Neutral Citation Number: [2002] EWCA Civ 1258
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LIVERPOOL COUNTY COURT
District Judge Harrison

Case No: B3/2002/0864 CCRTF

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6th September 2002

Before :

LORD JUSTICE PETER GIBSON
LORD JUSTICE BROOKE
and
LORD JUSTICE TUCKEY

Between :

THOMAS HALLORAN — **Claimant/ Respondent**

- and -

JAMES FRANCIS DELANEY — **Defendant/ Appellant**

Peter Ralls QC & David Holland (instructed by **Costs Advocates Ltd**) for the Appellant
Nicholas Bacon (instructed by **Irvings**) for the Respondent

Hearing dates : 3rd & 4th September 2002

JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Lord Justice Brooke : This is the judgment of the court.

1. This is an appeal, which comes direct to this court as a first appeal pursuant to an order made by Judge Marshall Evans QC in the Liverpool County Court on 23rd February 2002, from a decision of District Judge Harrison made in the same court on 11th February 2002 to the effect that the defendant should pay the claimant's costs of the Part 8 "costs only" proceedings in this case in the sum of £1298.24, inclusive of VAT. This assessment was made up in the following way:

18 letters and 3 telephone calls @ £16 each		£336
Preparation and Perusal		
2 hours 12 minutes at £160 per hour		£352
Preparation of costs schedule		
24 minutes at £160 per hour		£64
Attendance at hearing		£112
		£864
	Success fee @ 20%	£172.80
		£1036.80
	VAT	£181.44
Disbursements		
Court Fee £30		
Application fee £50		£80
		£1,298.24

2. The substantial disputed item on this assessment related to the recovery of a success fee in costs only proceedings. When he transferred the appeal to this court Judge Marshall Evans QC commented on the face of his order that the experience of the Liverpool Group of Courts was that different district judges had reached opposite decisions on this issue of principle. We invited Master O'Hare to sit with us as an assessor on the appeal, and we are very grateful to him for the advice he gave us.

3. The facts of the case are relatively straightforward. The claimant was injured in a road traffic accident on 22nd May 2000. He instructed Messrs Irvings to act for him as his solicitors and on 24th May 2000 he entered into a Conditional Fee Agreement ("CFA") with them in the Law Society model form. So far as is relevant the agreement contained the following provisions:

> "*What is covered by the agreement*
>
> - Your claim against J Delaney for personal injury suffered on 22nd May 2000
> - Any appeal by your opponent
> - Any appeal you make against an interim order during the proceedings
> - Any proceedings you take to enforce a judgment, order or agreement.

Paying Us

Whatever happens you have to pay our disbursements. In addition:

If you win your claim, you pay our basic charges and a success fee. The amount of the success fee is not limited by reference to the damages.

You may be able to recover our disbursements, basic charges, success fee and insurance premium from your opponent. For full details, see conditions 4 and 6.

Success fee

This is 40% of the basic charges. Of this percentage increase 10% relates to the costs of the postponement of payment of our basic charges and disbursements. The reasons for setting the success fee at this level are set out in the Schedule to this agreement."

4. The Schedule to the agreement referred only to the possibility/likelihood of contributory negligence, the inherent risks of litigation, the deferment of costs until the conclusion of the case and the risks of failing to beat a Part 36 payment.

The claimant also took out ATE insurance at a premium of £840.

5. On 6th December 2000 the claim was settled in the sum of £1,500, and by 24th January 2001 agreement had been reached on a sum of £910 (plus VAT) for the base costs. The only items left in dispute, prior to the decision of this court in *Callery v Gray* [2001] EWCA Civ 1117, [2001] 1 WLR 2113, were the recoverability of the success fee and the "after the event" ("ATE") insurance premium. Costs only proceedings were issued on 6th July 2001 and served on 24th July. This court gave judgment in *Callery v Gray (No 1)* on 17th July and in *Callery v Gray (No 2)* on 31st July.

6. On 12th November 2001 the defendant filed an acknowledgment of service in the costs only proceedings. On 22nd November the court directed that the defendant pay the claimant's costs of the original claim, such costs to be assessed by way of a detailed assessment. On 4th December 2001 the parties had reached agreement on the amount of the success fee and the ATE premium recoverable on the main claim in the total sum of £585.

7. All that remained in dispute now was the costs of the costs only proceedings and, on the claimant's application that these costs be summarily assessed, this issue was listed for summary assessment on 1st February 2002. At that hearing the district judge ruled that the claimant had acted reasonably in issuing the costs only proceedings and that

he was entitled to recover the costs of those proceedings. After looking at the CFA agreement, she said that she was satisfied that it covered "this enforcement action" in the form of the Part 8 proceedings, and continued:

> "... I have not been persuaded that there is any reason that it should not apply. In the absence of any case law to the contrary, my view is that it should. I accept that there are areas of risk to the claimant and his solicitor, and essentially the conditional fee agreement provides for cover. In the absence of contrary case law, my view is that it should cover exactly what it says and that these Part 8 proceedings fall expressly within the enforcement head of the agreement."

8. As we have observed, the claimant's accident claim was settled without the need to issue proceedings. The settlement included the defendant's agreement to pay the claimant's reasonable costs, but before the introduction of CPR 44.12A on 3rd July 2000 there had been no straightforward way of obtaining an assessment of those costs in default of agreement as to their amount, since no proceedings had ever been started. CPR 44.12A now provides, so far as is material, that:

> "(1) This rule sets out a procedure which may be followed where:
>
> (a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs)...
>
> (b) they have failed to agree the amount of those costs; and
>
> (c) no proceedings have been started.
>
> (2) Either party to the agreement may start proceedings under this rule by filing a claim form in accordance with Part 8
>
> (4) In proceedings to which this rule applies the court:
>
> (a) may:
>
> (i) make an order for costs, or
>
> (ii) dismiss the claim; and
>
> (b) must dismiss the claim if it is opposed."

9. There are plenty of references to the need for any costs recoverable (including success fees) to be reasonable and proportionate both in the Civil Procedure Rules (see CPR 1.1(c), 44.4(1) and (2) and 44.5), and the Costs Practice Direction ("CPD") (see CPD 11.1 and 45.4). So far as success fees are concerned, CPR 44.3A and CPD 11.7 – 11.9 provide the basic ground rules. The definitions of "funding arrangement" and "additional liability", being phrases which appear in CPR 44.3A, are to be found in CPR 43.2(k) and (o). A CFA is a funding arrangement and a success fee is an additional liability within the meaning of that rule.

10. CPR 44.3A provides, so far as is material:

> "(1) The court will not assess any additional liability until the conclusion of the proceedings, or the part of the proceedings, to which the funding arrangement relates ...
>
> (2) At the conclusion of the proceedings, or the part of the proceedings, to which the funding arrangement relates, the court may:
>
> (a) make a summary assessment of all the costs, including any additional liability ..."

11. CPD 11.7 – 11.9 provide that:

> "11.7 Subject to paragraph 17.8(2), when the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to 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.
>
> 11.8(1) In deciding whether a percentage increase is reasonable relevant factors to be taken into account may include:
>
> (a) the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur;
>
> (b) the legal representatives' liability for any disbursements;
>
> (c) what other methods of financing the costs were available to the receiving party.
>
> (2) The court has the power, when considering whether a percentage increase is reasonable, to allow different percentages for different items of costs or for different periods during which costs were incurred.
>
> 11.9 A percentage increase will not be reduced simply on the ground that, when added to base costs which are reasonable and (where relevant) proportionate, the total appears disproportionate."

12. CPD 17 is concerned with costs only proceedings brought pursuant to CPR 44.12A. CPD 17.8(2) provides:

> "In cases in which an additional liability is claimed, the costs judge or district judge should have regard to the time when and the extent to which the claim has been settled and to the fact that the claim has been settled without the need to commence proceedings."

13. In *Benzusan v Freedman*, unreported, 20th September 2001, Senior Costs Judge Hurst commented in relation to CPD 11.7 and 17.8(2):

> "The combined effect of these two paragraphs is to prevent the costs officer from using hindsight in arriving at the appropriate success fee, and to prevent excessive claims for success fees in cases which settle without the need for proceedings when it was clear, or ought to have been clear from the outset, that the risk of having to commence proceedings was minimal."

We agree.

14. Mr Ralls QC, who appears with Mr Holland on behalf of the appellant, advanced two main arguments of principle in support of the appeal:

(1) As a matter of principle the district judge should not have allowed any success fee by way of percentage uplift on the costs of the costs only proceedings; alternatively

(2) The figure of 20% was excessive given the minimal amount of risk involved, a figure of 5% being more appropriate.

15. He also argued that on the proper construction of the Law Society Model CFA, which was used in this case, the district judge should not have allowed the recovery of any success fee by way of percentage uplift because this form of CFA did not cover costs only proceedings.

16. We will consider this final argument first. The question has recently been considered by Master Hurst, the Senior Costs Judge, in *Tilby v Perfect Pizza Ltd*, unreported, 28 February 2002. In that case he had to determine whether an ATE insurance policy was still in force after the amount of damages in a small personal injuries claim had been agreed. The point was relevant because the defendant maintained that if the policy was not still in force, the agreement whereby payment of the insurance premium was deferred until after the costs only proceedings were resolved was an unenforceable agreement for credit, because the requirements of the Consumer Credit Act 1974 had not been complied with.

17. In deciding that the policy remained in force until the conclusion of the costs only proceedings, Master Hurst was influenced by the language of the Law Society Model CFA, which was also used in that case. This agreement expressly covered the claim,

and it also covered any proceedings taken to enforce a judgment, order or agreement (see para 3 above). In these circumstances Master Hurst accepted (see para 40 of his judgment) an argument by counsel for the claimant in these terms (see para 38):

> "[Counsel for the Claimant], in support of his argument that costs only proceedings precede the conclusion [of the case], relies upon the duration of the conditional fee agreement which he submits covers enforcement proceedings. The assessment of costs is not an enforcement proceeding but, until costs are assessed, the agreement to pay costs cannot be enforced. By commencing costs only proceedings the Claimant will obtain a detailed assessment of her costs which will result in a final certificate and that certificate will be enforceable in the same way as any other judgment for a civil debt."

18. Master Hurst went on to say (at para 40) that, taken together, the insurance policy and the CFA made it clear that the insurance cover extended to all necessary steps in relation to resolving the Claimant's claim, including her claim to be paid her reasonable costs. He therefore found that the ATE insurance policy was still in force, the case not yet having been concluded. The case would be concluded when the costs were finally assessed.

19. We accept Master Hurst's conclusion, and the reasons he gave. Under the Law Society Model CFA a "win" is explained in Condition 3(o) as meaning:

> "Your claim for damages is finally decided in your favour, whether by a court decision or an agreement to pay you damages."

Condition 4 provides, so far as is relevant:

> "If you win:
>
> - You are liable to pay all our basic charges and success fee ...;
>
> - Normally, you will be able to recover part or all of our basic charges, success fee and disbursements from your opponent ..."

20. It follows that the agreement contemplates that the claim will normally be "won" by achieving a result whereby the client is to recover her damages, basic charges, success fee and disbursements from his/her opponent in a quantified amount. Indeed, Condition 4 goes on to refer to some of the consequences which are to be provided for "if the court carries out an assessment of our charges" on what is clearly, from the context, an assessment between the parties.

21. We are therefore satisfied that this CFA, on its proper construction, embraces the costs only proceedings within the "claim" for which it provides coverage. Mr Ralls did not attempt to argue that this would not be the case if the detailed assessment of costs was conducted within the umbrella of contested proceedings on the claim. He submitted, however, that greater clarity would be required for a success fee to be chargeable as an uplift on the costs of costs only proceedings. We do not agree. It follows that the district judge was wrong when she considered that costs only proceedings constituted proceedings taken to "enforce" an agreement (because liability under the agreement was still to be quantified before it could be enforced) but correct in her conclusion that the CFA covered the situation.

22. The Law Society declined an invitation by the court that it might intervene in these proceedings. We received, however, a short written submission from the Society to the effect that the draftsman of the model agreement had taken the view that the resolution of the costs aspects of the claim formed an integral part of the claim. For the reasons we have given, we are satisfied that this intention was satisfactorily put into effect by the words used in the agreement. In view of the doubts raised in these proceedings, however, and in the interests of even greater clarity, we believe that it would be helpful if any future redraft of the model agreement made this point transparently clear. Rule 2(1) of the Conditional Fees Agreements Regulations 2000 requires a CFA to "specify" the particular proceedings or parts of them to which it relates. If this model agreement were made more specific, it would be even easier to understand, without the need for reference to caselaw.

23. We return now to Mr Ralls's first main submission (see para 14 above). He said when advancing this submission that whether or not it was technically lawful to enter into a CFA which provided for an uplift on the costs of costs only proceedings, such an uplift should not be recoverable from the paying party as a matter of principle. Alternatively, it should only be allowed in an exceptional case and not in a run-of-the mill small personal injury claim like this.

24. He said that a success fee is charged to compensate the lawyer for the risk he runs in pursuing the claim without the right to recover his costs from his client. In this respect it differs from ATE insurance, which covers the client (as opposed to his lawyer) against risks as to costs. The risk for which the success fee is to compensate is the risk that the lawyer will not recover his reasonable costs.

25. Mr Ralls said that there was no such risk to the lawyer in costs only proceedings. Such proceedings could not be initiated in the absence of an agreement to pay costs which were expressly or impliedly reasonable, and the procedure represented a simple and cost-effective way of resolving any dispute as to their amount. The only risks for the client's lawyer in costs only proceedings were that:

(1) He does not recover the full costs of the action which he claims;

(2) He does not recover the costs of the Part 8 proceedings;

(3) He is ordered to pay some or all of the costs of the Part 8 proceedings, whether by reason of a failure to beat an offer made pursuant to CPR Part 47.19 or because there was no written agreement on which to base the proceedings, or otherwise."[2a]

26. So far as the first of these risks were concerned, he said that this was not a risk to the lawyer (who would be entitled to recover from his client - who can or ought to insure himself against that possibility - any shortfall in the costs recovered from the opposing party). Even if he was wrong about that, it was not a risk which the court should take into account in deciding whether a success fee was properly recoverable from the paying party since any disallowed costs were by definition neither reasonable nor proportionate. Similarly, if the costs of the Part 8 proceedings were reduced or disallowed, they should be treated as unreasonable and disproportionate by definition.

27. Furthermore, if the claimant and/or his lawyers are ordered to pay some or all of the costs of the Part 8 proceedings, this will *a fortiori* flow from the lawyers' unreasonable behaviour in refusing a reasonable offer under CPR 47.9 or in issuing Part 8 proceedings prematurely. These, Mr Ralls said, were not risks in relation to which the court ought to allow a solicitor to recover a success fee by way of compensation.

28. In all the circumstances he said that to allow solicitors a success fee on the costs of costs only proceedings would only encourage them to pursue those proceedings rather than seek to negotiate and compromise them.

29. As a fall-back alternative he said that even if a success fee on the costs of costs only proceedings is allowable in principle, an uplift of 20% was excessive in all the circumstances. In this context he repeated his identification of the risks involved in costs only proceedings, if any, and argued that any costs recoverable (including success fees) must be reasonable and proportionate. He reminded us that in its judgment in *Callery v Gray (No 1)* [2001] EWCA Civ 1117 at [84] and [103], [2001] 1 WLR 2112, this court allowed for the possibility of unforeseeable circumstances resulting in the ultimate failure or abandonment of what appeared to be a straightforward motor accident claim. He said that in costs only proceedings like these there were no such unforeseeable circumstances, and those elements which might give rise to risk were foreseeable and could be guarded against. He therefore argued that if any success fee was to be allowed at all, it should be minimal. He suggested a figure in the region of 5%.

30. In considering these submissions we have to remind ourselves that the CFA the district judge was being asked to interpret was a CFA made on 24th May 2000, very soon after the Conditional Fee Agreements Regulations 2000 came into effect. At that time there was a good deal of uncertainty about a number of matters relating to the recoverability of costs (including ATE insurance premiums) in a case like this. The nature of those uncertainties are evident from the judgment of this court in *Callery v Gray (No 1)* (see, in particular, para 41 of that judgment).

31. Mr Bacon, who appeared for the claimant, described to us a number of the other risks a lawyer who has acted "reasonably" may run in detailed assessment proceedings even in a case as straightforward as this one. His costs may be reduced, for instance, because of considerations relating to the locality in which he practises, or he may take points in defence of his client's right to confidentiality which may fail, or there may be a dispute (resolved against him) about the terms of his retainer. While we would not suggest that any great degree of risk is involved, we would reject Mr Ralls's submission that even at the present time there is no risk in costs only proceedings for which a lawyer acting under a CFA is entitled to seek protection on the principles discussed by this court, and approved by the House of Lords ([2002] UKHL 28, [2002] 1 WLR 2000) in *Callery v Gray (No 1)*. In May 2000, moreover, those risks were more substantial because of the uncertainties in the law to which we have referred.

32. In *Callery v Gray (No 1)* this court held (at para 104) that in a modest and straightforward claim for compensation for personal injuries resulting from a traffic accident 20% was the maximum uplift that could reasonably be agreed, where there was no special feature that raised apprehension that the claim might not prove to be sound. This was the success fee which the district judge considered to be reasonable in the present case. For the reasons we have given we consider that she was right to conclude that the CFA covered the costs only proceedings. Because of the prevailing uncertainties at the time this particular CFA was made, we cannot say that she was wrong to hold that an uplift of 20% was reasonable. She had a wide discretion to exercise, and there is no basis on which we could reasonably interfere with the decision she made.

33. For these reasons we dismiss this appeal. Our decision on this appeal has been strongly influenced by the uncertainties in the law on costs recovery which preceded the two judgments of this court in *Callery v Gray*. From August 2001 those uncertainties have been removed (subject to any lingering concern until June 2002 that the House of Lords might reintroduce uncertainty by overruling those judgments).

34. We consider, however, that it is now time to reappraise the appropriate level of success fee which should be recoverable on these simple claims when they are settled without the need for court proceedings. In reaching this view, we have had the benefit of advice from our assessor, as to whose expertise in costs matters Lord Hope of Craighead paid a well-justified tribute in his speech in *Callery v Gray* [2002] UKHL 28 at [55].

35. In paragraphs 106-115 of the judgment of this court in *Callery v Gray (No 1)*, Lord Woolf CJ drew attention to the availability of a two-stage success fee, whereby the agreed success fee would be subject to an agreed deduction if the claim should settle before the end of the protocol period. He suggested (at para 107) by way of example, that the uplift might be agreed at 100% subject to a reduction to 5% should the claim settle before the end of the protocol period.

36. After taking advice from our assessor, and after considering the arguments in the present case, we consider that judges concerned with questions relating to the recoverability of a success fee in claims as simple as this which are settled without the need to commence proceedings should now ordinarily decide to allow an uplift of 5% on the claimant's lawyers' costs (including the costs of any costs only proceedings which are awarded to them) pursuant to their powers contained in CPD 11.8(2) unless persuaded that a higher uplift is appropriate in the particular circumstances of the case. This policy should be adopted in relation to all CFAs, however they are structured, which are entered into on and after 1st August 2001, when both *Callery* judgments had been published and the main uncertainties about costs recovery had been removed.

37. There is one final point we need to mention. At the hearing before the district judge the claimant's solicitor took the point that the defendant's advisers should not be allowed to see the CFA on which his claim to a success fee was based, although the district judge was allowed to see it. The matter was not pressed to a ruling, and for the hearing of the appeal the parties and the court all had access to the agreement. Although Mr Ralls asked us to make a ruling on the question whether a CFA could be properly withheld from inspection in these circumstances, it did not arise for decision, and we declined his invitation.