

Yet Another New CFA Regime

On the 10th August 2005, the Department for Constitutional Affairs (DCA) published a document that it is hoped will finally end the chaos in legal costs brought about by the Access to Justice Act 1999. The optimistically titled 'New Regulations for Conditional Fee Agreements (CFAs)' is the result of responses to the DCA's June 2004 consultation document 'Making Simple CFAs a Reality' and its specified objective is:

'to make CFAs simpler, clearer and more transparent both for the individuals using them and the solicitors advising individuals about their cases and whether to use CFAs'

This article will examine the new regime, consider whether the specified objective will be achieved and what the future holds.

Out with the old.

The principal method by which the CFA regime will be simplified is by revoking the statutory instruments that currently set out the requirements for a valid CFA or CCFA. The Conditional Fee Agreements (Revocation) Regulations 2005 will, from the 1st November 2005, completely revoke:

- The CFA Regulations 2000
- The CCFA Regulations 2000
- The CFA (Miscellaneous Amendments) Regulations 2003
- The CFA (Miscellaneous Amendments)(No.2) Regulations 2003.

However, all of the above regulations will continue to apply to agreements made before the 1st November 2005.

It should be noted that in revoking the CFA (Miscellaneous Amendments) Regulations 2003, the DCA's last attempt to simplify CFAs by introducing the so-called CFA Simple, it can be seen that this new regime is not the first such quest for a simple CFA system.

So what regulations are left?

The primary legislation remains within section 58 of the Courts and Legal Services Act 1990 (as amended by the Access to Justice Act 1999) and this requires that all CFAs must:

- Be in writing
- Not relate to proceedings which cannot be the subject of an enforceable CFA (such as criminal proceedings)

Additionally, all CFAs with a success fee must:

- State the percentage success fee

The Conditional Fee Agreement Order 2000 also survives the cull and this requires that:

- The maximum success fee is 100%.

This bare minimum of statutory regulation is therefore all that remains of the complex myriad of regulations that used to entertain solicitors, cost draftsmen and judges throughout the country. Section 58(3)(c) of the Courts and Legal Services Act specified that the Lord Chancellor may make regulations to regulate CFAs but he has now decided, after 5 years, that he rather wishes he had never done so in the first place.

And in with the new.

Having decided to forego the option to tinker with the existing regulations and preferred the rather more draconian route of complete revocation, what is there in place of the old regulations? After all, the theory behind the regulations in the first place was to ensure that entering into a CFA did not disadvantage a litigant or the proper administration of justice.

The answer is that the Law Society will step into the breach and through its role as regulator of professional conduct will ensure that the CFA system operates in everybody's interests. To this end, on the 1st August 2005, the Law Society published its new Code of Conduct that sets out, at section 2.03, what a solicitor should do in relation to their costs, including where acting under a CFA. In addition, on the 16th September, the Law Society published The Solicitors' Practice (Client Care) Amendment Rule 2005 that amended the existing Solicitors' Costs Information and Client Care Code 1999 in relation to information that should be given when entering into a CFA. These are to come into force on the 1st November 2005, when the old regulations cease to be.

Effectively, therefore, the regulations have reappeared under the guise of solicitors' practice rules and it will be a matter of professional conduct, regulated by the Law Society, as to whether the appropriate steps have been taken by a solicitor when entering into a CFA.

The Law Society has also published a new model CFA that reflects the new system of regulation and is intended to be a much simpler document, easier for a client to understand and accurately reflecting the new regulatory position.

So what does a solicitor have to do?

The new rules of professional conduct can very basically be broken down into a number of areas:

- All costs information should be full, accurate and not misleading
- Where possible, a client should be given as much information about costs in advance
- Information regarding costs should be kept up to date as matters progress
- A client should be presented with all of their funding options

- A client should be made aware of how the solicitor's costs are calculated
- A client should be made aware of what costs they will have to pay, both their own solicitor and the other side
- The solicitor should declare any interest in recommending a particular method of funding

The rules as drafted, whilst covering much of the same ground as the previous regulations, are phrased in a less prescriptive way and are, as one would expect, set out in broader terms than the regulations. The intention is that solicitors will be expected to comply less with the letter of the rules, but rather with the spirit, meaning that clients will be fully informed in relation to costs and CFAs in particular.

Will it work?

The theory behind the new system of regulation is sound. CFAs are no more than another method of funding a client's case and as such, the application of the same should come under the heading of the solicitor/client relationship. Where a client has a grievance about the way in which their case was dealt with in relation to costs, this is a matter that the Law Society, in its capacity as regulator, should be empowered to deal with. This is all well and good but there are, inevitably, issues to be resolved

The main issue is whether Defendants will still be able to challenge the validity of a CFA on the basis that the solicitor has failed to comply with the new practice rules. The House of Lords held in Swain v The Law Society (1983), that the Solicitors' Practice Rules have the effect of secondary legislation. Therefore a breach of the rules could potentially be as serious to the validity of the CFA as a breach of the previous Regulations. How this will work in practice remains to be seen, although it is fair to assume that the courts will not be keen to merely shift the focus from challenges on the basis of the regulations to challenges on the basis of the practice rules.

The second issue to be resolved is that whilst a breach of the practice rules may no longer render a CFA invalid and therefore no costs payable, there are other matters relating to the reasonableness of costs incurred under a CFA. On the standard basis, costs must be reasonable and proportionate. Is it, for example, reasonable for a solicitor to enter into a CFA where the Claimant has before the event legal expense insurance? The Court of Appeal in Sarwar v Alam (2001) said not. Therefore, if a solicitor fails to carry out proper investigations into alternative funding as required by the new rules, they may still face a challenge to the reasonableness of entering into a CFA and the additional liabilities will be at risk. Compliance with the new rules will clearly be a relevant factor and it will therefore be open to Defendants to refer to the same when dealing with the reasonableness of costs being claimed under a CFA.

Despite these issues, it is clear that there is a will for this system to work. The DCA is on record as saying that CFAs are here to stay and the system must be made to work better than it has done so far. Unfortunately, this is the crux of the problem. Whilst the new system may be intended to remedy all of the wrongs of the existing system, it fails to address the root cause.

Why is the issue so important?

The root cause of all of the problems in relation to CFAs was the decision to make unsuccessful Defendants, and in reality their insurers, meet the additional costs of CFAs. As soon as the Access to Justice Act 1999 effected this change, the issue of funding of a client's case by CFA moved from being a solicitor/client matter to being a matter between the parties. Where a Defendant insurer was being asked to pay substantial additional costs purely because the client chose to use a CFA, that insurer, inevitably, became embroiled in the question of funding. It is this that has led to the so-called 'costs war' and, for as long as this situation remains, there is always going to be conflict.

Defendants have been castigated for raising technical challenges to CFAs and seeking to block access to justice, but this is unfair.

Firstly, it is perfectly proper to use the law in one's client's best interests. If there is an argument that would potentially reduce your client's legal liability for costs, a professional advisor would be potentially negligent if they did not explore that possibility. It is the age old difference between tax evasion, illegal, and tax avoidance, perfectly legal application of the rules to one's advantage even if this was not envisaged at the time the rules were created.

Secondly, it is not only the Defendant insurers and their advisors who are raising doubts over CFAs. Some of the most senior members of the judiciary have expressed grave concerns over the application of the system. Both the Court of Appeal and the House of Lords in Callery v Gray (2001/2002) and Hollins v Russell (2003) expressed concerns over the situation where Claimants had little or no real interest in the costs of their claim, because they would be met by the other side if they won and there would be no costs if they lost (with an ATE premium covering the other side's costs). In these circumstances, the client does not really care about how the case is funded, who is paying or how much, as long as it isn't them. The idea that the solicitor/client relationship is therefore a genuine control over legal costs is a mirage. In these circumstances, how likely is it that a client will complain to the Law Society about any failings in relation to the funding of their claim?

There is also the issue of the proper administration of justice. The senior costs judge and other judges in the Supreme Court Costs Office, have dealt with a string of cases where they have expressed their grave concerns over funding arrangements entered into with Claimants. In Bowen v Bridgend Borough Council (2004), Master O'Hare struck down CFAs entered into with Claimants pursuing housing disrepair claims. The solicitors had totally failed to consider and advice upon the availability of legal aid and as a result the Claimant's had incurred substantial and disproportionate costs under a CFA funded case. Had the Defendant not challenged these cases, it is unlikely the Claimant's themselves would have raised any challenge. Similarly, in Samonini v London General Transport (2005), Master Hurst in a damning judgement held that:

'if solicitors are permitted to skim on the proper investigation of LEI (Legal Expense Insurance) the administration of justice will be badly served since there will be no improvement in the way solicitors conduct proceedings of this type, added to which the client has been badly served.' (at paragraph 66)

The issue of CFAs is an important one. It is not a case of Claimants good, Defendants bad, but is rather a question of having a system in place that it fair to Claimants, their solicitors and the Defendants, or in actual fact the individuals who, through their insurance premiums, have to meet the costs. It is for this reason that the new regime, when it comes into force on the 1st November, will be watched with such interest by all concerned.

Swain v The Law Society [1983] 1 AC 598

Sarwar v Alam [2001] EWCA Civ 1401

Callery v Gray [2001] EWCA Civ 1117 [2002] UKHL 28

Hollins v Russell [2003] EWCA Civ 718

Bowen v Bridgend Borough Council (2004) SCCO 25/3/04 Master O'Hare

Samonini v London General Transport (2005) SCCO 19/1/05 Chief Master Hurst

Paul Jones

Negotiations Manager

Legal Costs Negotiators Ltd.