IN THE CARDIFF COUNTY COURT **Claim No ZJ302167**

BEFORE HIS HONOUR JUDGE HICKINBOTTOM

ON APPEAL FROM DISTRICT JUDGE MARSHALL PHILLIPS

TAMMY PREECE

Appellant

-and-

CAERPHILLY COUNTY BOROUGH COUNCIL

Respondents

APPROVED JUDGMENT

15 AUGUST 2007

ANDREW ARENTSEN (instructed by Patchell Davies) appeared for the Appellant.

BENJAMIN WILLIAMS (instructed by Dolmans) appeared for the Respondents.

CARDIFF CIVIL JUSTICE CENTRE, 2 PARK STREET, CARDIFF CF10 1ET

I direct pursuant to CPR Part 39 PD 6.1 that no official shorthand note shall be taken of this judgment and that copies of this version, subject to editorial corrections, may be treated as authentic.

Introduction

1. This appeal concerns the ability of solicitors to recover costs under a conditional fee agreement ("CFA") where, in breach of the relevant statutory requirements, they have not signed the CFA upon which they rely for recovery.

2. On 4 October 2002, the Appellant Tammy Preece stumbled in a pothole and fell when walking down the pavement near the junction of Tredegar Road and Pentwyn Road, for which the Respondents were the relevant highway authority. She injured her left ankle and, considering the Respondents responsible, on 30 October 2003 she commenced proceedings against them in the Blackwood County Court.

3. Ms Preece claimed less than £5,000, and the claim was duly allocated to the fast track. It was tried on 16 February 2006 by District Judge Marshall Phillips. He found for Ms Preece awarding her judgment for £3,774.06 and, following further submissions, additionally ordered that the Respondents pay her costs of the claim. On 16 May 2007, at the detailed assessment of costs, the same District Judge held that the CFA relied upon by the Claimant in the assessment was unenforceable because it had not been signed by the Claimant's solicitors: and that consequently the Respondents' liability to pay costs was limited to those disbursements that Ms Preece had personally paid and the ATE insurance premium. He gave permission to appeal, which came before me on 10 August 2007. This is the reserved judgment from that hearing.

The Statutory Scheme

4. Ms Preece instructed Patchell Davies ("Patchells") in the claim. When a person instructs solicitors, that constitutes a retainer and it creates contractual relations between the client and the solicitor. One implied term of that contract is that the client will pay the solicitor's reasonable costs and disbursements. That implied term can of course be altered by an express agreement: but, at common law even by agreement it was anathema and unlawful for solicitors' costs to be related to the result of the case in any way. Such contracts were unenforceable.

5. Section 58 of the Courts and Legal Services Act 1990 ameliorated the uncompromising position of the common law. It authorised the Lord Chancellor to permit CFAs between solicitors

and clients in respect of contentious civil (i.e. non-criminal and non-family) work. CFAs in respect of personal injury actions were allowed from 1995.

6. However, such agreements were still the subject of strict regulation. On 1 April 2000, Section 27 of the Access to Justice Act 1999 substituted a new Section 58 of the 1990 Act which provided (as far as relevant to this appeal) as follows:

> "(1) A [CFA] which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason of its only being a conditional fee agreement; but… any other conditional agreement shall be unenforceable.
>
> (2) For the purposes of this section…
>
> (a) a conditional fee agreement is 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; and
> (b) a [CFA] provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in the specified circumstances.
>
> (3) The following conditions are applicable to every [CFA]:
>
> (a) it must be in writing;
> (b) it must not relate to proceedings which cannot be the subject of an enforceable [CFA]; and
> (c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor)…."

7. At the material time, the relevant regulations were the Conditional Fee Agreement Regulations 2000 (2000 SI No 692, "the 2000 Regulations") in which amongst other things the Lord Chancellor prescribed (in Regulation 5):

> "(1) A [CFA] must be signed by the client and the legal representative.

(2) This regulation does not apply in the case of an agreement between a legal representative and an additional legal representative."

The CFA

8. The CFA at the heart of this appeal was in standard Law Society Accident Line Form. It was made between Patchells and Ms Preece, and dated 30 October 2002. For an agreed premium of £813.75, Accident Line Protect Insurance would cover Ms Preece's disbursements, the insurance and any costs liability to the Defendants if she were to lose the case. So far as Ms Preece was concerned, it was consequently a "no win, no fee" agreement. However, if Ms Preece were successful, in addition to the basic costs, she would become liable for a success fee of 100% of the basic costs which (subject to assessment) would of course be recoverable from the Defendants. Provision for this success fee made this agreement a CFA as defined in Section 58(1).

9. The agreement was signed by Ms Preece, but not by or on behalf of Patchells. There was however before me a copy letter from Patchells to Ms Preece dated 6 November 2002 which purported to confirm that:

> "[O]n 30th October 2002 we signed a conditional fee agreement. This means that although you are responsible for our costs and disbursements we agree that if you lose your case we make no charge to you except the premium that you pay to the insurance company and where applicable for disbursements we pay on your behalf. However, if you are successful some of the damages you will receive will be used to pay our costs. This is explained in the agreement and. You will recall that this was discussed with your prior to signing the conditional fee agreement…
>
> I enclose a copy of the Conditional Fee Agreement you signed for you to keep…."

I have made no allowance for the obvious grammar and typographical errors, which the quotation retains. The letter went on to point out some particularly important features of the CFA. No signed version of this letter was before either the District Judge or me, but for the purposes of this appeal I accept that such a letter was sent by Patchells on 6 November 2002 with a copy of the CFA signed by Ms Preece but not on behalf of Patchells themselves. I also accept that the reason

the CFA was not signed by Patchells was by virtue of an entirely innocent mistake. It was a mere oversight on their part.

The Submissions of the Parties

10. At the assessment before the District Judge, the paying Respondents submitted that the net result of the statutory provisions above was clear on their face, namely that, for a CFA to be enforceable, it was a mandatory requirement of the scheme that it be signed by a solicitor. If a CFA is unsigned and consequently unenforceable as between solicitor and client, an opponent cannot be required to pay any costs referable to the agreement because of the indemnity principle.

11. The receiving Appellant's representative made two submissions to the contrary.

12. First, it was submitted that there was no breach of Regulation 5(1) because the letter of 6 November 2002 was signed by Patchells and this constituted signature of the CFA for the purposes of the scheme. The letter and CFA could and should be considered together.

13. This submission was rightly not pursued on the appeal. The enforceability of a CFA should as a matter of principle be capable of being determined as at the date the contract was made (Garrett v Halton Borough Council [2006] EWCA Civ 1017, [2007] 1 WLR 554, which I shall refer to as "Garrett", at [35]): and the letter itself suggests that this was on 30 October 2002. In any event, the letter does not suggest that it forms part of the CFA, as opposed to explaining the CFA. At the appeal, Mr Arentsen accepted that, as the CFA was not itself signed, there was a breach of the legislative requirements.

14. However, the second submission before the District Judge was that the absence of the solicitor's signature from the CFA was not a material breach of the Regulations. The District Judge found that it was a material breach, and was consequently unenforceable. That this was the primary ground of appeal and the vital plank of Mr Arentsen's submissions before me.

15. Mr Arentsen submitted that the primary purpose of the statutory scheme was to protect clients of solicitors as consumers: and that the absence of the solicitor's signature was (a) innocent and (b) did not and indeed could not have had any adverse effect upon Ms Preece. Patchells could not have denied the binding nature of the agreement, because they would have

been estopped from making such a denial by their letter of 6 November 2002. Neither could the absence of a signature have had an adverse effect on the administration of justice. The breach was therefore entirely a matter of form, rather than substance. It had no actual or potential adverse consequences for anyone, and therefore could not be said to have been a material breach.

Discussion

16. However, attractively and forcefully as they were put, I find Mr Arentsen's submissions to have two fatal flaws.

17. First, I do not accept that, even if the purposes of Section 58 and the Regulations under the 1990 Act are for the protection of (i) the clients of solicitors and (ii) the integrity of the administration of justice, then a solicitor's signature on a CFA is unimportant, immaterial and a mere trivial formality.

18. As Mr Benjamin Williams submitted, the law has always attributed the highest importance to signatures being appended to contractual terms (see, e.g., the rule in L'Estrange v Graucob [1934] KB 394: the significance of a signature being appended to a contract being recently affirmed in Peekay Intermark Ltd v Australia & New Zealand Banning Group [2006] EWCA Civ 396, [2006] 2 Lloyd's Rep 511, especially at [43], per Moore-Bick LJ). A signature is of considerable commercial importance for the purposes of authentication (see Halsbury's Laws of England, 4th Edition, Vol 13 (Reissue) at Paragraph 115). I do not suggest for one moment that the solicitor's signature in this case was omitted for anything other than the most innocent of reasons: but, if a CFA is not signed, then a less scrupulous solicitor may for example seek to enforce his right to be paid his reasonable costs if the client's claim fails. The signature of the solicitor affords the client some real protection against that possibility, as rare as that hopefully might be in practice. I return to the adverse effects to the administration of justice below (see Paragraphs 31 and following, particularly at Paragraph 34). It seems to me that the importance to Parliament of the requirement for signature in CFAs such as this is underscored by Regulation 5(2) which omits the requirement from certain other CFAs.

19. In any event, a purposive approach to the construction of statutory provisions pressed by Mr Arentsen is only permissible where those provisions are ambiguous. The principles of

purposive construction were helpfully set out by Lord Bingham in R (Quintavalle) v Secretary of State for Health [2003] 2 WLR 692 at [8]:

> "The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed.... The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

20. This is trite law of general application: but the passage was specifically quoted and applied in one of the leading cases of enforceability of CFAs to which I refer below, Hollins v Russell [2003] EWCA Civ 718, [2003] 1 WLR 2487 at [104].

21. Therefore, in respect of a requirement under a statutory scheme, where Parliament's intention is not controversial or ambiguous, but clear by the words they use - and in that I include regulations properly made under and within the powers granted by a statute, as well as the statute itself - then it is for the courts to enforce such a requirement and not to defeat it, even if the result of enforcement may appear harsh in an individual case. Otherwise, the intention of Parliament is frustrated.

22. For a CFA to be enforceable, Regulation 5 of the 2000 Regulations expressly requires it to be signed by the relevant legal representative, in this case Patchells. There is no ambiguity in this requirement, which could not be more clearly phrased: and there could not be a more extreme failure in compliance with the requirement than (as in this case) for there to be no signature whatsoever.

23. Mr Arentsen's submission confuses the relative seriousness of the degree of non-compliance with the requirement, with the relative seriousness of the consequences the breach. The distinction between the two is well-recognised by the law. The CFA legislation tests the validity of a CFA by the former, i.e. by reference to its compliance or non-compliance with statutory requirements, not by reference to the actual or potential consequences of the breach.

24. Mr Williams' helpful submissions traced some of the history of the doctrine of the sufficiency of substantial (rather than literal) compliance with legislative prescriptions. Although it may assist in practical analysis of specific circumstances to have a two-stage approach (identifying first whether there is a failure to comply literally with a requirement and, if so, then to consider whether there is substantial compliance), the authorities make clear that as a matter of jurisprudence "compliance" means "substantial compliance": and, where there is substantial compliance with a requirement, there is simply no breach. There is no question of the court having any form of discretion to waive a statutory requirement that has not been met.

25. The leading case is perhaps London & Clydesdale Estates v Aberdeen District Council [1980] 1 WLR 182, in which the House of Lords clearly drew the distinction between degree of compliance (which they held was relevant to the question of substantial compliance) and the consequences of a failure to comply (which was not). They held that, where a statutory scheme required notice of a right of appeal to be given, it was impossible to say that there had been substantial compliance where no such notice had been given, even though the documentation was otherwise satisfactory and there had been no real prejudice. Lord Hailsham LC said in that case (at page 188H and page 189C) that the doctrine of substantial compliance permitted "a minor defect of a trivial irregularity", but:

> "Total failure to comply with a significant part of a requirement cannot in any circumstances be regarded as "substantial compliance" with the total requirement in such a way as to bring the … contention [of substantial compliance] into effect."

That precisely covers the circumstances of the instant appeal.

26. The general principles of London & Clydesdale Estates have been regularly rehearsed and endorsed by the highest courts (e.g. the recent case of R v Soneji [2005] UKHL 49, [2006] 1 AC 350 at [65] per Lord Carswell).

27. The doctrine has been specifically adopted in relation to the legislative provisions regulating CFAs that are the subject of this appeal. In Hodgson v Imperial Tobacco Ltd [1998] 1 WLR 1056 at pages 1064-5, Lord Woolf said:

> "If the statutory requirements are complied with the CFA will be valid and enforceable by the legal advisers against a client. If it materially departs from the legislative requirements it will not be enforceable and will not be a CFA which is protected by [the section]".

28. What constitutes a "material departure from the legislative requirements" was considered by the Court of Appeal in Hollins v Russell at [106]:

> "The question whether something is 'satisfied' inevitably raises questions of degree. What is enough to satisfy? There can be different degrees of satisfaction…. Conditions are satisfied when they have been sufficiently met. How sufficiently must depend upon the purpose of the conditions. It is not impossible to imagine conditions which would only be sufficiently met if they were observed in every minute particular: the specifications for precision machinery might be an example. But in general conditions are sufficiently met when there has been substantial compliance with, or in other words no material departure from, what is required."

The reference to "substantial compliance with… *what is required*" is the language of compliance rather than consequences of breach.

29. However, the reference to the "purpose of the conditions" may have suggested that consequences were relevant to the exercise of assessing materiality. Paragraphs 105, 107 and 222-4 of the judgment also have language that might be similarly suggestive, the highest point of that language perhaps being Paragraph 107:

> "The key question, therefore, is whether the conditions applicable to the CFA by virtue of Section 58 of the 1990 Act have been sufficiently complied with in the light of their purposes. Costs judges should accordingly ask themselves the following question:
>
>> 'Has the particular departure from a regulation pursuant to Section 58(3)(c) of the 1990 Act or a requirement in Section 58, either on its own or in conjunction with any other departure in this case, had a materially adverse effect upon the protection afforded to the client or upon the proper administration of justice?'

If the answer is 'yes', the conditions have not been satisfied. If the answer is 'no', then the departure is immaterial and (assuming that there is no other reason to conclude otherwise) the conditions have been satisfied."

Mr Arentsen relied upon this passage in support of his submission that, when considering the materiality of a breach, the focus must be on the consequences of the breach: or, at least, consequences of the breach are a relevant consideration.

30. However:

(i) The passage from Hollins v Russell has to be read in context. The question posed in Paragraph 107 immediately follows the reference to "substantial compliance with… what is required": and the use of the word "therefore" shows that the question purports logically to follow from that reference (see Garrett especially at [10]-[22], referred to below).

(ii) As indicated above, as a matter of long-standing and well-settled jurisprudence, the doctrine of substantial compliance does not concern consequences but rather compliance with the requirement. In my respectful view, the jurisprudential analysis of Mr Arentsen is fundamentally flawed. He accepts that, where a solicitor does not sign a CFA, then that is a clear breach of the relative requirements: indeed, the breach is gross and obvious. However, he relies upon a purposive construction - the purpose of the provisions being for the protection of solicitors' clients and furthering the administration of justice - and the fact that there are no (or only trivial) consequences of the breach in terms of adverse effects on either Ms Preece or the administration of justice. For the reasons given above (Paragraphs 19-21), this is not a proper or permissible construction of the relevant provisions. Where legislative language with regard to a requirement is clear, the intention of Parliament as set out in the wording they have used must be enforced. No reference to "purposive construction" can be used to defeat that clear intention, even if the results may appear to be harsh in an individual case.

(iii) In any event, insofar as the language of the relevant passages from Hollins v Russell have required clarification, this has been given in two later Court of Appeal cases namely Garrett and Jones v Caradon Catnic Ltd [2005] EWCA Civ 1821 which I shall refer to as "Jones" (dealt with in Paragraphs 31-36 below).

31. Garrett made clear beyond doubt that consequences are not relevant to question of material compliance. Having set out the relevant passages of Hollins v Russell, the court said (at [14]):

> "There is no hint in the judgment that, in considering whether the conditions had been sufficiently complied with in these cases, it was necessary or relevant to take into account any detriment actually suffered by the claimant as a result of the departure from the regulation in question. In each case, the court considered whether there had been substantial compliance with, or a material departure from, what was required by looking at what the solicitor did without regard to the consequences for the client."

The court went on to consider specifically and in great detail the wording of Hollins v Russell, particularly Paragraph 107: holding (at [32]) that Parliament intended the focus of the scheme to be "on whether the CFA satisfied the applicable conditions, not on the actual consequences of a breach of one of the requirements of the scheme", and intended a strict approach similar to that applying to the scheme regulating pawnbrokers.

32. In Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816, a borrower claimed that a pawnbroker could not enforce a pawnbroking agreement against her because the agreement did not contain all of the terms required by the relevant statutory scheme, although in the circumstances of that case she had suffered no detriment. If this submission were good, then the borrower would receive a windfall, keeping the money borrowed and recovering the security against which the pawnbroker would be unable to enforce. The House of Lords held that the submission was good. Lord Nicholls said (at Paragraphs 72-74):

> "… Parliament was painting here with a broad brush.
>
> The unattractive feature of this approach is that it will sometimes involve punishing the blameless *pour encourager les autres*. On its face, *considered in the context of one particular case,* a sanction having this effect is difficult to justify….
>
> Despite this criticism I have no difficulty in accepting that in suitable instances it is open to Parliament, when Parliament considers the public interest so requires, to decide that compliance with certain formalities is an essential prerequisite to enforcement of certain

types of agreements. This course is open to parliament even though this will sometimes yield a seemingly unreasonable result in a particular case. Considered overall, this course may well be a proportionate response in practice to a perceived social problem. Parliament may consider the response should be a uniform solution across the board. A tailor-made response, fitting the facts of each case as decided in an application to the court, may not be appropriate. This may be considered an insufficient incentive and insufficient deterrent. And it may fail to protect consumers adequately."

33. In Garrett, the Court of Appeal expressly adopted the same approach to Section 58(1) and 3) of the 1990 Act. At [30]-[31], the court said:

> "To use the words of Lord Nicholls, Parliament was painting with a broad brush. It must be taken to have deliberately decided not to distinguish between cases of non-comp0liance which are innocent and those which are negligent or committed in bad faith, nor between those which cause prejudice (in the sense of actual loss) and those which do not. It would have been open to Parliament to distinguish between such cases, but it chose not to do so. The conditions stated in Section 58(3)(c) and in particular the requirements prescribed in the 2000 Regulations are for the protection of the solicitor's clients. Parliament considered that the need to safeguard the interests of clients was so important that it should be secured by providing that, if any of the conditions were not satisfied, the CFA would not be enforceable and the solicitor would not be paid. To use the words of Lord Nicholls again, this is an approach of punishing solicitors *pour encourager les autre*s. Such a policy is tough, but it is not irrational…
>
> The only mitigation of this strict approach as that, as was made clear in Hollins v Russell, the breach must be material in the sense described at Paragraph 107 of the judgment. Thus literal but trivial and immaterial departures from the statutory requirements did not amount to a failure to satisfy the statutory conditions…"

34. Where a CFA is unenforceable, the potential adverse effects of on the legal representatives of a successful party are harsh indeed. Because of the combined effect of (i) the unenforceability of the agreement between solicitor and client, and (ii) the indemnity principle (now enshrined in Section 60(3) of the Solicitors Act 1974), no costs referable to the agreement are recoverable by the solicitor from either client or opponent. This is particularly galling as the issue can only arise

if the legal representatives have been successful on behalf of their client in the substantive case, and both client and solicitors may well have cause for otherwise being very satisfied with performance and result. Mr Arentsen said, and I accept, that in this case Ms Preece was very pleased with the way in which her legal representatives had handled her case. This harshness may be compounded where the client has not suffered any actual or possibly even potential detriment by virtue of the default. However, the severity of this consequence results from the statutory scheme. It has been determined by Parliament.

35. The potential harshness of the legislative provisions in an individual case is illustrated in the earlier case of Jones, in which the solicitors claimed a success fee of 120% in the face of legislative provisions that limited such fees to 100%. The Court of Appeal held that the CFA failed to comply with the relevant provisions, and was consequently unenforceable: with the result that the solicitors could claim no costs at all. The leading judgment was that of Brooke LJ, who was the presiding judge in the Court of Appeal in Hollins v Russell. He found that to allow a CFA to be enforced in circumstances in which the relevant requirements of the statutory scheme had not been complied with would be contrary to the proper administration of justice (at [32]):

> "…[T]his is a provision which is concerned with the proper administration of justice. The Act provides that any agreement which does not comply with the Act and Order is unlawful and does not come within the umbrella protection of the CFA scheme."

Laws LJ added (at [35]-[36]):

> "A statement of 120 per cent success fee is a stark departure from the 100 per cent maximum specified in Paragraph 4 of the [2000 Order]. That maximum is plainly central to the regime on whose terms the legislature has accepted the legality of CFA. It's being disregarded, even if in the result it could not be shown that no one would be the loser, is inimical to the administration of justice….
>
> If we were to treat this violation as marginal, we should, in my judgment, be acting flat against the grain of the legislature's substantive policy objectives attained by Section 58(12): that is to confine within strict levels, specified by that rule, the acceptability of costs arrangements of this kind".

Maurice Kay LJ agreed with both judgments.

36. Mr Arentsen submitted that, in the case before me, not only did Ms Preece not in fact suffer any detriment, but she could not have done so - because Patchells would have been estopped from denying the CFA because of their letter of 6 November 2002. However, this submission suggests that, as at the relevant date (30 October 2002), the agreement would have been unenforceable because of the potential detriment to Ms Preece before the date of the later letter: and, for the reasons I have given, enforceability has to be considered at the date of the agreement (see Paragraph 13 above). In any event, this submission ignores the damage to the clear wording of the legislative provisions that would result from such a construction, and the consequent damage to the administration of justice that would therefore follow as explained in Jones. The absence of actual and even potential detriment to a specific solicitor's client in a particular case by virtue of the lack of a statutory requirement is irrelevant to the proper construction of the clear requirements laid down by Section 58 and the Regulations thereunder as a prerequisite of enforcement of a CFA.

Conclusion

37. As a prerequisite to enforceability, Parliament has clearly and unambiguously required a number of formalities to be undertaken with regard to the CFA, including that it be signed by the relevant legal representative. In this case, the CFA is deficient in those formalities and is therefore unenforceable. That this follows is, in my judgment, clear not only as a matter of principle but also on the basis of the general and specific authorities to which I have referred. These authorities are of course binding on me: although, for the reasons I have given, I respectfully agree with their reasoning and conclusions. If the CFA is unenforceable, no costs referable to it are recoverable from an opponent, in this case the Defendants. The liability of the Defendants is restricted to those disbursements Ms Preece has personally paid and the ATE premium. In short, I find that the District Judge's order (set out in Paragraph 35 of his judgment) is correct, and for the reasons he gave.

38. For these reasons, I dismiss the appeal.

39. My understanding is that the assessment of the Claimant's costs payable by the Defendants has been determined subject to the issue of principle which has been the subject of this appeal.

Having determined that issue, I would ask the parties to consider the appropriate order on the appeal, including the appropriate order for costs (particularly bearing in mind the principles of Myatt v National Coal Board (No 2) (The Times, 27 March 2007), given that this appeal has been for the benefit of the Claimant's legal representatives and not for the Claimant personally). By 4pm on 31 August 2007, I would ask the parties either to file an agreed order for approval or, if this cannot be agreed, to make an appropriate application to me. Subject to submissions to the contrary, I would propose dealing with any such application on the basis of written submissions.

His Honour Judge Gary Hickinbottom

15 August 2007