

The November 2005 Changes to CFAs and CCFAs – an analysis

The government has moved to stem the tide of satellite litigation which the CFA regime has generated ... by abolishing almost the entire regulatory framework.

Under the provisions of a draft statutory instrument entitled the Conditional Fee Agreements (Revocation) Regulations 2005, the Conditional Fee Agreements Regulations 2000 and the Collective Conditional Fee Agreements Regulations 2000 will be revoked from 1 November 2005.

The old regime will continue to apply to a CFA or CCFA entered into before 1 November 2005. After that date, the only statutory requirements for the form of a CFA or CCFA will be those in s. 58 Courts and Legal Services Act 1990, namely:

- (a) It must relate to proceedings for which CFAs are permitted
- (b) It must be in writing
- (c) If it provides for a success fee, it must state the percentage increase
- (d) The percentage increase must not exceed any specified limit for that class of proceedings

There will be no statutory requirements to give the client advice before entering into a CFA.

The clear aim of the new legislation is to prevent technical challenges to CFAs by paying parties without weakening the protection afforded to claimants from unscrupulous lawyers, but will it have the desired effect?

Consumer Protection

The CFA Regulations 2000 were intended to protect claimants from entering into agreements which they did not understand the effect of or which were unnecessary because they had other ways of funding their litigation.

In future, the government will leave consumer protection in the hands of the Law Society, which has drafted a new Code of Conduct to replace most of the present professional rules, including the Solicitors' Practice Rules and the Costs Information and Client Care Code. Unfortunately those new provisions will not be in force by the time the existing regulations are abolished. It is expected that the new rules will come into force in 2006.

Costs information and funding arrangements are dealt with in Rule 2 of the new Code, "Client Relations". In every case, Rules 2.03 (1)(d) and (g) require the solicitor to discuss with the client whether they may be eligible for public funding, whether their own costs may be covered by insurance or paid by somebody else, such as a trade union, and whether their liability for the other side's costs may be covered by existing insurance or whether specially purchased insurance may be obtained. Rule 2.03(4) requires information about costs to be clear and confirmed in writing. Rule 2.03(5) requires the solicitor to discuss with the client whether the potential costs are justified by the risks in the case.

The only specific provision relating to CFAs and CCFAs is Rule 2.03(2), which requires the solicitor to explain "at the outset" and, where appropriate, as the matter progresses, the circumstances in which the client may become liable for their own costs, whether the solicitor will seek payment of those costs from the client if entitled to do so, and if so, to advise the client of their right to an assessment of those costs.

The accompanying guidance adds that conditional fee agreements are subject to statutory requirements and all agreements must conform to these.

The Law Society has also produced a new model CFA for use after 1 November 2005. The model agreement refers to another Law Society publication, "Conditional Fee Agreements: what you need to know". These two documents between them contain all of the provisions previously found in the Law Society's model CFA and accompanying terms and conditions. The Law Society clearly intends the guidance to form part of the retainer contract, because it contains spaces for the solicitor to write in details such as the hourly rates. Why it does not therefore simply continue with the old model agreement is anyone's guess.

If solicitors use the new model CFA and guidance then, as a matter of contract, clients will continue to receive most of the protection they received under the CFA Regulations. The difficulty is that those documents go far beyond the new statutory or professional requirements and there is no obligation whatsoever on solicitors actually to use the new model agreement or the accompanying guidance.

Far from strengthening the consumer protection regime, the Law Society's draft Code of Conduct arguably weakens it. For example, the Costs Information and Client Care Code, which currently sets out what information a client must be given before a solicitor acts for him, requires the solicitor to "consider" whether the client may have pre-existing insurance. The Court of Appeal decided in Sarwar v Alam [2002] 1 WLR 125 that this meant that the solicitor would in most cases actually have to see any policies of insurance which the client might have and form his own view of whether the client was covered. In future, under the new Practice Rules, the solicitor will be required merely to "discuss" the possibility of pre-existing insurance. This apparently deliberate change of wording suggests that it may be enough in future simply to bring the possibility of pre-existing insurance to the client's attention without any obligation actively to investigate.

However, this no doubt welcome (to solicitors at least) reduction in the duties imposed on them is not matched by the obligations imposed by the Solicitors Financial Services (Conduct of Business) Rules 2001 which, since January of this year have applied to any solicitors recommending ATE insurance products¹. These rules impose additional responsibilities on the solicitor in this area, including 'obtaining details' of any existing insurance the client may have and explaining to the client what he or she needs to disclose. It is, on occasions, difficult to see a coherent policy between the various rules which apply in this area.

It is beyond the scope of this analysis to list every way in which the duties on the solicitor and the protection afforded to clients will be changed after 1 November 2005. Key omissions from the new regime include the inability to charge the client any unrecovered part of the success fee without the court's permission and the requirement to tell the client how much of the success fee relates to the cost to the solicitor of the postponement of payment, which remains irrecoverable from the other side.

There is nothing to stop unscrupulous solicitors from agreeing an exorbitant success fee in every case, knowing that if they do not get it from the other side, then they will get it from the client. How many clients will undertake a Solicitors' Act assessment for the sake of 10% of a success fee? The government believes that market forces will help protect claimants, because a solicitor who overcharges his clients will soon find himself without any more. But how many potential clients, who are often vulnerable and may never have consulted a lawyer before, will visit four or five firms before deciding whom to instruct?

The End of the Road for Challenges to CFAs?

Almost certainly not. Paying parties will probably no longer be able to challenge the entirety of the retainer and therefore avoid paying base costs, but challenges to success fees and insurance premiums are likely to continue, relying on breaches of the Solicitors' Practice Rules (and the Code of Conduct once it comes into force) rather than the legislation. The DCA's own response to consultation states that non-compliance would be a matter which judges could take into account on a solicitor-client assessment. If that is right, then there

¹ Unless the solicitor has separate, specific Financial Services Authority authorisation.

seems to be no reason why it could not also be taken into account on an inter partes assessment.

It may also be possible to bring challenges on straightforward contractual principles, for example arguing that an agreement which does not stipulate how much of the success fee represents postponement of payment is void for uncertainty.

Is The Door Now Open to Contingency Fees?

Contingency fee agreements (i.e. where the lawyer agrees to act in return for a percentage of the damages recovered) are presently unlawful because they do not comply with the CFA Regulations 2000.

It is arguable that a contingency fee agreement would not fall foul of s.58 Courts and Legal Services Act 1990. The counter argument is that the wording implies that a success fee must be by way of a percentage of costs not of damages, but it must be conceded that the provisions are less than clear on the point. If the statute does not bar a contingency fee, what of the new professional rules? Rule 2.04 of the draft Solicitors' Code of Conduct prohibits a solicitor from acting in contentious proceedings under a contingency fee agreement, except as permitted by statute or the common law. This is effectively a rehearsal of what is currently in Rule 8 of the Solicitors' Practice Rules.

Arguably a contingency fee agreement will be permitted by statute from 1 November 2005. No doubt the courts will be slow to allow them for lawyers (although recent decisions suggest that contingency fee agreements are no longer offensive per se in litigation), but unless the Law Society deals explicitly with the issue, the argument is there to be had.

Either way, it seems that the Law Society is now the gatekeeper as far as contingency fees are concerned.

Problems we can foresee

As will be apparent, we consider that there will continue to be challenges to the validity of CFAs, and there will continue to be satellite litigation about costs: quite simply too much money is involved for parties to forego the opportunity to challenge these agreements.

The areas that we can presently anticipate as contentious include the following:

- What will be the effect of a breach of the new Law Society Code of Conduct? It has been held that Law Society rules have the force of statute: Swain v Law Society [1983] 1 AC 598. In Geraghty v Awwad [2000] 1 All ER 608 the issue of whether a breach of Law Society rules rendered a retainer unlawful was left undecided. It is, accordingly, at least arguable that a sufficiently serious breach of the new Code will have the effect of rendering the retainer unenforceable, meaning that there would be no liability against which the party was to be indemnified under a costs order.
- What will be the effect of breaches of the Conduct of Business or Scope Rules – particularly with regard to ATE insurance. Will such breaches affect the validity of the retainer or the insurance agreement? Will they have wider implications – for example financial penalties?
- What will the attitude of the court in relation to the transitional period between the abolition of the regulations and the introduction of the Code? What test will be applied to CFAs entered into in this period?
- Will it be permissible for a party with an old CFA to terminate that retainer and enter into a new style CFA?

There will, no doubt, be other problems we have not yet anticipated....

The Future

Overall we consider that it is very unlikely that the new regulatory regime will achieve what the government wants by bringing an end to disputes about CFAs and CCFAs. The CFA regime's inherent conflicts of interest and the additional expense (to paying parties) of the system mean that there will continue to be very considerable scope for argument between the parties and between solicitors and their clients.

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On behalf of the Hailsham Chambers Costs Group

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