Solicitor/client costs

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Getting the retainer wrong

- *Radford v Frade* [2016] EWHC 1600 (QB), [2016] 4 Costs L.O. 653 (Warby J, on appeal from Master Haworth)
  - The appellants submitted a costs bill in the sum of £805,500, on the basis that all the work from 23 May 2012 carried out by their solicitors and by leading counsel on the case was done pursuant to CFAs. The bill included success fees.

Radford v Frade

- Neither solicitors nor counsel could recover fees charged for work done after 23 May 2012:
  - CFAs were only for procedural issues, not later application to strike out, had deliberately excluded any obligation to do any work defending the merits of the claim or the counterclaim ("wanted to enter into an agreement that would not commit counsel and his firm to fighting the claims to a full trial"). It was right to look at the risk assessment + covering letter too.
  - no other enforceable retainer existed entitling them to charge fees post-CFA, even for work outside the CFAs – CFAs discharged earlier retainer entirely
  - Unwritten retainer on CFA-basis, = unenforceable
  - Argument that Cs have 'smaller footprint' in arguing about paying party's liability to pay than paying party is rejected

Radford v Frade

- Counsel's CFA: the obligation to pay counsel arose in the event of a win and only in respect of work done within the scope of the defendants‘ CFA with the solicitor. The clients did not have an obligation to pay counsel in respect of work the solicitor was not authorised to instruct counsel to undertake.
- Nor could counsel’s fees be recovered from the corporate appellants (D4 and D5) who had not been identified as counsel's clients in the CFA made by counsel with the solicitors.
- Rectification too late to sort things out

Radford v Frade

- As the clients were not liable for the fees of either solicitors or counsel, they were not recoverable from the respondents under the costs orders made in the appellants' favour in the action.

Radford v Frade in CA

- [2018] EWCA Civ 119; [2018] 1 Costs L.R. 59
  - Appeal on basis costs were recoverable under the pre-CFA written retainer or implied quantum meruit retainer because work was outside CFA
  - Also appeal against finding that deed of rectification re counsel had to be disregarded, and that work outside his CFA was not subject to conventional terms or quantum meruit
  - No permission given for appeal re construction of CFA

Nope

- Conventional retainer does not co-exist once the CFA was signed
- No implied retainer either: the CFA did not cover all the work, but there was never any re-negotiation of the underlying understanding of all concerned that the work was being done on a CFA-basis.
- *Kellar v Williams* [2004] UKPC 30; [2005] 4 Costs LR 559
  - is authority for proposition that it is not open to receiving party to add to the liabilities of the paying parties after the making of the costs order which it is sought to enforce and does not merely say that rectification has to be reasonable. To allow enforcement of a retrospective agreement which increases liabilities would be to alter retrospectively the effect of the court's order.

Putting it right?

- No rectification of a CFA undertaken after a costs order had been made which could increase the liability of a paying party could be effective either.
- Accordingly, where the CFA had not mentioned two of the defendants against whom costs orders had been made, a deed of rectification purporting to be effective *ab initio* could not be enforced against the paying parties, since to do so after that date would have increased their liability under the terms of that order, contrary to the ruling in *Kellar*.

(1) DIAL PARTNERS LLP (2) DIAL HOUSE CONSULTANTS LTD v (1) EASTERN AIRWAYS INTERNATIONAL LTD (2) BRYAN HUXFORD (3) RICHARD LANE (2018)

- Master James, SCCO 16 Jan 2018:
  - Claimants had not breached the principle set out in *Kellar v Williams* [2004] UKPC 30 by changing their funding arrangements from a DBA to a CFA (which replaced the DBA) after receiving a Part 36 offer. Cs had not told the Ds of the change.
  - The claimants therefore could not be held to the terms of the DBA, which contained a cap on the amount of costs that could be recovered from the defendants.

Sprey v Rawlison Butler LLP

- [2018] EWHC 354 (QB)
- Sols act under discounted CFA and render bills for discounted fees as the case goes on; C then instructs new sols; sols bill for balance discounted and basic fees; and then for SF
- C says not statute bills and so entitled to DA
- Sols win but Nicklin J overturns on appeal
- Liability crystallises on outcome. DA.
- Appeal to CA: permission granted 1 May 2018

Herbert v HH Law Ltd

- [2018] EWHC 558 (TCC); Soole J on appeal from DJ, hearing 8 Nov & 15 Dec 2017:
  - CFA dated 17 March 2016 re RTA in 2015, 100% SF subject to cap 25% GDs and past loss, client also agrees to pay for ATE
  - D offers £3,400. Client will pay £1,228. Accepts.
  - C then instructs JG. **HH give JG their file**.
  - Challenge 100%: no risk assessment and 12.5% under earlier regime

HH and SF

- HH say no need to calculate SF = market rate
- Interpretation of CPR 46.9
- Re CPR 46.9(3)(a) and (b):*I do not accept that the 'approval' of the client is satisfied by the mere fact of the client's consent to the relevant type or amount of cost to be incurred.*
- Approval is informed consent, and doesn't apply only where client has been misled
- Words of CPR 46.9(4) demonstrate RA has not been removed for solicitor-client assessment.

HH and SF

- 46.9(4) is not free-standing and CPR 46.9 must be read as a whole. If a client applies for a reduction in the success fee, he may be met by evidence that he gave his informed approval to the percentage identified in the CFA. If so, the presumption in 46.9(3)(a) and/or (b) is likely to be satisfied and will be difficult to dislodge. Alternatively, if the presumption is not established, the costs judge will proceed to the assessment and hence the reasonableness of the success fee percentage.
- If and insofar as HH took no account of the risk in the individual case and provided for a 100% uplift (subject to the 25% cap) in all cases by reason of its particular post-LASPO business model, informed approval would require this to be clearly explained to the client before she entered the agreement. HH get 15%.

HH and ATE premium

- To cut a long story short: If a payment by a solicitor is properly to be classified as a solicitor's disbursement, it should be contained in his bill of costs and thus be amenable to the s70 process of solicitor-client assessment. The effect of allowing the solicitor to include the item in the cash account would be to deprive the client of the opportunity to challenge the item on a solicitor-client assessment.

Green and others v SGI Legal LLP

- [2017] EWHC B27 (Costs) (Master Leonard):
  - Application for delivery up under section 68 SA: by the time of the instant hearing, the claimants' application was limited to copies of funding documents, copies of all correspondence sent to the claimants, and copies of all invoices created during the currency of the retainer.
  - Law Society Guidance March 2017: *Who owns the file?*
  - Refuses claimants' application for documents which the defendant solicitors, following Law Society guidance, had not handed over on the basis that they belonged to the solicitors, and not the claimants.
  - The issue turned on proprietary rights, not on confidentiality or anything specific to a solicitor/client relationship. It was for the claimants to show that they were entitled to receive copies of another person's property.

Hanley v JC & A Solicitors

- SCCO 19 Dec 2017 = [2017] EWHC B28 (Costs) Master James
  - The defendant provided the claimant with some copy documents, but the claimant was still seeking copies of funding documents; correspondence from the defendant to the claimant during the retainer; correspondence from the solicitors to his insurers and medical examiners; and a vetting questionnaire.
  - Some of those documents belonged to the solicitors, rather than the claimant.

Hanley

- The status quo in the SCCO was that such applications almost invariably led to an order for the production of the documents that belonged to the client (or copies thereof) upon payment of a fee, but that production of the documents which did not belong to the client was not generally ordered
- The court was not persuaded that it should order production of documents that did not belong to the claimant. The claimant's reliance on the decision in Thomson, Re 52 E.R. 714 was misplaced. The court in Thomson ordered production of copies upon payment of a fee but, crucially, the solicitors had already offered that, and the case was decided solely on the issue of whether the client had to pay for the privilege.

Hanley

- There was currently no binding case in which solicitors had been ordered to hand over papers over which they (rather than the client) had proprietorial rights, Wheatcroft, Re (1877) 6 Ch. D. 97 and Mortgage Business Plc and Bank of Scotland Plc (t/a Birmingham Midshires) v Thomas Taggart and Sons [2014] NICh 14 considered

Riaz v Ashwood Solicitors LLP

- SCCO 26 March 2018, Master Leonard
  - Application refused. Bills had been paid more than 3 years before!
  - Sol's evidence over client
  - Court refuses to exercise inherent jurisdiction: no clear-cut evidence of any conduct that might make it appropriate for the court to exercise its inherent jurisdiction; the client had not identified a fiduciary duty which obliged a solicitor to supply to a client copies of documents which did not belong to the client or a breach of any other fiduciary duty; it would not be appropriate to exercise the inherent jurisdiction of the court to order, in effect, pre-action disclosure on the basis that the client suspected overcharging by the solicitors. CPR 31.16 test not met.

But *Swain v JC & A Ltd*

- SCCO 31 January 2018, Master Brown
  - Pursuant to s68 SA the court had a discretion to order delivery up of copies of the documents sought, regardless of whether the client had any proprietary right to them, *Mortgage Business Plc and Bank of Scotland Plc (t/a Birmingham Midshires) v Thomas Taggart and Sons [2014] NICh 14* applied. It was common ground that in proceedings for a s.70 assessment, the court could order the inspection of documents, including those to which the client had no proprietary right. That power appeared to be same as that in s.68, and it was clear that the s.68 power was exercisable before the issue of any application for an assessment.
  - It was appropriate to exercise the discretion in the client's favour. He reasonably required the documents and was at a substantial disadvantage without them. In particular, there was a need to consider the fee earners' rates. The solicitors had initially indicated that a legal executive would be handling the claim, but £250 per hour was normally associated with a substantially higher grade fee earner dealing with a case of much greater complexity and value.

Gavin Edmondson Solicitors Limited v Haven Insurance Company Limited

- [2018] UKSC 21:
  - The solicitors had entered into the CFAs to represent clients in personal injury claims against the insurer, and notified claims to the insurer under the RTA Portal
  - Under the protocol, the solicitors were entitled to receive direct payments of their fixed costs and charges from the insurer at each stage of the process

Gavin Edmondson

- Haven settled the claims directly with the clients on terms which included no provision for the solicitors' costs or disbursements.
- CFA and client care letter pose problems in CA, but sols win

Gavin Edmondson

SC:

- The client care letters did not destroy the clients' basic liability for the solicitor's charges expressly declared in the CFAs and the Law Society's standard terms.
- Solicitor's equitable lien: there had to be something in the nature of a fund over which the equitable lien could operate, fund can also by a debt arising from a settlement agreement, no reason in principle why formal proceedings must first have been issued.
- Once a defendant or his insurer was notified that a claimant in a road traffic accident case had retained solicitors under a CFA and that the solicitors were proceeding under the protocol, they had the requisite notice and knowledge to make a subsequent payment of settlement monies direct to the claimant unconscionable, as an interference with the solicitors' interest in the fruits of the litigation