

LawAssist – May 2009

E-News

We look this month at one Frequently Asked Question – do I have to disclose my CFA to the other side? The remainder of this E-Brief sets out the highlights of the initial findings of Lord Justice Jackson.

- [Vinayak v Lovegrove – disclosure of CFA](#)
- [Findlay v Cantor Index Ltd – disclosure of CFA](#)
- [Review of Civil Litigation Costs \(Jackson LJ\)](#)

When claiming a success fee from an opponent must I disclose my entire CFA?

We are now some way down the road from the bad old days of challenges to CFAs based on the CFA Regulations and the most frequently asked question now is whether there is any reason to require a receiving party to disclose the terms of the CFA. With the help of two decisions from Master Campbell at the SCCO we set out the “well it all depends” answer:

Hollins v Russell [2003] 1 WLR 2487

In the context of validity challenges under the now revoked CFA Regs, Brooke LJ said the CFA ought normally to be disclosed. This did not appear to depend on the paying party showing a genuine issue:

“So far as matters of procedure are concerned, 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.” [220]

Vinayak v Lovegrove [2007] EWHC 90096 (Costs) SCCO

Master Campbell considered Brooke LJ’s words and concluded that, nonetheless, the court has no power to order disclosure – had it such power, Brooke LJ would have referred to it.

But, in detailed assessment, Costs Practice Direction 40.14 does provide the court power to direct the production of any document. This power is exercisable where a genuine issue has been raised and the court considers it cannot make a decision without the document. Initially the disclosure is to the court.

Master Campbell took the view that 40.14 was not confined to the detailed assessment hearing itself and could be used under the court’s case management powers – CPR 3.

If, having seen the documents, the court takes the view that there is an issue to answer then the receiving party is put to their election as to whether to disclose the document to the paying party or rely instead on other evidence. This election procedure was established in *Pamplin v Express Newspapers* (1985) 1 WLR 689).

Master Campbell observed that the use of this power was no longer rare and indeed, was likely to occur in CFA cases where the receiving party does not voluntarily disclose.

The fact that the claimant sought a 100% success fee in both the solicitor's CFA with the client and with Counsel was enough to amount to a genuine issue (see *Findlay* below).

Findlay v Cantor Index Ltd [2008] EWHC 90116 (Costs)

The CFA here was entered into post 1 November 2005. The Costs Practice Direction requirements in respect of reasons for a success fee refer to the 2000 CFA Regulations. It follows that where the CFA is made after the revocation of the Regulations that provision of the CPD has no application.

Nonetheless Master Campbell went on to again cite Brooke LJ in *Hollins* at paras 74 and 80 as to a genuine issue:

“In our view the combination of the indemnity principle and a significant increase in the paying party's liabilities results in there ordinarily being a sufficient ground in cases involving a CFA (whether or not a CFA contains a success fee) for the paying party to require the receiving party to be put to her election to produce the CFA or rely on other evidence... [74]
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...[80]”

Comment: It is hard to divorce paras 74 and 80 from the fact that *Hollins* was a pre-revocation case and the context was an alleged breach of regulations. To lift paras 74 and 80 and apply those post revocation turns the level of success fee into a genuine issue in itself separate from any validity challenge. Master Campbell, in the context of CPD 40.14 and *Pamplin*, was clearly minded to make an order if disclosure was not volunteered. He can only do so on the basis of a genuine issue. What genuine issue? Seemingly the justification for the level of success fee. But the CPD no longer requires reasons – why should CPD 40.14 be used to put that requirement back? And what level of uplift becomes a genuine issue?

Note that in summary assessment CPD 14.9 requires the risk assessment to support the claim for a success fee to be made available to the court.

Conclusion

A receiving party can volunteer their CFA. If they do not volunteer then the paying party can raise a genuine issue and the court can exercise case management powers and direct under Costs Practice Direction 40.14 for disclosure to the court. The Pamplin election may then follow.

As to what is a “genuine issue”, Vinayak and Findlay are examples: the paying party was faced with a 100% success fee, a significant increase in the paying party’s potential liability.

Jackson Review

- Establish how present costs rules operate and how they impact on the behaviour of both parties and lawyers.
- Establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate costs.
- Have regard to previous and current research into costs and funding issues; for example any further Government research into Conditional Fee Agreements - ‘No win, No fee’, following the scoping study.
- Seek the views of judges, practitioners, Government, court users and other interested parties through both informal consultation and a series of public seminars.
- Compare the costs regime for England and Wales with those operating in other jurisdictions.
- Prepare a report setting out recommendations

The preliminary report has now been published. It runs to 652 pages plus 30 appendices. It is to be followed by a period of consultation and ultimately a final report by the end of 2009.

“The purpose of this report is to review the operation of the costs rules and to examine possible means of reducing the costs of civil litigation, whilst promoting access to justice. This report does not reach any firm conclusions. It sets out the facts ... and identifies possible options. This report is intended to set the scene for the consultation exercise during Phase 2, not to prejudge the outcome of that consultation.”

ATE insurance / success fees

The chapter on controlling the costs of litigation explores two questions before raising a third. Firstly, should success fees and ATE insurance premiums continue to be recoverable under costs orders? Secondly, if not, what steps should be taken to protect access to justice for claimants? The third question: are success fees and premiums currently set at too high a level?

Part 8 - Controlling the Costs of Litigation:

http://www.judiciary.gov.uk/about_judiciary/cost-review/docs-prelim-report/part8.pdf

One way costs shifting in personal injury?

This is seen as a related question to controlling litigation costs and it asks whether there should be one way cost shifting for personal injury cases? It gets considered in a separate chapter in the 5 chapter personal injury part:

On looking at the data which has come in during phase 1 of the Costs Review, it seems to me that a one-way costs shifting rule would (a) be cheaper for defendants than the present two-way rule and (b) reduce the burden on claimants. It is therefore necessary to look at this proposal and its implications in further detail.

One way costs shifting explained:

C = claimant D = defendant

- (i) In cases which C wins, C recovers costs on the same basis as present.
- (ii) In cases which C loses, the court makes no order for costs.
- (iii) Because C is not at risk of an adverse costs order, he does not need to insure against such risk. Therefore that element of the ATE premium is no longer charged.

Part 6 - Personal Injuries Litigation:

http://www.judiciary.gov.uk/about_judiciary/cost-review/docs-prelim-report/part6.pdf

If you want more:

Paper copies of Lord Justice Jackson's preliminary report are available, free of charge, from the [Costs Review Secretariat](http://www.judiciary.gov.uk/about_judiciary/cost-review/contacts.htm) (http://www.judiciary.gov.uk/about_judiciary/cost-review/contacts.htm)

Here is the link to the entire report:

http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm

How to contribute:

All comments, evidence and data should be sent by 31 July both in hard copy and electronically.

Hard copies should be sent to:

Ms Abigail Pilkington
Clerk to the Civil Litigation Costs Review
Royal Courts of Justice
Strand,
London WC2A 2LL

Electronic copies should be sent to costs.review@judiciary.gsi.gov.uk.

E-News

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