

## LawAssist – June 2009

### E-News

Success fees are back in the news this month – 100% approved in a clinical negligence case by the High Court and some interesting statistics from the Jackson Review showing 100% is often allowed. One worrying point about the misinterpretation of Gloucester v Evans to finish this topic.

We also take a look at a related question: advising on prospects without being negligent. Finally brief mention of two recent decisions: Master Hurst finds no breach of the CFA regulations; the High Court upholds a Solicitors Disciplinary Tribunal finding of misconduct in respect of arrangements with Norwich Union.

- **Oliver v Whipps Cross University Hosp NHS Trust**
- **Jackson Review: statistics on success fees**
- **Gloucester v Evans (revisited)**
- **Levicom International v Linklaters**
- **Bailey v UK Coal Mining Ltd**
- **Reed v Marriott (SRA)**

#### 100% success fee in clinical negligence claim - Oliver v Whipps Cross University Hosp NHS Trust [2009] EWHC 1104 (QB)

The CFA here was entered into at an early stage when the only information available to the solicitors was that provided by the client. The success fee was set at 100% on the basis that at that stage the case had even prospects of success and failure. Jack J held that the decision of Master Campbell in the SCCO assessment had been wrong in the view that the firm must have thought the case had a better than evens chance otherwise it would have rejected the case.

Master Campbell had also been wrong in considering himself bound by the decision of His Honour Judge Dean QC (with Master Campbell) in Barham v Atheraya (2007) where the same firm's CFA in the same terms had been considered and the 100% success fee reduced to 67%. Jack J rejects the Barham reasoning that entering into a CFA at an early stage wrongly puts a premium on ignorance. He also dismissed any suggestion that there must be a two stage success fee if you are going to justify 100%. (Barham was considered in the E-News for November/December 2007)

#### Jackson Review: statistics on success fees

Of the 30 appendices to the Jackson Review preliminary report 4 contain statistics that include the success fees claimed and allowed on assessments. They make interesting

reading, especially in terms of the number of 100% claims allowed. The four surveys are: District Judges; Circuit Judges; SCCO Costs Judges and West Midlands costs. You can view them all on the judiciary web site:

[http://www.judiciary.gov.uk/about\\_judiciary/cost-review/appendices.htm](http://www.judiciary.gov.uk/about_judiciary/cost-review/appendices.htm)

### **Gloucester v Evans (revisited) partial CFAs and 100% success fees**

The reason for briefly revisiting this decision (see E-News February 2008) is that the decision is being relied upon as authority that a 100% success fee is recoverable on all costs even though only part of the costs liability is conditional. That is simply not what Gloucester v Evans decided. The case considered only the argument that the success fee in a partial CFA case exceeded the statutory maximum of 100% if you looked at the fees risked. It was not at all concerned with the reasonableness of a 100% fee where only part of the fees are at risk. It would be astonishing were a court to allow 100% on all fees as a reasonable figure where only part of the fees were risked. To take an absurd example, make only the first £200 conditional in your CFA and put in a 100% uplift on all fees.

### **Levicom International v Linklaters [2009] EWHC 812 (Comm) – litigation negligence**

The issue here was the negligence of litigation lawyers in failing to advise the commercial client as to the firm's view of the difficulties faced in the case. The firm had what was described as a robust (optimistic) view of prospects and so did the client. It was not that that was the problem, but the failure to raise the difficulties that would be faced. Pyrrhic victory – nominal damages only because the client would not have changed tack. The client then had to pay the costs of the solicitors – they had in commercial terms been the successful party. An expensive lesson for the client.

It would be interesting to consider the robust approach to prospects were the firm to act on a CFA!

### **Bailey v UK Coal Mining Ltd – no breach of Reg. 4(2)(d)**

Reg 4(2)(d) required consideration of alternative funding to a CFA. Here the senior costs judge in a case that he refers to as “another technical challenge of the type that the Court of Appeal in Hollins v Russell [2003] EWCA Civ 718 tried to discourage” agreed with a district judge's decision that there was no breach. The claimant had entered into a CFA two years after initially enquiring with his union over funding his vibration white finger claim. The senior Costs Judge concluded that the district judge had been entitled to find that the solicitors had properly relied upon the information given to them by their client: that union funding had been refused, he was no longer a union member and other firms of solicitors had refused the case. All in all then no alternative funding enquiry needed.

## Reed v Marriott (SRA)[2009] EWHC 1183 (Admin) – claims handling agreement in breach of Solicitor code

A solicitor who entered into complex arrangements whereby Norwich Union profited from claims handling was guilty of a number of breaches of the Solicitors Practice Rules. In particular the arrangements breached the rules on fee sharing as well as the referral code as it had been before March 2004 and again after that date when referral fees were permitted. The sorry tale unravelled complex devices including two wholly owned subsidiaries of Norwich Union set up to make the arrangements as hard to follow as possible. Not a happy outcome and no doubt not the only schemes out there to have been devised to circumvent the rules.

### E-News

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