

LawAssist – November/December 2009

E-News

Part 36 continues to provide entertainment and we look at two recent decisions of the Court of Appeal dealing with the intricacies of settlement. Biffa Waste returns to the screens with a costs capping decision and we take a look at an interesting own solicitor costs fight with a cancelled CFA. The Government's plans to regulate contingency fee agreements were severely clipped in the House of Lords at the end of the parliamentary session – we look at all that survived which is concerned only with employment tribunal cases.

- **Kris Motor Spares Ltd v Fox Williams – cancelled CFA**
- **Widlake v BAA – Part 36 exaggerated claim**
- **Sonmez v Kebabery – Part 36**
- **Barr v Biffa Waste (No.2) – capping**
- **Contingency fees regulation – employment tribunal cases**

Cancelled CFA – client own costs liability – Kris Motor Spares Ltd v Fox Williams LLP [2009] EWHC 2813 (QB)

FW represented KMS under a discounted CFA arrangement (30% of the fees being conditional). The litigation failed at a very late stage due to the client misleading the solicitors as to the independence of an expert witness whose evidence was crucial. The solicitors terminated the CFA on terms that they would continue to provide services to conclude the case on ordinary fee terms, the opponents having offered a “drop hands” outcome. The CFA provided for full fees to be paid in the event of such termination. Had the solicitors not terminated at that stage the case would have concluded as a loss under the CFA and the solicitors would have only recovered 70% of their fees. The costs issue reached the High Court by way of appeal from Master Roger's decision to refuse detailed assessment. Held; the solicitors had validly terminated the CFA. The CFA had not provided for any notice provision and none was to be implied. The retainer was still in place so the client had not been left unrepresented at a late stage.

Comment: it is difficult to be sure as to how crucial the continuance of the retainer was to this decision. Suppose the client is so uncooperative that the solicitor wishes to have no more to do with them. Arguably there would need to be careful consideration of the client's position. And here is the guidance note from the Code of Conduct:

If there is good reason to cease acting, you must give reasonable notice to the client. What amounts to reasonable notice will depend on the circumstances. For example, it would normally be unreasonable to stop acting for a client immediately before a court hearing where it is impossible for the client to find alternative representation. In such a case, if there is no alternative but to cease acting immediately, you should attend and explain the circumstances to the court – see rule 11 (Litigation and advocacy). There may be circumstances where it is reasonable to give no notice.

Part 36 – contributory negligence: Sonmez v Kebabery Wholesale Ltd Court of Appeal 22 October 2009 Unreported

On a preliminary issue trial the Claimant had insisted that the employer was 100% to blame for his injury. The Defendant employer argued for contributory negligence and the court found the Claimant 20% responsible. The judge then ordered the Claimant to pay the costs on the basis that the Defendant had established some contributory negligence - i.e. it had won that issue. Held: applying Onay v Brown [2009] EWCA Civ 775 the judge was wrong. The issue of contributory negligence is a part of liability and not a separate issue. Accordingly the Claimant had won and there was nothing here to justify ordering the Claimant to pay the costs.

Part 36 – exaggerated claim: Widlake v BAA [2009] EWCA Civ 1256

A claimant in a personal injuries action had succeeded in beating a Part 36 payment in but the Claimant had concealed her history of back pain in the hope of increasing the compensation. She had been ordered to pay the defendant's costs. Held CA: doubting the decision in Molloy v Shell UK [2001] EWCA Civ 1272, exaggeration did not mean the claim would be dismissed. The question on costs was which party had been successful and here that was the Claimant. CPR 44.3(4)(a) refers to conduct and accordingly exaggeration was relevant conduct and could be taken into account on costs. The court could also its costs powers to penalise a party. On the facts the Claimant could recover nothing in respect of one of her own expert's reports and ought to provide some compensation for the Defendant having to deal with those reports. The case had become heavily contested because of the exaggeration. The correct order was no order for costs.

Costs capping - Barr & Ors v Biffa Waste Services Ltd (No.2) [2009] EWHC 2444 (TCC)

In a group litigation case where a GLO existed the High Court refused to cap the claimant's costs to the limit of indemnity provided by its ATE policy. In any event it had not been shown that the court's case management powers and detailed assessment could not control costs. The court did however make an order that the claimants would not recover beyond its recent estimate of costs unless that estimate was modified by an

order or direction of the court. So not a cap as such but seemingly an order that would bind a subsequent costs assessor?

Damage Based Agreements (contingency fees)

As reported in the October E-News the Government used the Coroners and Justice Bill to introduce regulation of contingency fees. To throw you off the scent these are called Damages Based Agreements (DBA's) and the start of regulation comes via a new section (S58AA) to be added to the Courts and Legal Services Act 1990 via the Coroners and Justice Act 2009 which received Royal Assent on 12 November. The new regulations will apply only to employment tribunal cases – i.e. to any matter that could become subject to employment tribunal proceedings (that includes therefore common law claims for breach of employment contracts).

S 58 AA of the 1990 Act will provide:

“58AA Damages-based agreements relating to employment matters

(1) A damages-based agreement which relates to an employment matter and satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.

(2) But a damages-based agreement which relates to an employment matter and does not satisfy those conditions is unenforceable.

(3) For the purposes of this section—

(a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that—

(i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and

(ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained;

(b) a damages-based agreement relates to an employment matter if the matter in relation to which the services are provided is a matter that is, or could become, the subject of proceedings before an employment tribunal.

(4) The agreement—

(a) must be in writing;

(b) must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner;

(c) must comply with such other requirements as to its terms and conditions as are prescribed;
and

(d) must be made only after the person providing services under the agreement has provided prescribed information.

Regulations will be made by statutory instrument and the scheme does not come into force until such regulations are made. No date for implementation is yet published.

E-News

E-Briefs are produced by LawAssist in conjunction with our consultant David Chalk, Head of Research and Knowledge Exchange, Faculty of Business, Law and Sport at the University of Winchester
David.Chalk@winchester.ac.uk [Winchester Law](#)

If you have any queries please call us on **01903 883811** or
email to enquiries@lawassist.co.uk
Visit our [website www.lawassist.co.uk](http://www.lawassist.co.uk)