

The Law since Forde

In **Forde v Birmingham City Council** [2009] EWHC 12 (QB) Sir Christopher Clarke J, sitting with Chief Master Hurst provided the most direct and authoritative consideration of the question of retrospective CFA's. The lack of such authority prior to 2009 probably reflects an unwillingness on the parts of both receiving and paying parties to fully test the issue.

In a nutshell, Forde is authority for the following general propositions:

- A retrospective CFA is not, per se, unenforceable or contrary to public policy
- The applies whether or not the CFA covers a period prior to revocation of the 2000 Regulations and the CFA Regulations 2000 do not apply to such an agreement if entered into post revocation
- The inclusion of a retrospective success fee does not render the CFA unenforceable or contrary to public policy
- A retrospective success fee itself is not automatically irrecoverable (overruling Chief Master Hurst in **Musa King v Telegraph Group Limited**)
- A paying party cannot raise issues of undue influence or abuse of confidence where the client has not him or herself sought to (a)void the CFA

All but the last bullet point above are subject of a second appeal to the Court of Appeal. Accordingly, the use of retrospective CFA's (particularly to cure problems with post revocation agreements or, perhaps agreements which failed to comply with the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008) remains a little uncertain until it is known whether Sir Christopher Clarke J's judgment is effectively the last word on the subject.

Other recent issues

CFA's & declaration of interest - Tankard v John Fredericks Plastics Ltd [2008] EWCA Civ 1375

The case will by now be well known to any solicitor concerned about disclosure of interests in insurance products under the CFA Regulations 2000. The Master of the Rolls (or rather Dyson LJ's) new test propounded at paragraph 13 ('for the purposes of regulation 4, a solicitor has an interest if a reasonable person with knowledge of the relevant facts would think that the existence of the interest might affect the advice given by the solicitor to his client') illustrates the flexibility which exists within regulations of this kind if the court wishes to find it.

Success Fees - C v W [2008] EWCA Civ 1459

The assessment of success fees on CFA's entered into after liability has been admitted (or at least once it is clear that it will not be seriously in dispute). The appellate judgment in fact turned out to be less wide ranging and interesting than had been anticipated. The most interesting part for Claimant practitioners generally is probably Moore-Bick LJ's dictum at paragraph 23 that:

"The best they [solicitors setting a success fee] can hope to do, in my view, is to make a broad assessment based on their own experience. Provided the resulting success fee falls within a reasonable bracket, however, I should not expect the costs judge to reject it"

A dictum that I anticipate will be much quoted on detailed assessments.

Costs for pre-action applications - Roche v Newbury Homes Limited [2009] EW Misc 3

Deputy District Judge Smith in Manchester, February 2009. An interesting case holding that costs of a pre action application for disclosure in a personal injury case could not even be awarded in principle (let alone recovered on assessment) because they were not within the standard wording of what a personal injury CFA covered.

The case is now being regularly used by paying parties.

Indemnities for adverse costs - Dix v Townend & Another [2008] EWHC 90117 (Deputy Master Williams)

Is an agreement under a CFA whereby the solicitor agrees to indemnify the client against any adverse costs orders champertous and/or an unenforceable contract of insurance? According to the Deputy Master (and on the facts of that case) 'yes' to the first question, 'no' to the second.

There is another case going through the SCCO at the moment on which judgment is awaited. More paying parties will investigate this issue as the cases attract more publicity.

Loss of capacity - Findley v Barrington Jones & MIB [2009] EWHC 90130

An interesting reminder of the need to take appropriate steps to ensure a valid retainer is in place if the client is found to lack capacity to give instructions at any stage. The receiving party in this case was saved by a combination of fortuitous circumstances and some inventive reasoning by the Chief Master. Other receiving parties have not been so lucky.

Inquest costs - Roach v Home Office [2009] EWHC 312 (QB)

The costs of attending inquests are recoverable in full (subject to an assessment of their reasonableness) where they were of and incidental to the proceedings. There should be no artificial distinction or partition of the costs by reference to what percentage was said to be for assisting the inquest and what was incidental to the civil claim. Where such an overlap existed the costs were recoverable in the civil claim. The existence of a public funding certificate was no bar to the costs claim.