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Herbert v HH Law Ltd [2019] EWCA Civ 527: success fees in a post-LASPO world

Introduction

1. The facts of *Herbert v HH Law Ltd* [2019] EWCA Civ 527 were unremarkable. The Claimant, Ms Herbert, had suffered relatively minor personal injury in a road traffic accident. She duly instructed the Defendant solicitors' firm to pursue a claim against the at fault party, funding that claim through a (post-LASPO)[1] CFA. That CFA committed her upon success to pay a 100% success fee (of basic charges), capped at 25% of PSLA and past pecuniary loss. The Defendant's standard policy was to charge such success fees in all cases irrespective of the actual risk. This particular fact – that the success fee was not calculated by reference to the specific risks of her case – the Defendant did not explain to the Claimant. However, the Defendant did provide the Claimant with written documentation which accurately[2] described the sums the Claimant was *prima facie* rendering herself liable to pay.

2. Put simply, the Claimant effectively agreed to pay 25% of her non-future damages upon victory, in return for free legal representation upon loss.[3] Many claimants who have pursued similar low-value personal injury claims since LASPO came into force probably

[1] LASPO being the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the material provisions of which (for the purposes of this note) came into force on 1 April 2013.
[2] The Court of Appeal firmly rejected the Claimant's argument that the written documentation itself was inaccurate or misleading. Rather, the Court of Appeal found this documentation to be a *"clear and comprehensive account of her exposure to the success fee and [the Defendant's] fees generally."* See [2019] EWCA Civ 527, [48]
[3] Obviously, this was not the strict legal position. However, it was the effective reality of the situation.

made similar agreements: The difference between Ms Herbert and those claimants was that, upon winning her personal injury claim, Ms Herbert then challenged that success fee.[4]

The dispute

3. At first instance, the Claimant was successful, with the trial judge, DJ Bellamy, reducing the success fee to 15% (of basic charges). On first appeal to the High Court, Soole J upheld that decision. On second appeal, in the Court of Appeal, the issues were simple. Both parties agreed that the success fee was to be assessed on the indemnity basis. They further agreed that, under CPR 46.9(3)(a) and (b), that success fee was presumed to have been reasonable if (but only if) the Claimant had given 'informed consent'. Here, the Claimant had plainly consented. Thus, the central issue was whether that consent had been sufficiently informed.

4. In argument, the Defendant apparently emphasised PD 46, para 6.1, which provides as follows (emphasis added):

> *"A client and a solicitor may agree whatever terms they consider appropriate about the payment of the solicitor's charges.* ***If, however, the costs are of an unusual nature, either in amount or the type of costs incurred, those costs will be presumed to have been unreasonably incurred*** *unless the solicitor satisfies the court that the client was informed that they were unusual and that they might not be allowed on an assessment of costs between the parties. That information must have been given to the client before the costs were incurred."*

[4] Ms Herbert further challenged an ATE premium, which this note does not discuss.

5. Strictly speaking, this paragraph does not address the scenario of when costs are presumed to have been reasonably incurred. Rather, it addresses when costs are presumed to have been unreasonably incurred. However, the Defendant's core argument appears to have been that the 100% success fee was not in any way unusual and thus that the written documentation provided to the Claimant rendered her consent sufficiently informed.

6. As to why the success fee was not unusual, the Defendant argued thus:

   6.1. The cuts imposed by LASPO rendered it necessary to charge such success fees in order to cover overheads and generate reasonable profit;

   6.2. Most of the Defendant's competitors imposed similar fees;

   6.3. Thus, a 100% success fee now constituted a reasonable market rate for such work; and

   6.4. The Claimant had always been free to shop around for a better rate.

7. The Court of Appeal unanimously rejected this argument. Holding that *"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"* ([50]), Sir Terence Etherton MR concluded that informed consent required the Claimant to have been told that *"the success fee of 100% took no account of the risk in any individual case but was charged as standard in all cases"* ([53]). Since this had not happened, the CPR 46.9(3)(a) and (b) presumptions did not apply. DJ Bellamy had held that, in the absence of such a presumption, a reasonable success fee would have been 15% of basic charges, and against that conclusion there was no further challenge.

Discussion

8. The beating heart of the Defendant's case was the fundamental issue of what English law considers the purpose of success fees to be. Are these fees merely mechanisms by which legal representatives can generate profit, or do they serve another function?

9. In *C v W* [2009] 1 Costs LR 123, the Court of Appeal recorded, with obvious approval, the agreement between the parties that pre-LASPO success fees **did** serve another function:

> *"8 It was common ground that the purpose of a success fee under a CFA is to compensate solicitors for the risk of failing to recover any fee at all."*

10. In *Fortune v Roe* [2012] 2 Costs LR 288, the High Court expanded upon this as follows:

> *"10 A success fee is based upon the premise that there is a risk that the claimant's solicitors will not recover all or part of their costs. The success fee compensates them for undertaking that risk. The level of risk determines the amount of the success fee, save in cases where such fees are fixed by the court."*

11. Accordingly, it is settled law that a pre-LASPO success fee is not a profit-generating mechanism. Rather, it compensates legal representatives as follows:

    11.1. Of all cases done on such a CFA, some will win and some will lose.

    11.2. The success fees should be set such that the fees recovered from the cases that win should, over time, equal the legal costs generated (and thus not recovered) by the cases that lose.[5]

[5] This is achieved through a simple mathematical formula. If the prospects of success are x% (for 0 < x < 100), then the success fee should be set at $\left(100 * \frac{100-x}{x}\right)$%.

11.3. Accordingly, legal representatives should remain broadly in the same financial position that they would be in if they simply obtained their costs in all cases, irrespective of whether those cases succeed or fail.[6]

12. The issue thus becomes whether the analysis is different for post-LASPO CFAs.

13. As is well-established, LASPO changed personal injury litigation (and in particular low-value personal injury litigation) in two important respects. Firstly, it prevented successful claimants from recovering success fees from their respective defendants, providing instead that such claimants had to bear such fees themselves. Secondly, it reduced the fixed costs recoverable from defendants in low value cases.

14. In the author's view, it is difficult not to sympathise with the Defendant's submissions that these changes have fundamentally changed the low-value personal injury marketplace. Not only does the reduction in recoverable fixed costs have obvious consequences,[7] but the fact that the recoverable success fee is subject to a 25% non-future damages cap means that legal representatives will inevitably not recover the full amount of their lost costs.

[6] Further indicating this, see in particular the recent detailed analysis of Martin Spencer J in *NJL v PTE* [2018] 6 Costs LR 1389, [32] – [43] (a case involving a pre-LASPO CFA), which assesses how precisely the risk should be calculated in cases where liability is admitted and where the only substantive risk arises from failing to beat a defendant's Part 36 offer.

[7] One interesting – and non-obvious – issue which apparently was not argued in this case, but could potentially arise in subsequent disputes, is whether the success fee uplift should be applied to the basic charges or to the recoverable fixed costs. Here, the retainer specified that the success fee applied to the basic charges. However, given that, in such proceedings, solicitors cannot recover more than fixed costs from their clients unless an express agreement exists to that effect (See CPR 46.9(2)), there is potentially a respectable argument that, in the absence of informed consent, it does not make sense for clients to compensate legal representatives for risks to costs that would never have been paid anyway. Indeed, under the pre-LASPO regime, the general rule was that success fees applied only to the fixed costs (see CPR 45x.11(2) and CPR 45x.12).

15. The courts' response to these arguments however has been striking and unambiguous. In *Herbert*, Sir Terence Etherton MR (with whom Asplin and Lindblom LJJ agreed) held that they did not *"answer the point … that a success fee is traditionally related to litigation risk"* ([53]). In the High Court, Soole J held that he could see *"no good reason for the risk in the individual case to be excluded as a relevant factor"*,[8] noting pointedly that *"the exclusive focus of the solicitor is on the best interests of the client."*[9] At first instance, DJ Bellamy bluntly stated: *"I do not accept as a starting point that a defendant has to charge clients fees simply to ensure overheads and a reasonable level of profit are made."*[10]

16. These arguments have been further tested elsewhere. Since LASPO, courts have been vexed by the related issue of when a litigation friend can recover success fees from damages payable to a child or protected party. CPR 21.12(1) allows litigation friends to recover reasonable costs and expenses from damages, although PD 21, para. 11.3(2) provides that, to demonstrate a success fee is reasonable, the litigation friend should produce *"the risk assessment by reference to which the success fee was determined."*[11] In the author's experience, courts have been inherently reluctant to authorise blanket 25% success fee deductions without clear justification.

17. Such reluctance is demonstrated in *A v Royal Mail Group* [2015] 8 WLUK 182 where, in a rare reported county court judgment, the court refused to summarily assess a success fee on a post-LASPO CFA, which the litigation friend sought at the maximum 25% level. The claimant's solicitors had argued, echoing that said subsequently in *Herbert*, that without

[8] [2018] EWHC 580 (QB), [44]
[9] [2018] EWHC 580 (QB), [44]
[10] [2018] EWHC 580 (QB), [22]
[11] The author notes that this wording indicates a clear assumption that such a risk assessment will always exist.

such recovery, such litigation would be economically unsustainable.[12] Rejecting this argument, the judge, DJ Lumb, was scathing:

"45 These so called submissions have no place in a properly prepared skeleton argument. They are, in the widest sense, political assertions that are of no relevance to the judiciary or the Courts who constitutionally are apolitical. If the solicitors consider that the predictive or fixed recoverable costs are insufficient then their argument is with the Government and the Legislature and not with the Judiciary or the Courts whose role is to apply the law.

46 The suggestion that solicitors would not undertake the work without the enhancement of a success fee in (at least in as much as it relates to simple and straightforward cases) is unfounded by the experience of the Courts in dealing with the many thousands of these cases throughout the country. On the contrary, it seems there are many solicitors who are quite prepared to do the work without a success fee. There is no compulsion on solicitors to do the work. They may choose not to do so if it is uneconomic for their firm. Other firms will do that work instead.

47 No doubt any competent solicitor would advise a prospective Litigation Friend that other solicitors may be prepared to accept instructions without insisting upon a success fee. Such advice would surely form part of the professional requirements in the Solicitors Code of Conduct when discussing funding arrangements with a prospective client."

[12] [2015] 8 WLUK 182, [44]

18. Subsequently, on detailed assessment, DJ Lumb assessed a reasonable success fee to be 10% of basic charges.[13]

Conclusions

19. There may well be a respectable argument that low-level personal injury work is not economic under the post-LASPO fixed cost regime. However, it is striking that, of the six judges to have considered it in a reported judgment – Sir Terence Etherton MR, Asplin LJ, Lindblom LJ, Soole J, DJ Bellamy and DJ Lumb – not one has found that argument persuasive. Rather, subject to any subsequent Supreme Court analysis,[14] the judicial position is clear and uncompromising: LASPO did not change the purpose of success fees. They exist to compensate legal representatives for the risk of not obtaining their costs and not to generate profit.

20. This does not mean that legal representatives cannot impose blanket success fees of 100% (as the Defendant in *Herbert* did). Rather, if they do so, they must obtain informed consent from their clients by explaining clearly the purpose of a success fee, and that (arguably contrary to that purpose) they have not undertaken any individual assessment of the risks in their clients' cases. If legal representatives are dissatisfied with this state of affairs, then their complaint lies with the legislature, not the judiciary.

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[13] *A v Royal Mail Group (No 2)* [2015] 9 WLUK 386
[14] The author has no connection to the legal teams in *Herbert* and does not know if they will attempt this.