Seminar Notes:
Getting the Retainer Right: avoiding the Pitfalls

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Your retainer is the ticket to being paid. If it is inadequate, there may be no entitlement to recover costs. It's that important.

In the beginning of civil litigation in England and Wales…

To recover any costs from your own client, the contract of retainer must be enforceable, otherwise the firm will go unpaid, so not point in sending out a bill! **If you do not get your costs right, there is no purpose in being in practice because you will earn nothing,** unless it is for altruism, something for which the legal profession is not well known!

So, when a new client comes into the office for advice about how to deal with a life changing problem, what do you need to know so that the firm will be paid for doing the job?

The basics -

Must the retainer be written?

Mostly **no**, but an **unwritten Conditional Fee Agreement (CFA) is unenforceable** because it must be in writing – s.58 (3)(a) Courts and Legal Services Act (CLSA) 1990

Robinson v EMW Law [2018] 4 Costs LO 477 Roth J

"the question... is whether the solicitors whose costs are sought to be recovered were acting for the receiving party as their client. That engagement to act will often be by way of a written letter of retainer, but it need not be... The fact that there was a written "confirmation of instructions" only on 1 May 2015, well into the proceedings, and that this was not retrospective in the contractual sense, does not affect the answer." [22]

But daft if you don't write it down

"On this question of retainer, I would observe that where there is a difference between a solicitor and his client upon it, the courts have said, for the last 100 years or more, that the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it... the reason is plain. It is because the client is ignorant and the solicitor is, or should be, learned. If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences"

Denning LJ [1953] 2 All ER 1364

Corporate client - get the right company resolution Rushbrooke UK Ltd v 4 Designs Concept Ltd [2022] Costs LR 1083
No resolution authorising the company to act, so no pay and wasted costs order made against the solicitors

Any other formalities? Yes - the principle of indemnity

The client must have **a liability** to pay the firm's costs in order to recover any costs from a losing opponent in litigation.

If there is no liability, by operation of the indemnity principle, there are no costs to indemnify, so a losing party's liability for the winner's costs is nil

Put another way, it means that the winner in litigation can never recover more from a losing opponent in costs than the amount which the successful client is liable to pay their own solicitors. Gundry v Sainsbury [1910] Costs LR (Core) 1

Easy so far, so what is the problem?

What happens if you do work before the contract of retainer is signed?

"We shall handle your case on a no win, no fee basis", says the solicitors in June and start work, and but nothing was put in writing until the CFA was signed without retrospective effect in October. "No liability to pay until CFA so nothing for us to pay – Gundry v Sainsbury -QED " say the defendants.

The Costs Judge agreed.

"The judge found that there was no private retainer and no liability for the claimant to pay for work done by BBK on his behalf in the period prior to the coming into force of the CFA."[22]

See TRX v Southampton Football Club [2023] Costs LR 15 – Stacey J

Appeal allowed

"The burden of rebutting the presumption rests with the paying party and in order to do so, it must be shown that the party was simply not liable to the solicitor for the work done on his or her behalf. It is not enough that someone else was going to pay the bill, or that they could never have afforded to pay, or that the solicitor was never likely to ask for payment. What must be shown is that the party was simply not liable to their solicitor for the work done." [61]

Moral of the story. Make sure that the client is liable to pay costs to the firm. It does not matter that the client cannot pay, or that someone else is indemnifying the client for the costs eg friend, family, Trade Union, insurer, provided that liability exists.

Ensure that the relevant Consumer Protection Regulations are complied with, including a notice of the right to cancel where appropriate.

Non-Contentious Business is all work done by solicitors including Tribunal work and portal work **until proceedings are BEGUN** in the High Court or a County Court see - re Simpkin Marshall Ltd [1959] Ch 229 - Wynne-Parry J.

Solicitors must comply with the Solicitors Code of Conduct.

"…[8.7] of the Code provides that solicitors should ensure that clients receive the best possible information about pricing and the likely overall cost of the matter. [8.6] of the Code provides that solicitors should give clients information in a way they can understand, and ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available."

Vos MR in Belsner v Cam Legal Services [2022] Costs LR 1569 [para 83]

Contentious Business – work done after proceedings are begun, including all work which was Non-contentious until that point. The client must give **"informed consent"** to the terms of the retainer.
see Macdougall v Boote Edgar Esterkin [2001] 1 Costs LR 118 – Holland J - approved in Herbert v HH Law Ltd [2019] Costs LR 253

"In the course of argument I talked of 'informed' approval and even with reflection I adhere to that concept. To rely on the Applicants' approval the solicitor must satisfy me that it was secured following a full and fair exposition of the factors relevant to it so that the Applicants, lay persons as they are, can reasonably be bound by it."

Remember :-

Give the client the **CPR 46.9(3) warning**...costs will be
(c) …unreasonably incurred if –

(i) they are of an unusual nature or amount; and
(ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.

AND contract out of 74(3) Solicitors Act 1974 which limits the costs which can be charged to the client for county court work to the amount recovered from the opponent (which could be only fixed costs). This is because -

Section 74(3) of the Solicitors Act 1974 applies unless the solicitor and client have entered into a written agreement which expressly permits payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings.

Remember the Cancellation Notice!

Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

- “on-premises contract” - made at legal services provider’s place of business
- “off-premises contract” - made not at that place eg following a visit to the consumer’s home or office
- “distance contract” - eg made by ‘phone or post

Contracts made by electrical communications methods – Zoom

Get the cancellation notice wrong and you can lose the lot even if the client wants you to be paid!

Cox v Woodlands Manor Care Home [2015] 3 Costs LO 327

Where a client signed a conditional fee agreement with her solicitor at her home, the failure to provide written notice of the right to cancel under reg 7(2) Cancellation of Contracts Made in a Consumer’s Home Regulations etc 2008 rendered the contract of retainer unenforceable. It followed that although the solicitor had recovered £100,000 in damages for the client and her costs of the action had been assessed at £53,000, the amount of costs payable by the defendant was nil by operation of the indemnity principle.

Unenforceable contracts cannot be saved by severing the offending provision

Diag Human SE v Volterra Fietta [2023 Costs LR

Clients billed $2,929,928.38.

Clients had paid “…over US$1.5m” - per Stuart-Smith LJ [77]

Common ground that the Conditional Fee Agreement was unenforceable because it included a success fee that could exceed 100% - breach of s.58 CLSA

Could the offending term re the success fee be severed so the solicitors could have their base costs for a claim “…being measured in billions…” [7]? **NO!**

Could the firm be paid on the basis of a quantum meruit? **NO!**

Could the firm keep the $1.5m for the work done? **NO! Pay it back! Ouch!**

Ensure fee earner definitions in respect of hourly rates do not unnecessarily restrict what can be claimed

Dramatis Personae - (taken from the Guide to the Summary Assessment of Costs 2021)

The categories of fee earners are as follows:

- **A -** Solicitors with over eight years post qualification experience including at least eight years' litigation experience and Fellows of CILEX with 8 years' post-qualification experience.
- **B -** Solicitors and legal executives with over four years post qualification experience including at least four years litigation experience.
- **C -** Other solicitors and legal executives and fee earners of equivalent experience.
- **D -** Trainee solicitors, paralegals and other fee earners."

Grades of fee earner The categories of fee earners are as follows:

- **A -** Solicitors with over eight years post qualification experience including at least eight years litigation experience and Fellows of CILEX with 8 years' post-qualification experience.
- **B -** Solicitors and Fellows of CILEX with over four years post qualification experience including at least four years litigation experience.
- **C -** Other solicitors and Fellows of CILEX and fee earners of equivalent experience.
- **D -** Trainee solicitors, trainee legal executives, paralegals and other fee earners.

The Retainer says this:

Grade of Fee Earner	Hourly Rate
Solicitor with over eight years post qualification experience including at least eight years litigation experience. (A)	£210
Solicitors and legal executives with over four years post qualification experience including at least four years litigation experience (B)	£185
Other solicitors and legal executives and fee earners of equivalent experience (C)	£155
Trainee solicitors, para legals and other fee earners (D)	£115

- *What about a Legal Executive with 8 years plus PQE?*
- *What about a barrister?*
- *What about a Costs Lawyer who may be conducting advocacy against a KC?*

Please Sir I want some more

As between the firm and the client, an hourly rate can be agreed irrespective of qualification. However :-

If it is e.g. a non-qualified managing clerk with 25 years of litigation experience charged out as a Grade A, the client should be warned under CPR 46.9(3) that only the rate at Grade C would probably be allowed on a between the parties assessment : the client will be liable to pay the difference

Note that the court has a wide discretion : see Paturel v Marble Arch Services Ltd [2005] EWHC 1055 (QB) - Cox J

Newly qualified solicitor with 15 years pre-admission experience allowed at Grade B

"I accept his submission that it is the experience of the representative which is of particular relevance here, experience frequently being as valuable if not more valuable in this area than an academic or professional qualification. The guidelines relied on by Ms Ackland are not binding instruments and the considerable experience of the assessors in this appeal is that litigation experience of this length, prior to qualification, would always be recognised and taken into account in determining the appropriate grade of fee earner and hourly rate. I therefore see no error in the deputy master's decision to allow the rate applicable to a Grade B fee earner."

Avoid provisions in retainers which conflict or are inconsistent with each other where standard templates are being used. If action is needed on a retainer, this needs to be taken before the case settles. Afterwards is too late.

Now here's a funny thing in a standard CFA

What is covered by this agreement

- "Your claim for damages for personal injury and consequential losses against Florence Nightingale Hospital NHS Trust and/or any other defendant that you may have a cause of action against for damages for personal injury suffered on the 17th October 2023 or any other date on which negligence may have occurred.
- Any work we carry out on your behalf in respect of your claim before or after the agreement date i.e. from the date you first contacted us to the conclusion of your claim"

Schedule 2
"Basic Charges - these are for work done now until the agreement ends "

What about billing the client? Interim statutory bills or interim on account?

"Billing Arrangements
6.1 To help you budget, we will send you a bill for our charges and expenses at the end of each month while the work is in progress. We will send you a final bill after completion of the work."

Does that mean the client is receiving interim bills which are final for the period to which they relate ("Statutory"), or interim, on account of a final bill to be rendered at the end of the case?

It took a High Court Judge to decide – see Vlamaki v Sookias & Sookias [2015] 6 Costs LO 827
Make sure that the Ts and Cs are clear and unambiguous! The client gets the benefit of any doubt.

Can you repair a defective retainer?

Yes - if the client agrees, but if that is done after a costs order has been made against the opponent, it is too late.
Radford v Frade *[2018] 1 Costs LR 59 Vos C, McCombe and Asplin LJJ*

No rectification of a CFA undertaken after a costs order had been made which could increase the liability of a paying party could be effective. Kellar v Williams [2005] 4 Costs LR 559 followed. Accordingly, where the CFA had not mentioned two of the defendants against whom costs orders had been made, a deed of rectification purporting to be effective ab initio could not be enforced against the paying parties, since to do so after that date would have increased their liability under the terms of that order, contrary to the ruling in Kellar.

Ensure everything is documented on your file

What is the point of that?

- Record of what was done, when and why
- Facilitates justifying the work and charges both to the client and the opponent
- Enables a fee earner coming into the case to work up the file quickly eg when the case handler goes on holiday, moves departments or firm
- Electronic time recording is an inadequate means to record time making all that work on the case vulnerable to reduction - Vik v Deutsche Bank. [2023] EWHC 9 (SCCO) “There were, for example, very few attendance notes or file notes. Most of the documents that I was taken to were emails, but clearly they were also not complete”
- £ 53,388,736 bill reduced to £ 36,527,259.11
- You get paid for making attendance notes! - Brush v Bower Cotton and Bower [1992] Costs LR (Core) 223

What, when, why and how long did it take

No good

Attended client 2 hours - 5 October 2023 plus 1 hour travelling

Better

Attended client 2 hours 17 October 2023. Had received DII’s Part 36 offer on Friday. Client still hospitalised and unable to travel or attend Zoom call. Went through the offer, took time due to having to use interpreter to translate into Polish...

Best
... AND explaining that she would be on risk as to costs from 7 November if she does not beat it at trial. Explained position of D I in relation to offer and what happens if service of notice of discontinuance given under CPR 38 , provided we can obtain indemnity from D II for D I’s costs and also for us running the action vs D I. Client instructed us to accept offer provided we get the indemnities for the costs against D I. 1 hr 30 minutes re D II, 30 minutes re D I. Travel one hour. Fares £50. Total 30 units 2 units writing attendance note.

“Best” is best because...
It explains what was done, when it was done and why it was done and how long was taken
Importantly, it anticipated the risk that costs would not be awarded against D 1, so the time spent on the D I aspect of the claim has been separated out, leaving the work done in respect of D II against whom costs will be recovered.
If that is not done, the task of dividing the bill to claim only the work vs D II will be horrendous – see Cinema Press v Pictures & Pleasures Ltd [1945] KB 356

Do you know the difference between **specific common costs** and **unspecific common costs**?

Note that whilst it is helpful to record time by reference to “Phase” , “Task” and “Activity” in order that preparing the bill when the case has been won is very helpful, there is no substitute (in addition) for good attendance notes.