

## Communication breakdown

The Civil Procedure Rules (CPR) were introduced as a way to make litigation more streamlined and less costly. A key element of this was to encourage the practice of earlier and fuller exchange of information between parties. This would enable the parties to properly assess the merits and value of the claim and, hopefully, settle cases at an earlier stage, thereby minimising costs. At the same time, the Access to Justice Act 1999 introduced the recoverability of success fees and after the event (ATE) insurance premiums as part of inter partes costs meaning that a losing party had to face the possibility of having to pay much higher costs for a case funded in this way. To square the circle, the CPR set out requirements for a party who was intending to claim these additional liabilities as part of their costs to inform their opponent of the fact so that this could then form part of their assessment of the value of the claim. The rules dealing with this requirement to notify one's opponent and the effects of a failure to do so have been the subject of a number of reported decisions since they were implemented and a recent example is the case of [Haydon v Strudwick \(2010\)](#).

Haydon concerned a claim arising from a serious road traffic accident. The Claimant, who was a minor, was a front seat passenger in a car of which the driver lost control and crashed into a bus shelter. The Claimant suffered serious personal injuries and instructed Russell Jones Walker Solicitors to bring a claim on his behalf. A Letter of Claim was sent on the 6th March 2003 setting out the basis of the claim and detailing the funding of the matter:

***‘Although not specifically required under the terms of the Civil Procedure Rules we can confirm that our client’s claim is being pursued with the benefit of a conditional fee agreement and that additional liabilities will be claimed for legal costs at the conclusion of the matter.’***

On the 14th November 2003, the Claimant entered into a CFA with a success fee with his solicitors. On 8th March 2005, proceedings were issued and served on the 18th March 2005. The proceedings repeated the earlier notification regarding funding:

***‘The claim is funded by way of a conditional fee agreement which includes additional liabilities as provided for by the Civil Procedure Rules which the Claimant will seek to recover from the Defendant on the successful conclusion of the claim.’***

***‘and the Claimant claims against the Defendant: Any additional liability under the Claimant’s conditional fee agreement.’***

On the 1st February 2006, the Claimant Solicitor entered into a second CFA following a change in the capacity of the Claimant and this was notified to the Defendant's representative on the 23rd May 2006:

*'Whilst writing, given that our client is now deemed a patient, we feel it necessary for the sake of completeness for an application to be made to the court for the header to be changed. We enclose our application together with draft order. Please confirm whether you are in agreement with the same. Similarly we have entered into a further conditional fee agreement with our client's litigation friend now that she is acting for a patient rather than a minor.'*

Finally in relation to funding, the Claimant took out an ATE insurance policy on the 18th September 2006. Thereafter, the claim was settled for £1.4 Million on the 20th July 2009 and the settlement was approved by the Court on the 27th July 2009. A Bill of Costs was served and the Defendant challenged, inter alia, the recoverability of the success fee and ATE insurance premium on the basis that the Claimant had failed to properly notify the Defendant as required by the CPR. The Claimant disputed the same and, in any event, made an application for relief from sanctions under the provisions of CPR Part 3.

The case came before Master Haworth in the SCCO for determination of the preliminary issue as to whether the Claimant should be granted relief from sanctions. It was the Defendant's case that the Claimant had failed to comply with the requirements set out in CPR 44 PD 19 in that they had failed to serve a formal Notice of Funding (N251), they had failed to notify the Defendant at all that they had taken out an ATE insurance policy and the notification of the second CFA was not effected until over 3 months after the second CFA was entered into. As a result, it was argued, the Claimant was unable to recover the success fee or ATE premium under the provisions of CPR 44.15(1):

*'A party who seeks to recover an additional liability must provide information about the funding arrangement to the court and any other parties as required by a rule, practice direction or court order.'*

It was further submitted by the Defendant that the Claimant should not be granted relief from sanctions due to these failures. Citing the judgment of Mr Justice Floyd in [Supperstone v Hurst \(2008\)](#) in support:

***‘I agree that relief from sanctions should not be granted lightly and any party who fails to comply with the CPR runs a significant risk that he will be refused relief. Thus, if a party does not have a good explanation, or if the other side is prejudiced by this failure, relief from sanctions will usually be refused. It is vitally important to the administration of justice that the rules of procedure are observed.’***  
**(at paragraph 39).**

The Claimant’s response was that the failure to serve a formal N251 was no more than an oversight and, in any event, the Defendant was well aware how the matter was funded, meaning that any breach of the rules was no more than a technicality which had not resulted in any prejudice to the Defendant. In relation to the ATE premium, it was argued by the Claimant that the reference to ‘additional liabilities’ in the Letter of Claim and the pleadings clearly indicated that an ATE premium would be sought in addition to a success fee and, therefore, the cost of the same should be allowed in addition to the success fee.

Master Haworth started his judgment by stating that it was common ground that the Claimant had failed to comply with the requirement to serve a Notice of Funding in the form of an N251 in relation to both the original and subsequent CFA. However, in determining whether the Claimant should be entitled to relief from sanctions as a result of this failure, it was necessary to consider the various factors set out in CPR 3.9. Of these factors, it was clear that the failure to serve the N251 was a genuine oversight on the part of the Claimant Solicitor. It was held that the application for relief had been made promptly and there was no evidence of any other failings on the part of the Claimant Solicitors in compliance with the CPR. Finally, there was no question of any trial date being missed as a result of the failure. In relation to prejudice, the Defendant accepted that they were fully aware that the matter was funded by way of a CFA with a success fee and had not, therefore, suffered any prejudice as a result of the failure to serve a formal N251. The Master therefore concluded that it was appropriate to grant relief from sanctions in relation to the success fee incurred under the two CFAs and held that these would be recoverable. However, in relation to the ATE insurance policy, Master Haworth held that the Defendant had not, at any stage, been notified

that the Claimant had taken out such a policy. The reference to additional liabilities in the Letter of Claim and pleadings did not make any mention of an ATE policy and, absent such notification, the Defendant could not be said to be aware of its existence. Whilst the Defendant was aware of the existence of a CFA with a success fee, they were never notified of the existence of the ATE policy. Consequently, relief from sanctions for the ATE premium would be refused and the same would not be recoverable from the Defendant.

Whilst the individual facts of this matter make the decision specific to this case, it does set out a lucid examination of, not only the rules regarding notification, but the rationale behind the rules and the considerations which the Court will take into account when dealing with an application for relief. The general approach is that notification must take place and a failure will leave a party susceptible to a challenge. However, where there has been notification, albeit of an imperfect nature, the Court is more likely to look favourably on an application for relief.

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Cases Cited:

Haydon v Strudwick [2010] EWHC 90164 (Costs)

<http://www.bailii.org/ew/cases/EWHC/Costs/2010/90164.html>

Supperstone v Hurst [2008] EWHC 735 (Ch)

<http://www.bailii.org/ew/cases/EWHC/Ch/2008/735.html>