

## A happy marriage

A thorough grounding in legal costs increasingly requires an awareness of the basic principles of contract law. Conditional Fee Agreements (CFAs) and other retainers are, after all, no more than contracts between a solicitor and their client. The recent case of [Connaughton v Imperial College Healthcare Trust \(2010\)](#) illustrates the importance of contract law in relation to the recoverability of legal costs.

The claim arose when the 75 year old Claimant slipped on a wet floor and broke her ankle whilst visiting her husband in hospital. She instructed Pannone LLP to bring a claim against the hospital trust and entered into a CFA with them on 24th October 2008. The CFA was in the standard Law Society format and annexed to the agreement was the Law Society document 'Conditional Fee Agreements: What you Need to Know'. Under the heading, 'What is covered by this agreement', the CFA confirmed that it covered:

Lord Justice Jackson's report recommended:

- Your claim against your opponent for damages for personal injury suffered on 2 September 2008.
- Any appeal by your opponent
- Any appeal you make against an interim order
- Any proceedings you take to enforce a judgment order or agreement
- Negotiations about and/or a Court assessment of the costs of the claim.

A protocol letter was sent to Defendant on the 30th October 2008 setting out the basis of the claim and requesting disclosure of certain documents in relation to the system of cleaning in place at the hospital at the time of the accident. No disclosure was forthcoming, despite several chase up letters, and finally, on the 27th May 2009, the Claimant issued an application for Pre-Action Disclosure in accordance with CPR 31.16. On the 13th July 2009, the Defendant provided the requested documents and a consent order was drawn up on the 13th August 2009. Following disclosure, the Claimant's claim was redirected away from the Defendant to a Third Party. The costs of the application, however, remained unresolved and the matter came before District Judge Hovington in Salford County Court on the 23rd December 2009. The Court held that the Defendant should pay the Claimant's costs in principle in accordance with CPR 48.1(3), but there was an issue, raised by the Defendant, as to whether the Claimant's CFA covered any of the work done in relation to the application. The District Judge therefore made a provisional assessment of the Claimant's costs but referred the point of principle to be determined by a Costs Judge in the SCCO. The matter therefore came before Master Haworth to be determined.

The Defendant's case was based on a number of arguments. Firstly, that a Pre-Action Disclosure Application was a separate action to the claim for damages and did not, therefore, fall within the ambit of the CFA. Secondly, the Pre-Action Disclosure Application could not be said to have achieved a win within the terms of the CFA as the order of DJ Hovington did not make any reference to the substantive personal injury claim and did not even order disclosure of any documents. Thirdly, it was argued that, because the substantive claim was now being brought against a Third Party, the Pre-Action Disclosure Application could not be said to form part of the costs of that substantive claim. In summary, the Defendant submitted that there was no liability under the CFA for the costs of the application and, therefore, in accordance with the indemnity principle, there could be no order for costs against the Defendant. In support of their case, the Defendant referred to the judgment of Deputy District Judge Smith in the case of *Roche v Newbury Homes* (2009) wherein it was held, in relation to a similar situation, that:

***‘I do not accept that argument advanced by the Claimant. The application is for pre-action disclosure. If it is pre-action disclosure, then it cannot by definition be the action, because what is sought proceeds and pre-dates the issue of any substantive claim.***

***I reject the suggestion that a pre-action matter is intrinsically linked with a post-issue matter that clearly would have been covered by a CFA. The Claimant fails. The Claimant has not provided evidence that it is covered in respect of this work by the CFA.’***

It response, it was the Claimant’s submission that the words ‘your claim’ in the CFA should be given a broad application and, absent an express exclusion of Pre-Action Applications from the scope of the CFA, should include work done in relation to such applications. This was supported, it was argued, by the express inclusion of appeals against interim orders within the scope of the CFA. If appeals against such interim orders were included, it followed that interim applications themselves were also included. In relation to the application forming a separate action to the substantive claim, it was argued that the application was a fundamental part of the substantive claim and should be considered in the same way as any other pre-action costs, namely as costs of and incidental to the main claim. Finally, in relation to the fact that the claim was now proceeding against a Third Party, it was argued that the claim was originally directed against the Defendant and it was clearly within the contemplation of the parties to the contract that the claim would be brought against the Defendant, notwithstanding the fact that proceedings were not actually issued against the Defendant. In support of their case, the Claimant referred to the decision of District Judge Culleton in the case of Billy Mae Smith –v- MacDonalds (2009) wherein it was held, in answer to a similar issue:

***‘In my view the CFA would generally cover damages and costs, but would include the costs incurred throughout including preparation for and in contemplation or in anticipation of proceedings. If a pre-action application proves necessary and is reasonably undertaken, then in my view a costs order maybe expected.’***

Master Haworth commenced his judgment by stating that this was purely a matter of contractual construction of the CFA. As such, he referred to the oft cited judgment of Lord Hoffman in Investors [Compensation Scheme Ltd. V West Bromwich Building Society \(1998\)](#)

***‘Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.’ (at page 912g)***

In applying this test to the CFA in question, Master Haworth adopted a broad interpretation of the CFA and concluded that the CFA did cover the work done in relation to the Pre-Action Disclosure Application. On whether the application was included within the ambit of the claim as covered by the CFA he held that, absent an express exclusion to the contrary, the costs of such an application formed part and parcel of the costs of the claim for damages and were a natural consequences of the Defendant’s failure to comply with the Pre-Action Protocol.

***‘In my judgment, although the scope of the agreement does not specifically include applications to pre-action disclosure, neither does it exclude them. The fact is that applications for PAD are interim orders in accordance with Part 25 CPR, and I am persuaded by the reference in the CFA to “appeals from interim orders” being included within its scope as an indication that by analogy an application for a PAD is also included within the definition of “your claim”. In that regard, the word “claim” refers to a “demand” for damages for personal injuries, whether or not Court proceedings are issued’. In my judgment this application was part and parcel of the Claimants claim for damages arising out of the accident which occurred on 2 September 2008. It was a natural consequence of the Defendant’s failure to comply with the personal injury pre-action protocol.’ (at paragraph 28)***

In relation to whether the absence of a ‘win’ precluded the Claimant from recovering their costs, the judge concluded that the CFA made express provision for such a situation where it stated:

***‘If on the way to winning or losing you are awarded any costs by agreement or Court order, then we are entitled to payment of those costs together with a success fee on those charges if you win overall.’***

Therefore, the Claimant was liable under the CFA for the costs incurred in relation to the Pre-Action Disclosure Application and the Defendant was, therefore, similarly liable in accordance with the order of the District Judge.

In summary, this case provides another example of the important interplay between the law of contract and the law of costs. Practitioners must be fully aware of the scope and extent of any retainer they enter into and, where there is an issue, the potentially draconian effects on the recoverable costs through the operation of the indemnity principle – if the client has no liability – the Defendant has no liability. Caveat Emptor.

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Cases Cited:

Connaughton v Imperial College Healthcare Trust [2010] EWHC 90173 (Costs)

<http://www.bailii.org/ew/cases/EWHC/Costs/2010/90173.html>

Roche v Newbury Homes (2009) Manchester County Court 10/2/09 (Unreported)

Billy Mae Smith –v- MacDonalds (2009) Liverpool County Court 1/10/09 (Unreported)

Investors Compensation Scheme Ltd. V West Bromwich Building Society [1998] 1 WLR 896

<http://www.bailii.org/uk/cases/UKHL/1997/28.html>