that the claimant had full indemnity for costs from the insurer and therefore there was no need for the CFA that the insurer had required the claimant to use. Held: The insurer in a subrogated claim could dictate the terms upon which the claimant had to bring its case. The claimant could therefore reasonably enter into the CFA that the insurer demanded.

Part 36 – when is a defendant not a defendant?: AF v BG [2009] EWCA Civ 757

The Part 36 offer was made by the Defendant, but this then raised the prospect of a Defendant's counterclaim not yet pleaded. The offer was expressed to be, and to have the costs consequences of, a Claimant's offer to settle. Express reference was made in the offer to the Claimant paying the Defendant's costs up to the date of notice of acceptance if the offer was accepted within 21 days. Express reference was also made to costs consequences should the offer not be accepted but a judgment obtained that was at least as advantageous as the offer. [So again this is purporting to be, and have the costs consequences of, a Claimant's offer.]

The Court observed that in terms of the incentive towards acceptance created by a Part 36 offer, the position of a Claimant making an offer to accept a sum in satisfaction of his

claim is much more powerful than that of the Defendant when making an offer to satisfy the Claimant's claim.

It followed that, but for the potential counterclaim, the Part 36 offer in this case was from a Defendant.

Could the Defendant present himself as a Claimant for Part 36 purposes?

Yes.

The purpose of the offer being identified as a Claimant's offer was to show that the party making the offer took the view that it would fall within CPR 36.14(1)(b) and (3) if not accepted.

The other side argued that if it was a Claimant's offer (which was denied) then it applied only to the counterclaim. The Court disagreed.

The offer made it clear that it was to apply to produce a net result dealing with both the claim and counterclaim.

The offer was a Part 36 offer, the proceedings to which it related were the entire proceedings, both original claim and proposed counterclaim, and upon acceptance it would have the effect not only that the entire proceedings would be stayed but that the original Claimant would become liable to pay the original Defendant his costs not only of asserting the proposed counterclaim but of defending the Claimant's original claim.

Success fees in clinical negligence – McCarthy v Essex Rivers Healthcare NHS Trust Case No HQ06X03686 13 November (unreported) QBD

According to the judgment this is the fourth case in which the same clinical negligence firm's CFA has been reviewed by a court.

This time the point taken was that the CFA (as do most) provided that it could be terminated "...if we believe that you are unlikely to win."

That, said Mackay J, was relevant to the level of a single stage success fee (claimed at 100%). Also relevant was the fact that this was not a two stage success fee. The success fee had been reduced to 80% and this appeal against that decision failed.

It was accepted that the case was, at the time taken on, a 50:50 risk. Mackay J took the view that the termination clause meant that at a fairly early stage cases below a 50% chance can be removed leaving claims falling into the range of 50% to 80% prospects.

Comment

If it is accepted that at some point a CFA must be entered into and if it is accepted that in this case at the point of making the CFA this was a 50/50 case it is inevitable that

some such cases will improve and others deteriorate – by definition half will in fact deteriorate to such an extent that they lose. The decision appears to be saying that the termination clause really means that there is no such thing as a 50/50 case. We do not know what the judge would have made of a two stage success fee but the indications are that it would have been more successful although no indication is given as to the appropriate trigger point for stage two.

RTA claims of between £1,000 and £10,000 – delayed publication of new rules

The 6 April changes to the CPR are partly published with a note that a further statutory instrument will be published in February. It is thought that this further SI will provide the details of the fixed costs RTA scheme intended to come into force in April.

Changes to the Solicitors' Code of Conduct relating to referrals

The guidance to rule 9 of the Code of Conduct was amended on 13 November 2009 to answer a number of queries on referrals of business. View guidance to rule 9 with 13 November 2009 changes highlighted: <http://www.sra.org.uk/solicitors/change-tracker/code-of-conduct/rule9.page#2009-03-31>

The main areas where the guidance has changed:

- More detailed guidance on entering into new and reviewing existing arrangements
- Disclosure of arrangements not involving fees
- Checking the information given to clients by the referrer
- Monitoring the referrer's marketing and materials
- Referrals to third parties

Paragraph 18 of the new guidance provides as follows:

“...you would not be prevented from acting on your client's instructions to conduct their matter in accordance with the terms and conditions of a "before the event" insurance policy.”

Consultation on success fees in Defamation cases

The Ministry of Justice has published a consultation paper which proposes to limit success fees to 10% in defamation cases. This is intended as a holding position pending more general changes on success fees following the Jackson report. Responses to the questions raised must be provided by 16 February 2010. The MoJ will produce a report within three months of the close of the consultation.

Help with Research into Part 36

If you would be willing to share your views and experience of Part 36 with David Chalk at the University of Winchester, he would be delighted to hear from you:

david.chalk@winchester.ac.uk Direct line: 01962 827599

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