

## What is the price of success?

With Lord Justice Jackson's recommendation that recoverability of success fees inter partes should be curtailed, disputes between parties as to the level of success fee may soon (or may-be not quite so soon) become a thing of the past. However, until that time, parties continue to lock horns over what is a reasonable success fee for those cases where there is no fixed success fee prescribed by the rules. A recent example in the Senior Court Costs Office, [Fortune v Roe \(2010\)](#), illustrates some of the issues that such cases turn on.

The claim involved an RTA on 8th December 2001 where the Claimant suffered catastrophic injuries including a head injury, serious lacerations and fractures to her spine, leg, pelvis, ribs, wrist and knee. She instructed Irwin Mitchell under the terms of a pre-existing legal expenses policy and a claim was intimated against the Defendant. On the 27th January 2003, the Defendant was convicted of dangerous driving and, unsurprisingly, on the 27th March 2003, the Defendant's insurer admitted liability. Thereafter, proceedings were issued and served on the 14th January 2005 and the Defendant filed a Defence, admitting negligence but denying the extent of the Claimant's head injury. In light of the admission, judgement for the Claimant was entered on the 6th April 2005. By 2006, the indemnity of the legal expense insurance had been exhausted and, therefore, on the 3rd February 2006, a Conditional Fee Agreement (CFA) was entered into with the Claimant. Negotiations continued and a round table meeting failed to reach a settlement. The matter was listed for trial on 30th March 2009 but, on the 12th March 2009, the Claimant accepted the Defendant's Part 36 Offer of £600,000 and a Consent Order in these terms was sealed on the 16th July 2009.

A Bill of Costs was presented by the Claimant Solicitors and all items were agreed with the exception of the level of the success fee. This was claimed at 100% and the Defendant argued that no more than 20% should be allowed. This sole issue came before Master Campbell in the Senior Court Costs Office.

The CFA set out the following terms in relation to the success fee:

*The success fee will be:*

*(a) if you win your claim prior to three months before the date fixed for trial or the first date of the trial window (whichever is earlier) 25% of the basic charges; or*

*(b) if you win your claim at any later date or time: 100% of the basic charges; or*

*(c) if Rules of Court fix the percentage success fee recoverable from your opponent this will be the percentage which shall apply.*

Paragraph (c) did not apply as the fixed success fee under CPR 45.16 was not in force at the time of the accident. Therefore, the issue was what level of success fee was reasonable with regard to all of the circumstances as they reasonably appeared to the solicitors at the time the CFA was entered into.

In this regard, the Court considered the risk assessment prepared by Irwin Mitchell at the time the CFA was entered into. It noted that liability had already been conceded and that judgement had been entered for the Claimant but referred to the risks on quantum and, in particular, the risk of failing to beat an effective Part 36 offer by the Defendant. The CFA provided that, if the Defendant made a Part 36 Offer which the Claimant rejected on her solicitor's advise and that Part 36 Offer was not subsequently beaten, then no costs at all would be charged (base costs or success fee) for the period from 21 days after the Part 36 Offer was made. This clause put the Claimant Solicitors at risk of losing a proportion of their costs in the event that a Part 36 offer was made by the Defendant and it was this residual Part 36 risk which the success fee sought to take into account.

The Defendant's submission was that the level of the success fee was unreasonable. In particular, it was argued that, in light of the admission of liability and the entering of judgment for the Claimant, the prospects of the case not achieving a win were nil; the case had already been won at the time the CFA was entered into. It was accepted that the Part 36 risk was valid but it was argued that this was overstated. At the time the CFA was entered into, the claim had been ongoing for just over a year and no Part 36 offer had yet been made, so the Claimant Solicitor was at no risk in relation to the costs already incurred. In relation to the ongoing risk of a future Part 36 Offer, the Defendant relied upon the Court of Appeal decision in *C v W (2008)* where a 20% success fee was allowed in similar circumstances and submitted that this provided clear guidance that this was a reasonable success fee for a case where a CFA was entered into after liability had been resolved and the only residual risk was in relation a Part 36 Offer.

The Claimant, in reply, argued that there was a residual risk in relation to liability, namely in relation to causation. The assessment of quantum was complicated by the various injuries suffered by the Claimant and the issue was contentious. Furthermore, the Claimant argued that, by staging the success fee, the Claimant had adopted a reasonable approach by building in a lower success fee in the event that the claim settled more than 3 months before trial. If the case proceeded to trial, it was reasonable to assume that both parties believed they had good prospects of success and 100% would be the appropriate success fee. This was supported by the now fixed success fee of 100% for RTA cases that concluded at trial (CPR 45).

The judge started from the premise that, at the time the CFA was entered into, the case had been won. Judgment had been entered for the Claimant, the case had been won and, therefore, the Claimant Solicitor was entitled to their costs under the terms of the CFA:

***'I consider that when the CFA was signed on 3 February 2006, the Claimant was litigating in a risk free environment so far as recovery of her costs were concerned, since she was bound to recover damages that were substantial (but the figure does not matter).'*** (at paragraph 25)

In relation to the Part 36 risk, whilst it was accepted that the wording of the Claimant's CFA did give rise to a real risk to the Claimant Solicitors, at least in relation to part of their fees, this risk could not be put at more than 20%. The difficulties in assessing quantum for the claim did not, in the Master's view, mean that the risk was materially higher such that a higher success fee should apply.

*'It follows, in my judgment, that the fact that assessing quantum proved to be extremely difficult, is not a factor that bears upon the prospect of the Claimant winning or losing the case. That win had already been achieved. The high value and complexity could only bear upon the risk of failing to beat the Part 36 offer, but even if that had happened, the costs up to the date of the offer would have been recoverable and only those incurred after that date would have become payable to the Defendant. For his part, Mr Mallalieu (for the Defendant) accepted that the possibility of failing to beat a Part 36 offer so that circumstances such as these could have arisen, did carry a risk, and for that reason, the Defendant has conceded that a 20% success fee would reflect that factor. I agree with that submission.'*  
(at paragraph 27)

As a final note, the Master did not consider that the staging of the success fee had any effect on what a reasonable success fee was in this case. One couldn't escape the fact that judgment had already been entered for the Claimant and, in those circumstances, a success of no more than 20% was reasonable, staged or not.

As with any success fee case, the final figure is, to a large extent, fact sensitive to the individual case. However, it seems logical to draw the conclusion that where a CFA is taken out after liability has been determined, then a success fee in excess of 20% will be very difficult to sustain, even where there are clear risks in relation to a Part 36 Offer.

Paul Jones  
Technical Director  
LCN

Cases Cited:

Fortune v Roe [2010] EWHC 90180 (Costs)

<http://www.bailii.org/ew/cases/EWHC/Costs/2010/90180.html>

C v W [2008] EWCA Civ 1459

<http://www.bailii.org/ew/cases/EWCA/Civ/2008/1459.html>