Making Valid Retainers

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By Andrew Hogan

If a solicitor does not have a valid retainer with their client, they will have no entitlement to be paid their costs by either their own client or, even if they win the case, the opposing party to litigation. It is accordingly of critical importance that a solicitor has confidence in their retainer from the outset of the case.

In this short paper, I shall consider some of the issues that arise when drafting and checking retainers to ensure they are valid, the interpretation of retainers and the consequences of how horribly matters can go wrong, when a retainer proves invalid or offends regulatory considerations.

Drafting retainers

Let me start, with some observations about the context in which a solicitor makes a retainer with a client. One of the interesting developments of the last decade or so has been the rise of behavioural science, its acceptance by the political establishment and its deployment into mainstream policy making by politicians.

In 2008, Richard Thaler and Cass Sunstein's book **Nudge: Improving Decisions About Health, Wealth, and Happiness** gained a following among politicians in the United Kingdom. The authors refer to influencing behaviour without coercion as "libertarian paternalism" and the influencers as choice architects. Thaler and Sunstein defined their concept as:

A nudge, as we will use the term, is any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates. Putting fruit at eye level counts as a nudge. Banning junk food does not.

This in turn led to the establishment as part of the Cabinet Office in 2010, of the Behavioural Insights Team. The team ran a series of trials with HMRC that sought to improve tax collection rates by making it easier for individuals to pay. One of the simplest interventions involved testing the impact of directing letter recipients straight to the specific form they were required to complete, as opposed to the web page that included the form. This increased response rates by 19 to 23%

The team also worked with the Ministry of Justice, devising a policy that prompted those owing the UK Courts Service fines with a text message ten days before the bailiffs were to be sent to a person, which doubled payments made without the need for further intervention. This innovation has reportedly saved the Courts Service £30 million a year.

At its heart, behavioural science rejects the notion that people are calm, rational decision makers, capable of infinite patience and weighing of evidence, and are rather creatures driven by instinct, much of whose decision making is subconscious and capable of being "nudged". They are human beings and not an alien species, known as the "econ".

For many years I have had an interest in behavioural psychology. The field is closely related to a quality that all lawyers should possess namely: empathy. That is the ability to share and understand the feelings of another.

I would emphasise the word "feelings": because although we may kid ourselves that we are creatures of logic, moving smoothly from rational decision to rational decision, much decision making is unconscious, or instinctive and not based on objective evaluation of the circumstances we find ourselves in.

An example will suffice: do you buy goods or services online? Do you always read the terms and conditions, scrolling carefully through them? Or do you just click "accept", not knowing that in so doing you have agreed to give your children into slavery, by carefully drafted small print?

This is irrational behaviour, which is the normal reaction of most human beings. It follows that as a measure of consumer protection, requiring terms and conditions to be placed on a screen, where a consumer is free to scroll down them and read them at leisure, is utterly useless, as it does not achieve the objective of creating informed choice. A similar point can be made against the provision of documents with lengthy terms and conditions: people continue to

sign them, without reading them, so what good is achieved by providing the terms and conditions?

It also raises the larger question, which is whether our current legal system predicated on alleged rational decision making is no such thing: and there are fascinating studies that have taken place, which reveal that, for example, when sentencing in the criminal courts, the severity of the sentence that you might get, can be affected by the time of day when sentence is handed down, and whether the judge is hungry or has been fed. See: https://www.theguardian.com/law/2011/apr/11/judges-lenient-break.

If such considerations apply to purchasing goods or services online or to the decision making process of the courts, how much more do they apply to clients: and it follows that when taking instructions from a client or litigating their case, it is extremely dangerous to assume that they will behave rationally, by e.g. always reading letters that you send them, or that they will assiduously check the truth of what they tell you, against available contemporaneous documents or more prosaically, that they will actually correct witness statements, prior to reading them.

Yet they are litigating in a court system designed for “econs” and predicated on the assumption that decisions made by courts are rational and based upon the evidence.

Which brings us neatly to the issue of retainers. Stepping back, this problem is evident at the earliest stage, when a client retains a solicitor, and is provided with copious written material, which is meant to govern the relationship between client and solicitor, and fulfill the purpose of providing consumer protection for the client. It will not work, if the client does not read it or if they do read it, does not understand it. That is a recipe for unhappy clients and disputes further down the line.

I would therefore suggest that the current system of client care and provision of client care letters, retainer provisions and terms and conditions of business is not fit for the purpose of providing real consumer protection to clients, both in terms of the basis upon which solicitors charge and the way that charging methodology is then recorded and explained . It needs to be fundamentally reshaped to deal with the real needs of the clients who are represented by solicitors.

I deal with the charging basis first. Let me take as an example, personal injury claims, as a type of consumer claim. I would hazard that most clients will not understand the conditional fee agreement they are provided with.

They will not understand the subtle difference between a 100% success fee on costs and a 25% deduction from their damages, they will not understand that if they agree to a conditional fee agreement without a success fee, they are still at risk of unrecovered base charges eating into their damages.

They will probably make their retainer remotely, with a firm located in another part of the country and simply sign whatever is provided to them by email or in the post and what is provided to them, will cover many pages of impenetrable retainer documentation.

This retainer documentation will have been created using a model conditional fee agreement and a client care letter written with an eye to the **Law Society Practice Note June 2018 Law Society Guidance on retainers**. This document notes without any irony "There are relatively few outcomes that require you to provide information in writing. These relate to complaints.".

But reading into the document that is not quite right. Clients must be made aware in writing of their right to make a complaint and details of how to do so. They must also be advised of their right to complain to the Legal Ombudsman. They must further be aware of their right to challenge or complain about a bill, including their rights to an assessment of costs under part III of the Solicitors Act 1974.

Moreover as the document unfolds, it makes it plain that clients must be informed the solicitors regulatory status, provided with cost information and fee arrangements, told about any separate businesses and there must be an agreement about service levels including for example the type and frequency of communications.

Although this information need not be provided in writing, it would be a bold or incautious solicitor, who does not record it in writing. Nor is this a new problem or one that goes unrecognised. Section 4.12 of the Guidance notes this:

Many clients comment about being given large documents containing lots of legal language in small print by their solicitors. Often these documents are not read or understood.

The advice given by the Law Society is to alter the style, which is used to write these documents, to make them more user friendly.

You may wish to consider adopting the following style for your written client information to help clients understand the contents:

- *ensure the key information is highlighted early on. If the document exceeds three pages, you may wish to move detailed information into annexes. This will help ensure important information is not overlooked*
- *use a clear font, in no smaller than 11 point*
- *make use of headings and bullet points to break up blocks of text and highlight points*
- *use plain language*
- *only include terms and conditions which actually apply to the specific retainer*
- *where a document is long, include a table of contents.*

However, the Guidance also goes on to heap yet more written requirements on the solicitors head, promising that on the one hand there is no regulatory requirement to set out terms of business, whilst on the other noting ominously that it is good business practice to do so. These terms of business are stated to include the following matters.

Terms of business will normally set out details of:

- *standards of service clients can expect*
- *information on professional indemnity insurance (also see requirements under Provision of Services Regulations 2009)*
- *verifying bank account details in order to protect against fraud*
- *data protection issues*
- *storage of documents and any related costs*
- *confidentiality and disclosure*
- *outsourcing of work*
- *auditing and vetting of files*
- *any clauses limiting liability*

- *processes for terminating the retainer*
- *client due diligence you will undertake financial arrangements with clients.*

But what is the point of all these provisions, if the client is not actually going to read them, and if they do, is not going to understand them?

I am frequently asked to draft retainer agreements, conditional fee agreements, and client care letters. When I ask to see the documents currently in use, they always resemble a "coral reef" of provisions, which have been added to over the years, with fresh terms and conditions, but nothing is ever taken away: the result being that the documents get longer and longer, and are often contradictory in whole or in part. This is most unsatisfactory, and my task is usually to simplify and reduce, rather than to expand upon what has been done in the past.

I would suggest that a radical new approach could usefully be taken, to the practice both of charging clients and giving them real consumer protection, and reform of the second, is easier to achieve than the first.

In respect of reforms to the practice of charging, there would have to be the repeal and replacement of the Solicitors Act 1974, with amendments to the Courts and Legal Services Act 1990 to sweep away the nonsense of damages based agreements which don't work, and conditional fee agreements which don't reflect the realities of the agreements that solicitors and clients want to make. Obtaining primary legislation seems most unlikely in the current climate.

In respect of consumer protection, a lot could be done to simplify retainers and make them easier for clients to understand. Most retainers could be reduced to 2000 words in my view, and most client care protections made standard to all clients and set out in the Solicitors Handbook. There is no need to duplicate them in a client care letter.

Moreover, it could be made a regulatory requirement that a solicitor or solicitor's representative must give an oral explanation to the client of key provisions and keep a record of it.

Since the advent of email, people don't talk to each other as they used to, but a conversation is a much better way of ensuring the most important information is conveyed in a way, where there is a reasonable chance that the client will

actually understand what their rights and obligations are, with a better prospect of achieving the objective of consumer protection accordingly.

Interpreting retainers

In point of fact, on reflection perhaps the largest part of what I do, concerns not only drafting contracts but advising upon their interpretation: because although drafting conditional fee agreements, collective conditional fee agreements, damages based agreements and other retainers, documents for litigation funding arrangements or group actions, is niche work, all these documents are subject to the general principles of the common law of contract.

As these are principles are frequently deployed in argument to contend for or against a particular result, when something has gone wrong, with many hundreds of thousands or millions of pounds of costs at stake, anyone dealing with costs work needs to have a good grasp of how they work and accordingly I will discuss some of the key principles below and how they can be applied in disputes over retainers.

The principles are of wider application though: they apply to contracts of compromise and also form the starting point for the interpretation of part 36 offers, another area which can be rich in disputes as to what the parties have actually agreed.

Principles of contractual interpretation

Perhaps the most significant set of principles relate to the interpretation of a contract: many contracts are so ambiguously drafted that they might have several meanings. The court has a large toolkit of principles called the canons of contractual construction, which it can use to determine what a contract means.

The root of all modern authority lies in the **Investors Compensation Scheme v West Bromwich Building Society[1998] 1 W.L.R. 896** case where Lord Hoffman famously explained how a contract should be interpreted in his speech:

The principles may be summarised as follows.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

*(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the *913 exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749 .

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191 , 201:

"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

So much would appear straightforward, yet in the years after this case, the principles expressed by Lord Hoffman, were stretched to breaking point, in particular to argue that what might be thought to be the plain or obvious meaning of contractual words, could be displaced by consideration of the "background matrix of fact". This led to retrenchment in later authorities.

In the case of **Arnold v Britton [2015] AC 1619** Lord Neuberger laid down his own principles emphasising that commercial common sense, and the surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed.

In a foreshadowing of arguments to come, he noted that the worse the drafting of a provision, in a sense the more ready the court should be to depart from its natural meaning. He also noted that commercial common sense, was to be looked at, at the time an agreement was made, and there was a distinction to be drawn between that concept and an imprudent term that the parties nonetheless had agreed upon. He also emphasized that when looking at the background matrix of fact, the facts had to be known or available to both parties.

Arnold can be regarded as an attempt to rein in judicial inventiveness. But the interpretative pendulum swung again in the case of **Wood v Capita Insurance Services [2017] AC 1173** where contextualism, was re-iterated as an interpretative principle, as well as textualism where the Supreme Court held:

11….Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause….

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571 , para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival

constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance…."

Practical problems

The Law Reports are littered with cases, where solicitors have lost out on their costs due to ambiguities or problems with the drafting of their retainer. A relatively recent example of how these principles can be drawn together and then applied in the context of costs litigation reached the Court of Appeal.

In the case of **Malone v Birmingham Community NHS Trust [2018] EWCA Civ 1376** the Defendant paying party, attempted to argue that by a poorly drafted conditional fee agreement, the Claimant had limited the scope of his retainer to exclude work done on a claim against the Defendant ultimately responsible for paying damages for his injury. These arguments arise from time to time, and in several county court decisions have been successfully argued by paying parties.

The submission made was summarized by the Court of Appeal in these terms:

10. After the case was settled a detailed assessment was commenced. The defendant asserted that no costs were payable to the claimant because the only potential defendant named in the CFA was the Home Office and the CFA was accordingly limited to a claim against the Home Office/Ministry of Justice. It did not cover a claim against a health trust, such as the defendant.

The CFA stated:

What is covered by this agreement

- *All work conducted on your behalf following your instructions provided on [sic] regarding your claim against Home Office for damages for personal injury suffered in 2010. (underlining added)*

The Court of Appeal noted:

21. In the present case, the insertions made to the CFA demonstrate poor quality drafting and little attention to detail. The critical wording consists of only one sentence and yet it contains three manifest mistakes: (i) the omission of the date of the instructions and (ii) the omission of the definite article before "Home Office" and (iii) the description of the claim as being against "Home Office". The Home Office had not been responsible for operating prisons for some years.

22. In accordance with the guidance provided in Wood , the interpretation of such an agreement is likely to call for more emphasis on the factual matrix and contextual considerations and less principal emphasis on close textual analysis.

Thus the Court of Appeal adopted the approach in the case of **Wood** which had swung the emphasis of interpretation away from a black letter textual approach (at least in the case of poorly drafted agreements) and to a broader contextual approach as to what the parties meant.

29. This construction is supported by the contractual context. As is clear, no great care has been taken in relation to the drafting of the critical wording. This is consistent with the wording being descriptive rather than prescriptive. If the intention had been to define and limit the coverage of the CFA to claims against a particular defendant, greater care and precision would be expected and, in particular, one would not expect the named defendant to be an entity which was obviously inappropriate. Although Mr Booth suggests that the CFA involves a "positive choice" being made as to the defendant, this is not consistent with the obvious misnomer of that defendant.

30. It is also supported by broader contextual matters. In particular:

(1) The CFA was entered into at an early stage and before proceedings were commenced. This is unsurprising, as a client is likely to want the protection of conditional fee terms before the solicitor starts work. At this stage of proceedings, as the facts of this case illustrate, the identity of the ultimate defendant(s) may be unclear. In such circumstances it is intrinsically unlikely that a reference to a named opponent in the description of the claim would be

intended to limit the CFA to proceedings against that opponent, rather than simply to serve to describe the claim.

(2) It is generally in both the client's and the solicitor's interest that the CFA covers the relevant work. That is the reason for having the CFA. It is therefore in neither party's interest to seek to impose strict definitional limits which may exclude foreseeable work, particularly, as here, at an early and embryonic stage of a claim.

(3) In this particular case there was uncertainty as to the appropriate defendant when the CFA was entered into. This makes it all the less likely that the inapt reference to "Home Office" was intended to limit the CFA to a claim against that entity. The proper entity to be sued was one of the main questions which the solicitor was being appointed to determine.

(4) In the present case there was also no commercial reason to limit the claim to a particular defendant because, for example, of solvency concerns. All the potential defendants to the claim were public authorities responsible for aspects of the regime at HMP Birmingham. They could be no doubt that any of the potential defendants would have been financially able to meet the claim, and thus no reason for the solicitors to exclude them from consideration.

The Court of Appeal thus effectively asked themselves, why the parties, the claimant and his solicitor would want to limit their agreement, in the way suggested by the defendant.

Allowing the appeal, on the current state of authorities, perhaps the surprising part is that the defendant got as far as it did, before two experienced county court judges.

It is interesting to note the chronology: both these decisions, were made before the decision in **Wood** in 2017 and perhaps also illustrates how the merits of a case can change whilst other litigation is grinding through the appeals process. The emphasis that the defendant placed on **Law v Liverpool City Council (unreported)** where a similar argument had found traction, was found to be misplaced.

Of course disputes don't always arise on an inter partes basis whether they be over the scope of a retainer or something else: a dispute can arise between the parties to a contract, the client and solicitor in which case there is more room to apply wider doctrines, to constrain a document's meaning. These include the

principle of estoppel by convention, in short where both parties have acted on the assumption that a contract means a certain thing, they may be precluded by principles of estoppel from asserting it means something to the contrary: in the case of **Stevensdrake Limited v Stephen Hunt [2017] EWCA Civ 1173** Briggs LJ as he then was stated the principle thus:

60. As summarised in Chitty on Contracts (32nd edition) at 4-108:

"Estoppel by convention may arise where both parties to a transaction "act on assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other." The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable (typically because the party claiming the benefit has been "materially influenced" by the common assumption) to allow them (or one of them) to go back on it."

61. In considering this issue the Judge referred to the summary statements of the doctrine made by Lord Steyn in Republic of India v India Steamship Co Ltd [1988] AC 878 at 913E-F and the Court of Appeal in Christopher Charles Dixon EFI (Loughton) Limited v Blindley Heath Investments Ltd [2016] 4 All ER 490 at [72]-[73]. Both these cases are referred to in the footnote to the passage cited from Chitty, which is in broadly similar terms to Lord Steyn's summary.

In the **Stevensdrake** case estoppel was effectively deployed to argue that having accepted a contract of retainer meant one thing, a party could no longer rely upon its black letter wording to the contrary, all in the context of a dispute over payment between a solicitor and client.

Conditional fee agreements and success fees

Conditional fee agreements which provide for a success fee, can cause particular problems for solicitors, not only because of the statutory formalities which apply to the drafting of the agreements, but in respect of charging success fees to clients, which inevitably these days have to be paid from the client's own resources.

There are a number of significant points arising from the decision of the Court of Appeal in **Herbert -v- H H Law Ltd [2019] EWCA Civ 527** which are of general importance to the profession, and not just that part of the profession which undertakes personal injury litigation.

The first point is whether when running a case under a conditional fee agreement (CFA) which provides for a success fee, it is necessary to undertake a risk assessment and to charge a success fee which is commensurate with the prospects of success in that individual case as the "just price" which a client may be charged, or whether it is possible and indeed proper, to charge a client a success fee which is divorced from considerations of risk and takes into account other factors.

The second point which arises, is how closely the court will hold a client to the bargain that they struck at the beginning of the case, when making a CFA which provided for a defined success fee and which the client now wishes to argue should have been a lower fee. This requires consideration of the nature and purpose of a solicitor own client assessment under section 70 and the application of the presumptions which can apply to the agreement of a fee, pursuant to rule 46.9 CPR.

The third point is to the nature of an ATE premium payable by the client in respect of a policy of ATE insurance effected through the agency of the solicitor, and to what extent this ATE premium, when disputed by the client can be challenged through the mechanism of a solicitor-own client assessment pursuant to section 70 of the Solicitors Act 1974.

I will consider the first of these points in this paper. It is now clear that a success fee, grounded as it is, in statutory innovation wrought by the Courts and Legal Services Act 1990, is conceptually different from other items of costs such as an hourly rate, an experts fee or counsels fees, and can be regarded as a category of sui generis costs, which must be charged in a particular way, by reference to a percentage uplift of base costs.

It is also right to note that the starting point for charging a success fee and quantifying it, is the quantum of risk posed in a case that the solicitor will not be paid.

In **Herbert,** the CFA provided for a 100% uplift, which was subject to the statutory cap of 25% of relevant categories of damages as provided by the Conditional Fee Agreements Order 2013. The Court of Appeal noted in respect of the retainer documentation that had been prepared for the client the following:

48. It is important to bear in mind that the complaint of Ms Herbert on this issue is not that she should have been sent a more detailed invoice or further invoices

but that she did not give her informed consent to the charging of the success fee and its amount. There is no merit in that complaint (subject to the risk point addressed below) because all the information relating to its imposition and calculation and to her exposure to HH's fees generally, in the circumstances which occurred, was clearly set out in the documentation with which she was provided before agreeing HH's retainer. The retainer letter said that any contribution by her towards HH's costs under the CFA would be limited to 25% or less of her recovered damages. It told her who, within HH, would have the initial responsibility for dealing with her claim and the person having overall supervision for the claim. The CFA said that, if she won the claim, she would pay HH's basic charges, their disbursements, the success fee and the ATE premium. It said that HH would use their best endeavours to recover maximum costs from the defendant and their insurers. It set out the way the success fee would be calculated, and specified that there would be a cap of 25% of the elements of damages described. The "What you Need to Know" document also stated that, if HH won her claim, she would be liable to pay HH's basic charges, their disbursements, the ATE insurance premium and a success fee, and that her contribution towards her costs liability would be limited to up to 25% of the damages she obtained. That document also set out how the basic charges were calculated, and the hourly rate to be charged, and the imposition of VAT. Subject to the point on litigation risk and the success fee, the totality of that information provided a clear and comprehensive account of her exposure to the success fee and HH's fees generally.

But the Court of Appeal then went onto consider the 100% fee in the context within which success fees are calculated:

50. The fixing of a success fee uplift in the context of a conditional fee agreement has traditionally been related in this country to an assessment of the risk of the proceedings being lost. Soole J set out in his judgment (at [29]-[30]) a clear and detailed account of the difference between the way that an uplift under a conditional fee agreement was treated on an assessment of costs as between the parties and an assessment as between solicitor and client before and after LASPO. It is sufficient, for the purposes of this appeal, to say the following. Prior to April 2013, in deciding whether a success fee was recoverable between the parties as a reasonable cost, the CPR stated that the relevant factors to be taken into account included "the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur", judging the facts and circumstances as they reasonably appeared to the solicitor or counsel when the

funding arrangement was entered into and at the time of any variation of the arrangement: see the then 44PD.5 paras. 11.7 and 11.8(1)(a). The same consideration applied, on a solicitor and client assessment, where the client had entered into a conditional fee agreement: see the then 48.PD.6 paras. 54.5(1)-54.8. LASPO abolished the right of recovery of a success fee as between the parties. Those provisions in the former Practice Directions, and the corresponding provisions in the CPR, have been revoked. They are not reproduced in the current CPR 46.9 or in PD 46. As Soole J observed, however, and Mr Kirby submitted, the wording of CPR 46.9(4) shows that it was envisaged that a success fee would be related to risk: the reference to the perception of the solicitor or counsel when the conditional fee agreement was entered into or varied closely reflects the language in the former 44PD para. 5 11.7 and 48PD.6 para. 54.5(2).

The evidence was that the success fee had not been calculated based on risk at all:

51. Mr Ralph's evidence in his witness statement was that HH's charging model was the same as that of many of its competitors. He said as follows:

"I can say that the model we have adopted, is that opted for by most of our competitors. It is routine that solicitors now make a solicitor client charge in the form of a success fee: I also know that many of our competitors charge success fees in the same way that we do. Our policy on success fees and the amount therefore reflects the "market rate" for a person who wishes to instruct a solicitor will pay. Equally of course, clients are free to "shop around" for a better rate, or lower success fee."

52. HH's point on the business model is that it is a perfectly fair and reasonable way of addressing the limited recovery of costs, generally fixed costs, in small personal injury claims, and the abolition in such claims of the right to recover from the losing party a success fee payable under a CFA, and so enables solicitors to handle those types of claim, bearing in mind that the client does not pay under the CFA if the claim is lost, the solicitor is effectively funding the litigation as it progresses and the effect of the 100% standard uplift is to spread the risk across the range of cases handled by the solicitor. HH says that consumer protection is provided in these types of claim by the statutory cap of 25% of relevant damages.

In **Herbert,** the Court noted that the client had not been told that the success fee was calculated and charged, without regard to risk in an individual case:

53. Leaving aside that there is a substantial dispute between the parties as to the practical implications of the 25% cap on different amounts of damages and profit costs, I do not consider that either HH's justification for its charging model or the 25% cap answer the point that in this country, in the context of a conditional fee agreement, the amount of a success fee is traditionally related to litigation risk, as reasonably perceived by the solicitor or counsel at the time the agreement was made. Across the broad range of litigation, it would be unusual for it not to be. It continues to be the case in those limited areas, such as publication and privacy proceedings and mesothelioma claims, where success fees are still recoverable from the losing party. Even taking the sub-set of low value personal injury claims, Mr Ralph's evidence goes no further than that "most" of HH's competitors have adopted the same business model and "many" of HH's competitors charge success fees in the same way. That is insufficient to avoid the need, for the purposes of informed consent of the client *under CPR 46.9(3)(a) and (b), to have told the client that the success fee of 100% took no account of the risk in any individual case but was charged as standard in all cases.*

54. Nor was the 100% uplift in the present case any less unusual in nature and amount just because it was capped, as required by LASPO and the 2013 Order, at 25% of general damages for pain, suffering and loss of amenity and damages for pecuniary loss, other than future pecuniary loss. While the level of the contractual cap was not unusual, and its practical effect may have been to reduce the success fee to an amount that was not in all the circumstances exorbitant, it nevertheless remains the case that the starting point of a 100% uplift, irrespective of litigation risk, was and is unusual.

These two paragraphs are crucial to understanding the judgment on this point. It is not the case that the Court of Appeal has found that it is unlawful for solicitors to charge a success fee irrespective of the quantum of risk in an individual case. Still less is it the case that a risk assessment must be undertaken.

What the Court of Appeal has pointed out, is that given the way that success fee is traditionally calculated by reference to a percentage uplift derived from the risks of the individual case, if a solicitor proposes to charge a success fee, on a different basis it is incumbent upon the solicitor to explain why the success fee is calculated in that way, and to be clear that risk plays no part in the calculation. The solicitor must also ensure that the client is in no doubt that the success is not recoverable from the opponent to litigation as part of the costs and must be

paid by the client from her own resources. If a client is told these three things, then informed consent to the success fee can be argued to have been given and the solicitor may rely on the application of the presumptions in rule 46.9 CPR.

So in summary, the model of charging clients 100% success fees, capped at 25% of relevant damages, remains a good one, sound in law, provided that the client has a clear explanation given to them of why and how the success fee is being charged at 100% and is told that the risks of their individual case are irrelevant and play no part in determining the level of the success fee, and that they will have to pay it out of their own money, it being irrecoverable as an item of costs from the opponent in the litigation.

It follows that the quality of the written and oral explanations of the calculation of the success fee, will be key to determining whether a challenge to a success fee will itself succeed or whether a client will be held to their bargain.

The final sanction

The issue of charging practices has been further brought into stark relief by the decision of the Divisional Court in **Solicitors Regulation Authority v Good [2019] EWHC 817 (Admin)** which unusually concerned an appeal by the SRA against a failure to find dishonesty and upon sentence. The report makes for grim reading. The court, allowing the appeal, and striking off the solicitor drew these conclusions.

77. In these circumstances, given that the appeal on Ground 1 will succeed, it is not strictly necessary to deal with Ground 2, but since it was fully argued, I will deal with it, albeit more briefly than Ground 1. In my judgment, even if Mr Good was not dishonest, but only guilty of the lack of integrity found by the SDT, the sanction of a £30,000 fine was excessively lenient and clearly inappropriate so that the Court should intervene and quash that sanction, substituting the sanction of striking off the Roll.

78. I have reached that conclusion for a number of reasons. First, even if Mr Greaney QC were right that the finding at [26] that the lack of integrity was of limited extent was a reference back to the fact that overcharging was limited to clinical negligence cases, this whole passage in the evaluation of the SDT as to the appropriate sanction does contain a miscalibration of the seriousness of the misconduct and downplays significantly its seriousness. On the basis of the

strong and critical findings the SDT had made earlier in its judgment about the knowledge and deliberate misconduct of Mr Good, such as his deliberate setting of artificially high rates pursuant to a planned policy to seek inflated costs, his deliberate disregard of Practice Directions and decisions of costs judges and his knowledge that the rates and the success fee were excessive/grossly excessive, the SDT should have concluded that the lack of integrity was particularly grave.

79. Second, whilst it is correct that Emeana is not authority for the proposition that whenever the SDT makes a finding of lack of integrity the appropriate sanction is striking off, it is authority for the proposition that where the lack of integrity is particularly serious, as it is in the present case, the reputation of the profession is seriously undermined by the imposition of fines and that reputation will only be properly protected in such a case by the sanction of striking off: see per Moses LJ at [28] and [35]. Accordingly the sanction imposed by the SDT here of a fine was wrong in principle and excessively lenient and the sanction should have been striking off. That conclusion is not altered by the mitigation available to Mr Good to which I referred at [21] to [23] above.

80. Third, one of the reasons why, in my judgment, Mr Good's misconduct was particularly serious, even if he was not dishonest, is that it is of paramount importance that the public and other members of the profession are able to have complete trust in a solicitor when it comes to statements or Bills of costs. Were it otherwise there would always be a risk that the paying party on a Bill, relying on the integrity of the solicitor rendering the Bill, would settle a Bill which was in fact excessive or grossly excessive, to the knowledge of the solicitor rendering the Bill. Contrary to what the SDT appears to have thought at [26], I consider that risk was always present in these cases.

81. The serious lack of integrity demonstrated by Mr Good in relation to the Bills of Costs he rendered completely undermined any such trust. In my judgment, in those circumstances, the maintenance of the reputation of the profession and public confidence in it, which Sir Thomas Bingham MR in Bolton described as the most fundamental purpose of the sanction for misconduct, require that the sanction imposed in the present case be the most serious one of striking off. I do not consider that the public would regard it as acceptable that someone who breached that trust in the way in which Mr Good did should be allowed to act as a solicitor.

There is a tension at work here, between a solicitor's freedom to charge his client whatever the market will bear, and an almost quasi-Biblical concept of a

"just price" for a piece of work. But on further reflection, the tension is capable of resolution by consideration of the surrounding circumstances.

High rates or large success fees in retainers may not themselves be dishonest charging practices: what can make them so is lack of transparency, breach of Practice Directions and seeking to impose unreasonable and disproportionate costs on paying parties who, not being clients, have no freedom of contract to bargain for a market rate.

Conclusions

Retainers can be a minefield for the unwary solicitor. They should be the subject of advice and drafted with an eye to the considerations above and regularly reviewed.

Otherwise the danger is that a solicitor will inadvertently make legal history: through an unwanted entry in the Law Reports as an example of what-not-to do. In addition, an invalid retainer can mean the loss of tens or hundreds of thousands of pounds in costs, representing many years of hard work.

If you would like to discuss matters further, please contact me using the details below.

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