Your professional client seeks your general guidance where conditional fee agreements entered into after 1st November 2005 may be challenged as to enforceability. Prepare a comprehensive advice to your professional client.

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Dear Mr Smith,

I note your requirement for advice concerning the enforceability of conditional fee agreements post 1st November 2005. Given that I have been instructed to advise only on CFA's post this date, I will not comment on the regulations prior to this.

Conditional Fee Agreements were first permitted under the Courts and Legal Services Act 1993 s.58. This defined a CFA as *"an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances"*[1]. In the vast majority of cases, these '*specific circumstances'* where a solicitor would not be paid, would be losing.

CFA's dated on or after 1st November 2005 must comply with s.58 of the CLSA as amended by s.27 of Access to Justice Act, which brought in a new section[2] . This authorised legislation to prescribe the rules under which CFA's could be entered into and for rules to be made relating to the assessment of success fees.

Conditional Fee Agreements can allow for a success fee to be applied. However, s.58 (3) of CLSA outlines the requirements of every CFA, namely that the CFA must be in writing, it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement and it must comply with such requirements if any as may be prescribed by the Lord Chancellor.

Firstly, the CFA must be in writing. This is a matter of fact. Although there is no authority directly on the point, it would seem that any conditional fee agreement which is not in writing would be unenforceable. There is also the requirement in this section that the CFA itself must be signed by the Client and Solicitor. It is shown in the Solicitors Code of Conduct that retainers must outline the information that should be given by a solicitor to his client when instructions are first given. Failure to give this information may make the funding arrangement illegitimate.

Secondly, s58A of the CLSA outlined that criminal proceedings and family proceedings cannot be the subject of an enforceable Conditional Fee Agreement[3]. Family proceedings are further defined in S58A (2) CLSA.

The final requirement under s58 (3) regards the requirement to comply with anything prescribed by the Lord Chancellor. The first requirement prescribed by the Lord Chancellor is *"for the person*

[1] s58 2(a) Court and Legal Services Act 1990
[2] s58A Courts and Legal Services Act 1990
[3] S58A (1) Courts and Legal Services Act 1990

providing advocacy or litigation services to have provided prescribed information before the agreement is made". This is an important part, as the conducting solicitor is under a duty to give information to the client regarding the conditional fee agreement. Failure to give this would make the arrangement unenforceable.

It is also important for the solicitor to have made the necessary enquiries before the CFA can be held to be valid. In *Deborah Garrett v Halton Borough Council*[4], specific tests were recommended which a solicitor should carry out regarding the prescribed enquiries to be made of a client by his solicitor regarding alternative methods of funding. Failure to make such enquiries at the appropriate stage would render the CFA unenforceable. If no alternative method of funding is available, it is often the case that clients are advised to take out an ATE insurance policy to cover any adverse costs and often their own disbursements. The solicitor is under a duty to advise the client where they have a vested interest in a particular provider of such insurance.

Where an insurance premium is obtained, it is vital for a solicitor, before entering into a CFA, to make all necessary enquiries regarding the possibility of BTE insurance. Under CPR 43.2 (o) such insurance policies are classed as additional liabilities. It was held in *RSA Test Cases*[5]*,* that the court should look both at the costs risks and the size of the claim when considering the premium. This brings in an idea that any insurance premium which is claimed should be proportionate to the matters in interest, in order to be recoverable.

There are further requirements for a conditional fee agreement which allows a success fee. These requirements are set out in s58 (4) CLSA, such as the need for the percentage increase to be stated on the agreement and that the percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order of the Lord Chancellor. This can be seen in Road Traffic Incidents, where the success fee is fixed at 12.5% success fee unless the matter finishes at trial, where it would be 100%. It was held in *Jones v Cardon Catnic Ltd*[6] that if a success fee exceeds 100% of the basic charges, then the retainer is unenforceable.

Under the CPR, there are numerous further requirements in order to recover a success fee. CPR s44.15 states that *"A party who seeks to recover an additional liability must provide information about the funding arrangement to the court and to other parties as required by a rule, practice direction or court order"*[7]*.* This is also mentioned in the Costs Practice Direction 19.1 (1). Under this provision, there is no requirement to disclose the amount of the additional liability.

CPR 44.3B sets out further circumstances where an additional liability would not be recoverable. Specifically CPR section 44.3B (1)(c) states that a party may not recover *"any additional liability for any period during which that party failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order".* It appears from this that there is not a strict requirement to give such notice prior to the commencement of proceedings. Costs Practice Direction 19.2 also states that *'A claimant who has entered into a funding arrangement before starting the proceedings to which it relates must provide information to the court by filing the notice*

[4] Deborah Garrett v Halton Borough Council: David Myatt & Otrs v National Coal Board (2006) EWCA Civ 1017
[5] RSA Test Cases [2005] EWHC 90003 (Costs)
[6] Jones v Caradon Catnic Ltd [2005] EWCA 1821
[7] Civil Procedure Rules 44.15 (1)

when he issues the claim form"[8]*.* This supports the idea that a notice of funding must only be served once proceedings are issued. However, in CPD 19.2 (4), it further states that *"a party must file and serve notice within 7 days of entering into the funding arrangement concerned".* This is contradictory, and outlines that any form of notice of the funding arrangement would be helpful in recovering the additional liabilities.

The solicitor with the CFA is also under a duty under Cost Practice Direction 32.5 to draft a statement of reasons for the percentage increase and undertake a risk assessment to assess the success fee. There is no requirement to disclose these, however under 32.5 (d) it states that *"if the conditional fee agreement is not disclosed …..a statement setting out …..information contained in the conditional fee agreement so as to enable the paying party and the court to determine the level of risk undertaken by the solicitor"* should be drafted.

In conclusion it can be seen that there are many factors which could make a conditional fee agreement unenforceable. The CFA must be in writing, meaning that a verbal retainer for a 'no win no fee' agreement is unenforceable. Further there is the requirement that the funding arrangement is signed by both solicitor and client, and that any additional liability should be stated on the agreement. This is all part of giving specific and adequate information regarding the funding arrangement to the client. If an insurance premium is taken out to cover adverse costs or otherwise, again the solicitor is under a duty to outline the implications of the same and also to outline any financial interest they may have in recommending a specific policy. If a Conditional Fee Agreement allows for a success fee, then there are further duties on the solicitor to recover these. The conducting solicitor must give notice of the funding arrangement preferably as soon as it is entered into. If a Conditional Fee Agreement does allow for a success fee, then the solicitor is under a further duty to investigate as to whether other methods of funding are available to the client, such as BTE Legal Expenses Insurance. If the client subsequently has such cover, then the success fee would likely be unrecoverable. Overall there are many rules which affect Conditional Fee Agreements, which must be followed in order to make the agreement completely enforceable and work under it recoverable.

Yours Faithfully

David Hill

[8] Costs Practice Direction 19.2 (2)(a)

Bibliography

s58 2(a) Court and Legal Services Act 1990
s58A Courts and Legal Services Act 1990
S58A (1) Courts and Legal Services Act 1990
Civil Procedure Rules 44.15 (1)
Costs Practice Direction 19.2 (2)(a)

Deborah Garrett v Halton Borough Council: David Myatt & Otrs v National Coal Board (2006) EWCA Civ 1017
Jones v Caradon Catnic Ltd [2005] EWCA 1821
RSA Test Cases [2005] EWHC 90003 (Costs)