DIAG HUMAN v VOLTERRA FIETTA [2023] EWCA Civ 1107

Could a case on CFAs have major implications for litigation funding?

On 4 October 2023, the Court of Appeal handed down judgment in *Diag Human v Volterra Fietta*, upholding the decisions of the Judges below[1] that solicitors who had entered into an unenforceable discounted CFA could not obtain any payment under the CFA through severance or quantum meruit. The two previous decisions had attracted relatively little attention, appearing simply to confirm what had been generally understood since the "CFA wars" of the noughties. However, the Supreme Court's decision in *R (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28 (handed down between argument and judgment in *Diag*) suddenly gives the case enormous significance for arguments over litigation funders' rights under LFAs rendered unenforceable by *PACCAR*.

The Facts

Diag Human (DH) instructed Volterra Fietta (VF) to act for it in an arbitration against the Czech Republic and entered into a standard retainer with hourly rates. After some months, the retainer was changed by a "side letter" to a discounted CFA (also entered into with DH's controlling mind, Dr Josef Stava). The terms of the discounted CFA provided for VF's fees to be subject to an initial discount of 30%. In the event of success, various additional sums were payable to VF, the effect of which could have been to amount to a success fee of over 100%. Indeed, the side letter contained a worked example of its effects which demonstrated a success fee of 280%. The clients fell out with VF and terminated the retainer, following which they argued that the CFA was unenforceable. By that point, they had paid around USD 1.6m on account of fees and disbursements under the CFA. VF put in a bill seeking only the discounted fees (70% of the normal fees) and the clients commenced detailed assessment under s. 70 Solicitors Act 1974.

[1] Costs Judge Rowley in the SCCO and Foster J (sitting with Costs Judge Brown as an assessor) in the High Court

It was accepted by VF that the CFA was unenforceable, but they argued that all of the parts of the side letter other than the 30% discount could be severed, alternatively that they were entitled to a quantum meruit in the amount of the discounted fees. They also argued that they were in any event entitled to retain the sums paid on account, which the clients sought the return of.

The Argument

The central planks of VF's argument were as follows:

- Public policy had moved on and it was open to the Court to hold that public policy no longer prevented VF from being paid the discounted fees (which the clients had agreed to pay in all circumstances)
- The case of *Garnat Trading & Shipping (Singapore) Pte Ltd v Thomas Cooper* [2016] EWHC 18 (Ch) (in which an unenforceable CFA had been severed from a retainer which also governed payment for other work, for which the solicitors sought payment) supported the principle of severance of conditional terms from unconditional terms in a retainer
- *Aratra Potato Co Ltd v Taylor Joynson Garrett* [1995] 4 All ER 695 was authority for there being no right to repayment of sums paid under an unenforceable retainer absent a restitutionary claim by the client

The Result

All of VF's arguments were rejected. The main judgment was given by Stuart-Smith LJ, with a short concurring judgment from Andrews LJ. Newey LJ agreed with both judgments.

The Court took as its starting point that the CFA as a whole was rendered unenforceable and reiterated Dyson LJ's dicta from *Garrett v Halton BC* [2006] EWCA Civ 1017 to the effect that the CFA legislative regime is deliberately draconian.

Severance

The Court held that it was not open to it to conclude that public policy had moved on since cases such as *Awwad v Geraghty & Co* [2001] QB 570 and that in event, there was no reason to think that it had.

Applying the three-stage test for the availability of severance from *Beckett Investment Group Ltd v Hall* [2007] EWCA Civ 613, which was approved by the Supreme Court in *Egon Zehnder Ltd v Tillman* [2019] UKSC 32,[2] while the first two stages were satisfied (as was common ground), the third was not. The contract before severance was *"a CFA with a substantial proportion of the solicitor's proposed remuneration being conditional upon the contingencies outlined in paragraph 3"*, while after severance, it would be *"a conventional retainer providing simply for the solicitors to charge at a discounted rate, with no conditional element at all"*.

VF were not assisted by *Garnat Trading*, because there were two workstreams in that case with different payment terms, whereas in this case, there was only one retainer governing all of the work.

That was a conclusion reached without reference to public policy, but in any event, it would be contrary to public policy to permit severance. Doing so would permit partial enforcement of an unenforceable CFA. Furthermore, in an unsuccessful case, the solicitors would recover exactly what they contracted for without suffering any penalty at all.

Andrews LJ made further observations on public policy, accepting the clients' submission that VF were seeking to carve out a special regulatory regime for discounted CFAs, under which the discounted fees would always be payable. She noted that, if that was right, *"there would be little incentive to solicitors to adhere to*

[2] (1) It must be possible to "blue pencil" the offending provision; (2) there must be consideration for what remains; (3) the effect of severance must not be to make the contract *"not the sort of contract that the parties entered into at all"*

the straightforward requirements of the regulations laid down for the protection of their clients, if the worst that could happen if they failed to do so would be that they would be paid the amount that the client had agreed to pay for their services win or lose."

Quantum Meruit

Having dismissed the possibility of severance, Stuart-Smith LJ dealt with quantum meruit briefly, holding that, on the basis of authority (in particular, *Awwad*) and public policy that it was not available.

Andrews LJ added that *"the short answer is that it is not open to the solicitors to claim by the back door any payment for their services which they cannot receive through the front"*, referring to the House of Lords decisions in *Orakpo v Manson Investments Ltd* [1978] AC 95 and *Dimond v Lovell* [2002] 1 AC 384. *"The clients cannot be said to have been 'unjustly' enriched by the receipt of services for which solicitors cannot claim to be paid under a contract which failed to comply with the specific requirements that would have made it a lawful and enforceable CFA. Equity will not step in to relieve the solicitors from the consequences of providing services pursuant to an unlawful agreement which they are precluded from enforcing"*.

Repayment

The Court held that s. 70 Solicitors Act 1974 gave rise to a self-contained regime, under which repayment of sums paid on account of a bill being assessed would automatically be ordered if the bill was assessed at less than what had been paid. *Aratra Potato* was not a case involving a s. 70 detailed assessment and in any event, in light of cases such as *Garrett*, the law had moved on since then.

The Implications

Diag Human will be pored over by those presently involved in disputes with litigation funders over what might be payable under prima facie unenforceable LFAs. Funders will be considering what, if anything, can be saved by severance and the possibility of restitutionary claims, for example for the amount of the funding provided. While the Court in *Diag Human* was not concerned with the position of litigation funders, it is certainly not a helpful judgment for them.

In remains to be seen how much further this case goes. The Court of Appeal refused VF permission to appeal to the Supreme Court.

Jamie was Counsel for the clients in *Diag Human*, instructed by Louis Flannery KC of Mishcon de Reya LLP and Nick Overton of Overtons Costs Consultants Ltd.

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