The Law Society

Conditional fee agreements guidance

May 2013

Disclaimer

In all cases solicitors must ensure that any agreement with a client is made in compliance with their professional duties, the requirements of the SRA and any statutory requirements depending on the individual clients' circumstances and solicitors' business models. The Law Society does not accept any responsibility for any breaches of such requirements which may be caused by reliance on this guidance.

On 1 April 2013 the new requirements which apply to conditional fee agreements ("CFAs") came into force. Where the CFA and/or ATE policy was signed on or after that date, with a few exceptions, success fees and after event insurance premiums ("ATE") will now be paid by the client, not the defendant.

The exceptions are:–

- Diffuse ,mesothelioma claims
- Publication/privacy proceedings
- Insolvency work

These changes and the relevant transitional provisions are contained in the Legal Aid Sentencing and Punishment of Offenders Act 2012 ("LASPOA"), the Conditional Fee Agreements Order 2013 ("CFA Order") and the Civil Procedure Rules ("CPR"). LASPOA also amends S.58 of the Courts and Legal Services Act 1990 ("CLSA").

In addition, personal injury and clinical negligence clients entering into a CFA on or after 1 April 2013 will benefit from qualified one way costs shifting. This means that in the majority of cases a claimant will not be liable for the defendants' costs in the event that the claim is unsuccessful. However, all successful claimants will be at risk of an adverse costs order if they fail to beat a Part 36 offer to settle (up to the level of any damages and interest recovered).

Whilst the maximum success fee that a solicitor can charge as uplift on basic costs remains at 100 per cent, the legislation introduces a cap on the amount which can be deducted as the success fee (the recoverable success fee) from the claimant's damages in personal injury and clinical negligence claims.

The Legislation and Civil Procedure Rules

LASPOA 2012

S.44 – Success Fees

S.46 – ATE Premiums

CFA Order 2013

Article 1 – Citation, Commencement, Interpretation and Application

Article 2 – Agreements providing for a success fee

Article 3 – Amount of success fees

Article 4 – Specified proceedings

Article 5 – Amount of success fees in specified proceedings

Article 6 – Transitional and savings provisions

CLSA 1990

S.58 – Conditional Fee Agreements

CPR

Part 48.2 – Pre commencement funding agreements

[see also The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2013]

Transitional provisions and exceptions

In the case of a CFA and an ATE policy signed by a client on or before 31 March 2013 the success fee and the ATE premium will be recoverable from the unsuccessful defendant and the Conditional Fee Order 2005 will continue to apply to those agreements (CPR Part 48.2).

In the case of a CFA and an ATE policy (if necessary) signed on or after 1 April 2013 the success fee and ATE premium must be paid by the client and will not be recoverable from the defendant (sections 44 and 46 LASPOA).

In the case of a CFA signed on or before 31 March 2013 but where an ATE policy is signed on or after 1 April 2013 the success will be recoverable from the unsuccessful defendant (CPR Part 48.2) but the ATE premium must be paid by the client (S.46 LASPOA).

Article 6 of the CFA Order excludes mesothelioma claims, insolvency proceedings, publication and privacy proceedings and pre commencement agreements from the provisions of sections 44 and 46 LASPOA.

Maximum success fee and cap on recoverable success fee in personal injury cases

By Article 2 of the CFA Order the maximum uplift on the basic costs which a solicitor can charge is 100% except in specified proceedings.

Article 4 of the CFA Order provides that personal injury claims are specified proceedings for the purposes of limiting the amount that a client is liable to pay in respect of a success fee (the recoverable success fee).

Article 5 of the CFA Order imposes a cap on the recoverable success fee in personal injury claims to 25 per cent of general damages and past losses, less any recoupable benefits by the Department of Work and Pensions. The cap of 25 per cent must

include VAT. Whilst it is not clear from the legislation, the Law Society considers it is likely to have been parliament's intention that the 25 per cent cap should also include any success fee payable to Counsel and VAT. This 25 per cent cap applies only to proceedings at first instance. In other proceedings the cap is 100 per cent of these categories of damages.

Failure to comply with the requirements

A breach of the statutory requirements of S.58 CLSA renders a CFA unlawful/unenforceable and you will not be able to recover any costs. Examples of breaches are:

- a success fee of more than 100 per cent
- the CFA is not in writing
- there is no statutory cap in PI cases where the CFA provides for a success fee to be paid

However, there are no additional statutory requirements regarding information to be given to clients over and above the requirements of the SRA Code of Conduct and any breaches of the Code will be a professional conduct issue and therefore a matter for the SRA to deal with but it will not render the CFA unlawful/unenforceable.

Termination of agreement/minors/changes

Death

Under the Law Society's Model Conditions, the CFA Contract automatically ends upon death of the client. In a transitional case, the Solicitor would thus need to enter into a new agreement with the estate after the client dies. However, the solicitor can recover costs under the old CFA up until the point of death.

Minor reaching majority

Contracts entered into with a minor are not binding unless it is for necessaries. A contract for legal services could be argued to be for necessaries. Thus, any CFA entered into with a minor (whether by himself or through a "next friend" as agent) would bind the minor on the attainment of majority at 18. Thus any CFA would continue after the minor reached 18.

Further, even if a CFA entered into with a minor was not a contract for necessaries (and could thus be avoided by the minor on his reaching 18), the minor could ratify the contract after he reached 18.

If the contract has been entered into with a "next friend" personally as opposed to as agent for the child, then it is automatically terminated once the child reaches majority. However, there is probably nothing to stop the next friend assigning the contract to the child once the child reaches majority. This would mean the original CFA would continue.

If you have a next friend signing the contract on behalf of the minor but the contract is in the minor's name, then the minor is the client. There is then no need to assign the contract when the child reaches majority.

Protected parties

If the protected person gains capacity there is no automatic termination of the next friend's status unless there is a court order to that effect. Therefore the next friend continues until termination. In this situation it is, in reality the next friend that is the client.

Change of solicitor after 1 April

This issue was dealt with in *Simmons v Castle* ([2012] EWCA Civ 1288). A fresh CFA is a new CFA. If a client changes to another solicitor where the original solicitor was acting under a pre 1 April CFA then there would need to be a negotiated agreement in any assignment that the first solicitor is paid what is owed for the legal services provided up until the time of the assignment.

Termination of agreement

The Law Society conditions attached to the model CFA sets out the circumstances and liabilities when an agreement is terminated. In such cases the client needs to be made aware that if a pre 1 April 2013 CFA is terminated and the client enters into a new CFA on or after that date with another solicitor any success fee and ATE premium incurred under the new agreement will not be recoverable from the unsuccessful defendant.

Notice of funding

There will no longer be fixed recoverable success fees under the CPR for CFAs entered into on or after 1 April 2013 and consequently there will be no need to serve a Form 251 as there will be no "additional liabilities" in those cases. There will, however, still be a requirement to serve Form N251 in any case where a CFA has been entered into on or before 31 March 2013.

Model agreement

The Law Society has produced a new model CFA for personal injury and clinical negligence claims and that model agreement should be read in conjunction with this guidance note. It should be noted that the model agreement is not a precedent for use with all clients and that it will need to be adapted/modified depending on the individual clients' circumstances and solicitors' business models. In all cases solicitors must therefore ensure that any agreement with a client is made in compliance with their professional duties, the requirements of the SRA and any statutory requirements. The Law Society does not accept any responsibility for any breaches of such requirements in respect of the model agreement which is intended for guidance only.

The draft clause in bold and square brackets in the model CFA are optional clauses. Please consider these very carefully before deciding whether you wish to include them or not and make sure you are consistent in making those choices.

Calculation of damages cap

In circumstances where a "global" offer of settlement is made by the opponent you should set out in your advice to the client details of how you calculate the amount that is attributable to general damages and past losses for the purposes of calculating whether or not any cap on the success fee payable by the client applies. If your client disagrees with your assessment you should have in place a procedure for independent resolution of the dispute (see the Law Society's model CFA for an example).

Fixed fees

If you intend to agree a fixed or capped fee with the client, you need to decide whether you wish to limit your charges to the client to the CPR Fixed Costs Regime fees which are recoverable from the opponent as the basic charges if you win in certain types of injury claims. If your client lives in London any CPR Fixed Costs Regime amount will be increased by 12.5 per cent. It is open to you to charge a higher fixed fee to the client, but you should make it clear that they will have to pay the excess out of their damages. You should be careful to make any sort of cap compliant with what is now CPR Part 44.1(3).

Increase in Damages

The Government has confirmed that general damages should be increased by 10% in accordance with the recommendation of Lord Justice Jackson in his *Review of Civil Litigation Costs – Final Report.*

In *Simmons v Castle* (see above) the Court of Appeal declared that in all cases where a judgment is given after 1 April 2013 the level of general damages under the following heads will be 10 per cent higher than previously: (i) pain and suffering; (ii) loss of amenity; (iii) physical inconvenience and discomfort; (iv) social discredit; (v) mental distress. However this 10 per cent increase will **not** apply to claimants who fall within section 44(6) of LASPO. Section 44(6) of LASPO provides that success fees will continue to be recoverable in two categories of cases: where an individual CFA was entered into prior to 1 April 2013; where a Collective CFA was entered into prior to 1 April 2013 **and** advocacy or litigation services were provided to an individual client before 1 April 2013.

Note that the new regime of non-recoverability of success fees (and thus the 10 per cent increase in damages) **will** apply to cases where a solicitor acts under a CCFA entered into before 1 April 2013 but carries out no advocacy or litigation services for an individual client prior to that date.

Clinical negligence claims

The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2013 and Article 6 of the CFA Order deal with the recovery of ATE premiums in respect of clinical negligence claims. In those cases the ATE premium will continue to be payable by the defendant but only in so far as it relates to the claimant's liability to pay for one or more experts reports on liability or causation and the costs of the reports are not allowed under the costs order.

Qualified One Way Costs Shifting ("QuOCS")

CPR Part 44.13 applies to claims for damages:–

a) for personal injuries
b) under the Fatal Accidents Act 1976
c) estate claims under S.1 of the Law Reform (Miscellaneous Provisions) Act 1934

This rule applies to all personal injury claimants, except those who entered into a CFA before 1 April 2013 and protects them against an adverse costs order in the event that the claim is unsuccessful.

Where claimants fail to beat offers to settle under CPR Part 36, any costs liability will be capped to the amount of any order for damages and interest made in their favour. Any order for costs in such circumstances cannot be enforced until after the proceedings have been concluded and any shortfall will not be treated as an unsatisfied or outstanding judgment.

Claimants will lose the benefit of QuOCS and will be liable for costs to the full extent where:

- the claim discloses no reasonable grounds for bringing the proceedings
- there is an abuse of the court's process
- the claimant's conduct (or a person acting on their behalf) is likely to obstruct just disposal of the proceedings
- fundamental dishonesty on the balance of probabilities (enforcement only with the court's permission).