

CFAs & ATE Policies Implications for Professional Indemnity Market

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July 2006

Indemnity principle

- Harold v Smith 1860
- Gundry v Sainsbury 1910
- Solicitors Act 1974 S 60 (3)

"The client shall not be entitled to recover from any other person under an order for the payment of any costs to which a contentious business agreement relates more than the amount payable by him to his solicitors in respect of those costs under the agreement".

Administration of Justice Act 1999

- S.27 "A conditional fee agreement ("CFA") which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason of its being a CFA but any other CFA shall be unenforceable"
- CFA Regulations 2000 (SI 2000/692).

What must a CFA contain?

Section 58 Courts and Legal Service Act 1990

- It must relate to proceedings for which CFAs are permitted
- It must be in writing
- If it provides for a success fee, it must state the percentage increase
- The percentage increase must not exceed any specified limit for that type of litigation.

Solicitors Costs Information and Client Care Code 1999 as amended January 2006

- How and when costs are to be paid.
- Client eligible for Legal Aid?
- Client has insurance cover?
- Is ATE cover appropriate?

Indemnity principle

- Client has to remain contractually liable for paying fees, any success fee and any ATE premium otherwise CFA offends the CFA Regulations and indemnity principle and CFA unenforceable against paying party

Are contingency fees recoverable?

- S.58 Courts and Legal Services Act 1990 success fees as a percentage of what?
- Rule 2.04 new Clients Code of Conduct.

In what types of litigation can CFA be used?

- Not criminal
- Not family
- Anything else
- Claimant
- Defendant
- Part 20 Defendant
- Rich or Poor
- Any specific part of proceedings.

Advantages of CFAs for claimant/their solicitors

- Up to double the hourly rate
- Staged success fee additional negotiating tool
- Share risk in litigation
- Remove much if not all risk from client
- Raises stakes for opponents.

Disadvantages of CFAs for claimants and their solicitors

- Cash flow – fees and disbursements
- Success fees only awarded on fees
- Only suitable if prospect of recovering costs from opponent
- Solicitor has personal interest in outcome

ATE policies

- S29 AJA 1999

"Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may...include costs in respect of the premium of the policy"

Part 41(o) CPR includes a success fee and an insurance premium as "additional liabilities" recoverable from paying party

Recoverability of ATE premiums

See Practice Direction for Parts 43-48 CPR @ 11.10

- See PD 11.1 to 11.7 for pts 43-48 CPR
- Claims Direct Test Cases 2003 EWCA
- Sharratt v London Bus Co – TAG Tranche 2 cases May 2003
- Is premium reasonable ? if not arrive at a figure which is reasonable.

Real premium

- If premium "buys" collateral benefit to that extent it will be disallowed
- Exception – brokerage/commission
- ATE 2 types:
 - (i) Generic low value
 - (ii) One off high value cases.

High value premiums enforced

- Ashworth v Peterboro F.C. 10/6/02
- Premium £46,000 for £125,000 limit for Claimant and Defendant's costs and damages shortfall
- Damages awarded £66,000
- Premium upheld
- But RSA "Pursuit" test cases May 2005.



Temple Legal Protection Ltd - providers of ATE insurance

Rocco Pirozzolo

An overview of some issues to be considered when dealing with CFAs and ATE insurance



In summary, Practice Rule 15 requires a solicitor to:

- Give client best information possible about the likely overall costs
- Discuss with the client how and when any costs are to be met, and
- Consider the funding options open to the client to pay their own costs and the client's liability for another party's costs.

Therefore, this Rule requires solicitors to consider –

- Budgeting costs – the client’s own costs and disbursements and those of other parties (see new paragraph 6.5A of the CPD)
- The type of retainer to offer, and
- After the event (ATE) insurance for their clients – whether they are acting under a CFA or under a private paying retainer - where costs follow the event.

The practice needs to decide –

- whether to enter into a CFA
- which type of CFA to enter into (a pure CFA – “no win, no fee” – or a discounted CFA)
- when to enter into a CFA – e.g. immediately or after investigative stage funded privately (traditional retainer or under a fixed fee). The firm can switch retainers at any time.

Unearthing the funding in place



How?

If you receive a letter of claim and there is no mention at all about how the claim is being funded, ask:

- If there a CFA in place
- Whether there are any staged success fees, and if so, what these stages are
- The amount of the success fees
- Whether there is an ATE policy
- Whether it has staged premiums, and if so, what these stages are.

Whilst there is no requirement under the Civil Procedure Rules for a claimant to tell an opponent whether he has entered into a CFA or has ATE insurance until proceedings are commenced (by the serving of the form N251), this information is normally offered pre – issue because it assists recoverability of the success fee and the premium.

Unearthing the funding in place



Why?

This is all relevant to forecasting the cost implications should the defence be unsuccessful where you are facing a claimant who has the benefit of a CFA and ATE insurance, as opposed to a claimant who is pursuing his claim under a traditional private paying retainer.

If you discover that the solicitor is acting under a CFA, then you should expect:

- Counsel, and
- When costs come to be dealt with, the costs draftsman

to act under a CFA with the same success fee as the solicitor.

Success fees apply to even the detailed assessment proceedings – see the Court of Appeal’s ruling in *U v Liverpool City Council* [2005] EWCA Civ 475.

Therefore, if there is a 100% success fee, this will apply to the base costs in the detailed assessment hearing. In Naomi Campbell’s case against Mirror Group Newspapers, her solicitor’s base costs were £90,000 and they were claiming 95% success fee.

But Mirror Group Newspapers has petitioned the House of Lords for permission to appeal the decision of the taxing officers in *Campbell v MGN Ltd (No. 2)* [2005] UKHL 61 in an attempt to overturn the Court of Appeal's decision in *U v Liverpool City Council*. MGN argue for either no success fee or a far lower one – no more than 20%.

Equally, when it comes to dealing with a claimant's bill of costs, as the law currently stands, defendants need to pitch Part 47 offers very carefully given the decision in the case of *U*.

Staged success fees – some relief?



The Court of Appeal has made it clear on a number of occasions that it expects CFAs to refer to staging the success fees – Callery v Gray, Atack v Lee [2004] EWCA Civ 1712 and U v Liverpool City Council [2005] EWCA Civ 475.

Therefore, if there is only one success fee, there are good grounds for challenging this where the claim has settled, for example, pre – issue. But if a case has proceeded to trial then it is likely to be difficult to argue against a 100% success fee.

CFAs without ATE insurance – capping the costs?



Cost capping orders involve capping the costs of a party in an action if:

- there is a substantial risk that the costs will be unreasonable or disproportionate
- this risk may not be managed by conventional case management and a detailed assessment of costs after a trial, and
- it is just to make an order.

These orders were originally made in group litigation order cases and then defamation cases (see *King v Telegraph Group Ltd* [2004] EWCA Civ 613; [2005] 1WLR 2282). But there is no limit to the type of case that it can apply to.

In *Andrew Knight v Beyond Properties Pty Ltd and others* [reported in *The Law Society Gazette* on 22/06/2006], it was held that the fact that there was a CFA with a large mark up, with no ATE cover, was not in itself enough to justify a costs capping order.

ATE insurance



Types:

- Cover for opponent's costs and the claimant's own disbursements
- Both sides cover – the cover includes cover for the claimant's solicitor's costs as well.

Staged premiums

Staged premiums are becoming increasingly common amongst ATE insurers.

At Temple, we have 3 steps:

- Premium (a): pre – issue
- Premium (b): post – issue up to 45 days before the date listed for trial
- Premium (c): thereafter.

The premium becomes progressively more expensive to reflect the increased risks as a case progresses towards trial. The premium payable is determined according to the stage that the case ends. Therefore, the earlier the case settles the cheaper the premium will be.

This approach has been endorsed by the courts over the last 6 years – most recently by Master Wright of the Supreme Court Costs Office in the case of *Tyndall v Battersea Dogs Home* – and is evidenced by the success fees mediated in personal injury claims.

Staged premiums are fairer to opponents than having to pay a block (i.e. one price) premium, particularly if a case ends early.

The role of your costs estimates

Typically, a standard limit of indemnity is bought by the claimant (this tends to be £100,000). However, higher limits can be obtained.

Top – up cover can be applied for, if required.

Accordingly, be wary of overstating your costs estimates when filing and serving these estimates. You are inviting the claimant to apply for additional cover that will result in an additional premium that, if the claim is successful, will be claimed from you.

CFAs and ATEs here to stay

- Personal injury world has sorted out much of the unknowns
- A solicitor must consider them as a form of litigation funding for any client
- Key to use is careful risk selection
- Remember – any type of litigation, except family and crime
- Available to any party.

Implications for Professional Indemnity Insurers

- Claimants' costs will be more expensive
- Gradual increase in use of CFAs and ATEs predicted
- ATE premiums may decrease in time
- New breed of claim against solicitors
- Different tactics required?

Top tactical tips

- Early detailed evaluation essential
- Harder the case fought - Higher the success fee and premium
- Settlement prior to litigation will reduce ATE premium and success fee
- Early admissions reduce scope and extent of dispute
- “Divide and Conquer” offers
- Fund defence on CFA basis but stakes being raised
- Grounds for challenging CFA or reducing premium?

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