39 Essex CHAMBERS

3+9=Costs
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Introduction

Shaman Kapoor
Call 1999

EDITOR

Welcome to the 11th Edition of 3 + 9 = Costs.

Although this edition is a little later than usual, much has been happening in the Costs world. We have celebrated the contribution of the former Senior Costs Judge at the end of February with a dinner at Lincoln's Inn, and now we welcome the new Senior Costs Judge Jason Rowley. Many congratulations to him! The new edition of the White Book has again produced the very valuable publication in the Costs & Funding supplement, to which several members of our team continue to contribute.

The costs world continues to evolve. There seems to be an ever-increasing demand for our expertise, collaboration across the professions and a real appreciation for our work from the depths of a costs dispute to the mammoth group action work that seems to have most of us involved in some way or another. All to be welcomed!

This edition is a short and fast spotlight on three cases of interest to our junior members, whose costs practices are developing in leaps and bounds.

There seems to be always something about retainers. **Daniel Laking** writes on the Court of Appeal judgment in *Singh* which provides guidance on the challenge to retainers, particularly, a retrospective CFA.

Sticking with good form at the beginning of the litigation journey, **Chris Moss** writes on the Commercial Court judgment in *4VVV Ltd,* which seems to have put an end to any trench warfare around the validity of a retainer where there has been a failure to provide a cancellation notice pursuant to the regulatory framework.

Closing the show, **Daniel Kozelko** analyses a decision of the High Court in *Attersley*, which considered the interplay between fixed costs and the late acceptance of a Part 36 offer.

That's it in this edition. A quick read of some very useful analysis!

Shaman

Retrospective CFAs: *Singh v Ingram* [2025] EWCA Civ 264

Daniel Laking
Call 2015

This case contains a helpful reminder of the rules applicable to the interpretation of retainers generally, and answers key question of whether a CFA can have retrospective effect.

Facts

In 2015, Mr Ingram (in his capacity as liquidator of MSD Cash and Carry PLC) commenced proceedings against the Appellants. The proceedings concerned whether the Appellants had sought to diminish the assets available to the liquidator. The trial was resolved in the liquidator's favour and the Appellants were ordered to pay the liquidator's costs of the proceedings on the indemnity basis.

The issue before the Costs Judge on detailed assessment was whether the conditional fee agreement ("CFA") entered into between Mr Ingram and his solicitor was retrospective.

Judgments Below

At first instance Costs Judge Nagalingam found that:

1) The liquidator had originally entered into a written retainer by way of letters dated 31 March 2011 and 28 March 2012 in respect of the claim.
2) There was also an oral agreement to the effect that, in the event of no realisations from the assets, the solicitors would either waive or reduce their charges.
3) The liquidator and the solicitors had previously worked together in cases where there had been an underlying fraud, and the realisation of assets was necessary in order to fund the insolvency proceedings and the associated legal fees.
4) At all stages Mr Ingram understood the written CFA would be retrospective and that was consistent with previous instructions to the solicitors.

The Costs Judge's conclusion on retrospectivity was challenged on appeal to Lavender J who concluded that, on its proper construction, the CFA was retrospective.

CFA

The CFA was signed on 24 March 2015 and included the following clauses:

"2. What is covered by the Agreement

2.1 The Claim.

2.2 Any appeal made by the Client against an

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interim order during the proceedings.

2.3 Any appeal by the Defendant

2.4 Proceedings to enforce a judgment, order or agreement.

…

4.1 Successful Claim

If the Client wins the Claim, it will be liable to pay to the Firm, when sufficient funds have been realized from the Defendants or any third party on their behalf and if insufficient funds are recovered such payments will be in accordance with clause 15 of the Conditional Fee Agreement dated 17 November 2014 between David Ingram and John Briggs:

(i) the Basic Charges.

(ii) the Success Fee; and

(iii) any Disbursements."

Appellant's Arguments

The Appellant argued that:

1) The Judge was wrong to find that the CFA was expressly retrospective. The term as to retrospectivity was not express, clear or unambiguous.
2) The Judge was wrong to find that the combination of terms within the CFA was sufficient to amount to an express term on retrospectivity.
3) The Judge erroneously treated the definition of "the Claim" and its use in clauses 2 and 4 as an express and unambiguous term on retrospectivity, notwithstanding the fact that the definition of "the Claim" could reasonably be interpreted as a pure description of the proceedings.
4) The judge failed to consider and give proper weight to the matrix of fact which included clear evidence that the signatories to the CFA had no commercial imperative to sign a retrospective CFA.
5) The Judge failed to consider the fact the solicitor had at no time explained to their client that the CFA was intended to have retrospective effect.

Principles Applicable to the Interpretation of CFAs

The Court of Appeal's judgment (at [13] to [21]) contains a helpful summary of the principles which apply when interpreting retainer documents. In short:

1) Retainers are commercial contracts and ordinary rules of contractual interpretation apply. In particular, the Court of Appeal relied on *Lukoil Asia Pacific Limited v Ocean Tankers Limited* [2018] EWHC 163 (Comm) in which it was held: *"The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."*
2) Section 59 of the Solicitors Act 1974 provided for an agreement to be made in respect of business "done, or to be done" and therefore plainly covers work which had been carried out prior to the retainer.
3) Section 58(3) of the Courts and Legal Services Act 1990 provided that a CFA must be in writing but did not prevent it from being retrospective.
4) CFAs are capable of being retrospective: *Birmingham City Council v Forde* [2009] EWHC 12 at [123]

5) A court should be wary of construing the CFA by reference to similar terms in similar CFAs which had previously been interpreted: *Tartsinis v Navona Management Co.* [2015] EWHC 57 (Comm) at [62].

Court of Appeal's Reasoning

The Court of Appeal found that the CFA was "plainly" retrospective. It was agreed the CFA was entered into on 24 March 2015 but that the solicitors had been working on the case since 30 March 2012. That period was recoverable under the CFA.

The CFA was concerned with the work by the solicitors that it covered. The work was defined in Clause 2.1 as the work on the claim. No division was made between work done in the past and work to be done in the future. The CFA covered all the work done. The CFA also stated that the work went back to 30 March 2012.

The Court of Appeal approved the Costs Judge's analysis that basic charges were defined as "work done by [the solicitors] for the client in relation to the 'claim'" and there was no express term that the solicitor's CFA covered only work which post-dated its signing.

There was no specific form of words that had to be used in order to 'trigger' retrospectivity. Every case required analysis of what the words mean in their context.

Whether or not the liquidator was told about the retrospective nature of the CFA was not determinative. The 'factual matrix' could not be used to override the clear terms of the CFA. The knowledge of the parties at the time was relevant but *"it is important that the proper limits of this rule are understood"* (see [42] of the judgment).

The fact there was an existing retainer which appeared to be an unenforceable CFA (in that it was not in writing) did not negate the effect of the written CFA from 24 March 2015. The written CFA superseded the previous agreement and was not a good reason to find that the March 2015 was intended too solely prospective.

Even if the solicitors had been in breach of their professional obligations by failing to inform the client that the CFA had retrospective effect, that was irrelevant to the question of whether the CFA was actually retrospective. A breach of the relevant Code of Practice would, at most, give rise to a disciplinary claim but had no bearing on the interpretation of the CFA.

Key Practice Points

This case serves as a useful reminder of both the principles that should be applied when interpreting retainer documents. It seems to me there are a number of helpful takeaways for practitioners.

Importantly, any question of the interpretation of your CFA will be a matter of contract. What is in the minds of the solicitor and/or client at the time can only ever be of peripheral relevance.

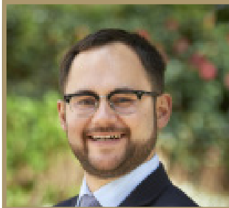
Courts can and will find that CFAs have retrospective effect where the agreement permits that interpretation. It is unlikely a court will be particularly receptive to an argument from a Paying Party that a CFA is not retrospective in order to get out of paying an otherwise legitimate claim for costs.

Beware of relying on other, similar terms which have been found to be retrospective in other cases. Each case will turn on its own facts and, importantly, on the language used.

One point that remains for open for discussion (it did not arise in *Singh v Ingram*) is the impact of the Consumer Rights Act 2015. Where the client is a 'consumer' for the purposes of the CRA 2015, the enforceability or interpretation of the retainer may be influenced by consumer protection legislation. As Coulson LJ said at [33]: *"I acknowledge that in certain circumstances, solicitors have specific duties to advise those who qualify as consumers of their rights, and this may sometimes have an effect on the construction of the retainer."*

Finally, if you want your CFA to have retrospective effect, the safest way (and the way to avoid arguments as to the contractual interpretation) is to say so expressly on the face of the retainer!

Attersley v UK Insurance Ltd [2025] EWHC 884 (KB)



Daniel Kozelko
Call 2018

Introduction

Will a claimant be entitled to fixed costs, or costs assessed on the standard basis, up to the point of the expiry of the relevant period of a Part 36 offer that she accepted late, where a claim began under the RTA Protocol but exited and became a Part 7 claim? That was the question in this case, examining the interaction of CPR rr 36.20 and 45.29B, following the decision in *Qader v Esure* [2016] EWCA Civ 1109.

Background

The claimant was involved in a road traffic accident with the defendant on 9 March 2018. She submitted a claim notification (an RTA1) under the RTA Protocol on 19 March 2018 (and thereby became subject to the fixed costs regime). At the defendant's request, the claim exited the RTA Protocol on 9 April 2018 as there was a dispute as to liability. On 12 February 2021 the claimant issued Part 7 proceeding, and on 4 March 2021 a defence was filed admitting liability along with a Part 36 offer. That Part 36 offer was not accepted by the claimant within the relevant period (ending 25 March 2021). On 5 January 2022 the claim was allocated to the multi-track. Finally, on 8 July 2022, the claimant accepted the defendant's Part 36 offer.

CPR Provisions

It was common ground between the parties that, had she accepted the Part 36 offer within the relevant period, the claimant would only have been entitled to fixed costs (subject to there being exceptional circumstances for r45.29J). The question, then, was what happens when the Part 36 offer is accepted late and, importantly, after the claim is allocated to the multi-track. Rule 45.29B at that time provided:

> *Subject to rules 45.29F, 45.29G, 45,29H and 45.29J, and for as long as the case is not allocated to the multi-track, if in a claim started under the RTA Protocol, the Claim Notification is submitted on or after 31 July 2013, the only costs allowed are –*
>
> *The fixed costs in rule 45.29C*
>
> *Disbursements in accordance with rule 45.29I*

The words 'and for as long as the case is not allocated to the multi-track' were added subsequent to the decision in *Qader*. The other key provision is r36.20 which at that time provided for a claim which *'no longer continues under the RTA… Protocol pursuant to rule 45.29(1)':*

> 2) *Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.*
>
> …
>
> 4) *[Subject to provisions not in issue], where a defendant's Part 36 offer is accepted after the relevant period –*
>   a) *the claimant will be entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and*
>   b) *the claimant will be liable for the defendant's costs for the period from the date of expiry of the relevant period to the date of acceptance.*

The arguments

The claimant argued that, at the time the offer was accepted, r45.29B provided that fixed costs no

longer applied as the claim had been allocated to the multi-track. On the other hand, the defendant argued that, at the time the offer had been made and at the time it should have been accepted, the matter was not allocated to a track and thus r36.20(4) provided that fixed costs would apply (subject to any exceptional circumstances under r45.29J).

The judgment

The judge (Stacey J) began by noting the statutory intention which underlies these rules, as identified by Briggs LJ in Qader: *'fixed costs were not intended to apply where there had been a judicial determination that a claim issued in Pt 7 should be allocated to the multi-track'*. The rationale is that the relevant Protocols and fixed costs regime were only suitable for smaller, less complicated claims. This did not describe a multi-track claim. Nothing in *Qader* carved out an exception for Part 36 offers; any suggestion to the contrary would have been clearly spelled out. In short, it was the intention that the fixed costs regime would never apply to multi-track claims.

The defendant suggested it was an absurd outcome that, as a result of her delay, the claimant would benefit from a far more favourable costs regime. It was suggested it would lead to claimants gaming the system (by delaying until allocation), and as a result Part 36 must be carved out of the effect of r45.29B. The judge rejected this; there are quite proper reasons for a claimant to initially reject an offer and then to circle back and accept later outside of the relevant period. Indeed, the judge saw merit in the claimant's argument that the defendant's approach would itself lead to absurd outcomes. It could lead to both claims of substantial value being limited to fixed costs where the claimant accepted the offer out of time, and also (depending on the timing of the offer and date of track allocation) even when the offer is accepted within time. This would mean r45.29B would not apply to Part 36 offers at all which was not the intention of the provision following *Qader*.

The judge noted that, if r45.29B applied, both parties could protect their positions to avoid the harshness of the rules. The defendant could choose to withdraw offers; the claimant could make counteroffers before allocation to a track. The reality, however, is the defendant's approach would encourage the withholding of claims from the RTA Protocol until it was clear what the value of the claim was. Deterring the use of such protocols was not a desirable outcome. The reality is the defendant's approach produced the more unfair outcome which was a significant windfall. No case law subsequent to Qader helped the defendant. Neither did the literal interpretation of the rules, which similarly favoured the claimant's interpretation.

The judge finally rejected the suggestion from the defendant that, even if the fixed costs rules did not apply, they should be applied by analogy using the costs discretion. The Part 36 regime is self-contained and has its own sanctions for the late acceptance of offers. Further constraint to costs recovery should not be applied in those circumstances.

Comment

While arising in relatively niche circumstances, this case is an important clarification of these two rules. Even with subsequent changes to the rules, practitioners must be careful to bear in mind the offers that have been made, and the timing of allocation. Proactive case management is a must to ensure that offers are not left on the table where their protective effect is diminished, or to ensure that proper and new offers are made to protect against the effect of these and similar provisions.

Non-compliance with distance selling regulations does not invalidate a retainer - *4VVV Ltd & Ors v Spence & Ors* [2024] EWHC 3035 (Comm)

Christopher Moss
Call 2021

Summary

In 4VVV Ltd & Ors v Spence & Ors [2024] EWHC 3035 (Comm) Mr Justice Foxton considered whether a firm's failure to comply with Regulation 13(1) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ("the 2013 Regulations"), governing the details that must be provided to a client before making a distance contract, rendered the retainer contract unenforceable. In concluding that it does not render a contract unenforceable the High Court has, hopefully, finally put an end to inter-partes disputes over non-compliance with Regulation 13.

Background and facts

The underlying claim arose out of a multi-million-pound property investment scheme in student accommodation and holiday properties around the UK. The claimants alleged that the scheme, which had promised fixed returns over set periods of time which did not materialise, was fraudulent. Following a 10 week trial the claimants were successful with Mr Justice Foxton, in a detailed and lengthy judgment starting amusingly with a quote from Charles Kingsley's 1855 novel *Westward Ho!*, finding that the claimants' claims for deceit and unlawful means conspiracy were made out.

Following the conclusion of the substantive proceedings, the defendants contended that the claimants were not entitled to costs orders because their retainer was unenforceable. This was due to a failure to comply with Regulation 13 of the 2013 Regulations. Regulation 13 sets out the information that a trader must provide a consumer before making a distance contract.

In *Cox v Woodlands Manor Care Home Ltd* [2015] EWCA Civ 415, a case dealing with the pre-2013 Regulations, the Court of Appeal held that a failure to provide a client with their right to cancel before entering into a distance contract rendered the retainer contract unenforceable leaving the solicitor with no costs. Here, the Defendants were seeking the same outcome.

The Defendants argued, inter-alia, that the words "Before the consumer is bound by a distance contract" in Regulation 13(1) meant that compliance with Regulation 13(1) was a pre-condition to the conclusion of a binding contract; they argued that the consequence of failing to comply was that the ensuing retainer was unenforceable. The Claimants argued that the wording of Regulation 13(1) simply defined the time for performance of the trader's obligations.

Judgment

Mr Justice Foxton held that the Claimants' construction was correct for the following reasons:

- Regulation 13(5) provides that non-compliance with particular parts of Regulation 13 will mean that the consumer is not liable for particular costs arising under the contract. 13(5) would be superfluous if the effect of non-compliance with 13(1) meant that there was no binding contract at all. [8]
- Regulation 14(2) deals with a sub-set of contracts addressed by Regulation 13(1), namely distance contracts concluded by electronic means. Regulation 14(5) provides that a failure to comply with Regulations 14(3) and (4) means that the consumer is not bound by the contract or order. There is no such language in Regulation 13 save for the specific provision in Regulation 13(5) which did not apply here. [9]
- Regulation 18 provides that "every contract to which this Part applies is to be treated as

including a term that the trader has complied with the provisions of – (a) Regulations 9 to 14". This only makes sense if a failure to comply with Regulations 13 and 14 did not preclude a binding contract. The effect of non-compliance with those requirements is that the consumer can sue the trader for breach of contract. [10]

- Regulation 31(1) addresses what happens if the trader does not provide the consumer with the information on the right to cancel required by paragraph (l) of Schedule 2, this is one of the items of information required by Regulation 13(1). Regulation 31 provides that if the information is provided in the period of 12 months beginning with the first day of the 14 days mentioned in Regulation 30(2) to (6) (i.e. 14 days "after the contract is entered into" or, for sales contracts, after certain goods are delivered: "the Regulation 30 date ") then the cancellation period will be 14 days after the information is provided. Otherwise, the cancellation period will end 12 months after the Regulation 30 date. Regulation 31 accordingly contemplates that a contract will be binding even if the Scheule 2(l) information is not provided to the consumer before it is entered into.

Accordingly, non-compliance with Regulation 13(1) did not render the retainer unenforceable.

Commentary

Mr Justice Foxton's judgment will hopefully provide an end to the frequently raised retainer challenges on the basis of non-compliance with Regulation 13. It may not, however, mean the end of the road for arguments about the 2013 Regulations. As noted in [10] of the judgment, consumers may be entitled to sue for breach of contract where a trader has failed to comply with Regulation 13.

With respect to the "consequences of non-compliance [with the 2013 Regulations] being addressed in other ways" it is worth noting that if a client is not provided with information on the right to cancel required by Schedule 2 of the 2013 Regulations or has not expressly requested that work be commenced before the end of the cancellation period then Regulation 36(6) provides that "the consumer bears no cost for supply of the service, in full or in part, in the cancellation period". Where the cancellation period is extended to 12 months after the Regulation 30 date the potential losses for a firm could be extensive. Thus, whilst the decision may have put an end to inter-partes wranglings on this point, it does not lessen the importance of compliance with the 2013 Regulations.

CONTRIBUTORS

Shaman Kapoor

Call 1999

Shaman specialises in costs and litigation funding together with a broader practice in commercial and common law litigation and group action work. He appears regularly in the High Court and the Senior Courts Costs Office, often involved in appellate work or complex points of principle and injunctive relief. His recent involvement in group action work includes the claims against the regulatory bodies in the sport of rugby in the concussion litigation and the civil claims arising out of the Grenfell Tower tragedy. He has experience of representing professional sports players in anti-doping proceedings and has contributed to the editorial work towards the regulation of British Wrestling. He is a Fellow of the Chartered Institute of Arbitrators, having specialised in international arbitration, and receives instructions domestically and internationally. He is a frequent speaker at key seminars on the costs and funding calendar and a contributing editor to Thomson Reuters' *"Costs & Funding following the Civil Justice Reforms: Questions & Answers"*, The White Book. He is a Lead Advocacy Tutor for Lincoln's Inn and has been ranked by the Directories as a leading junior for many years. He is the editor of our bi-annual Costs Newsletter (*3+9 = Costs*) and is joint-head of Chambers' Costs Group. He is appointed as a member of Chambers' Management Board and separately appointed as a school Governor. He is a qualified Mediator and is an appointed Deputy District Judge.

shaman.kapoor@39essex.com

Daniel Laking

Call 2015

Daniel has a broad civil practice, and specialises principally in the fields of personal injury and clinical negligence, insurance fraud, costs, inquests and inquiries, and health and safety. In his costs law practice he has been instructed in cases dealing with a wide range of costs issues such as the recoverability of ATE premiums and joint/several liability. He is familiar with the law in respect of both pre- and post-LASPO costs and is available to advise on tactics and procedure in relation to Detailed Assessment Hearings and related applications. He is also available to assist in cases where he specialisms overlap, for example recovering costs of inquest proceedings in subsequent civil litigation. As a personal injury specialist, Daniel is familiar with all aspects of costs as they relate to PI and clinical negligence cases. He is frequently instructed in Costs and Case Management Conferences as well as costs applications that arise in civil proceedings. He has a full understanding of the exceptions to Qualified One-Way Costs Shifting and has been successful in recovering costs under both CPR r44.15 and CPR r44.16 in bespoke applications. He has also been instructed in applications for wasted and indemnity costs as well as in relation to Part 36 offers. He is currently instructed as junior counsel to the Grenfell Tower Inquiry alongside his court practice.

daniel.laking@39essex.com

CONTRIBUTORS

Daniel Kozelko

Call 2018

Daniel accepts instructions in a variety of costs matters, and regularly appears in the County Court in cases raising costs issues. His costs practice also reaches across various areas of Chambers practice, including costs disputes in planning and regulatory matters. While a Judicial Assistant at the Supreme Court, Daniel worked on a number of costs cases including *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36. Daniel has also recently been involved in providing costs training to medical defence insurers.

daniel.kozelko@39essex.com

Christopher Moss

Call: 2021

Christopher accepts instructions in a variety of costs matters. He currently works one day a week with the costs team of a National law firm advising on, and drafting pleadings and witness statements in relation to costs and funding disputes. He assisted Nicola Greaney KC, acting for the successful *Class Representative in Alex Neill Class Representative Limited v Sony* [2023] CAT 73, the first decision to address the validity of a PCR's funding arrangements following the Supreme Court's judgment in Paccar. Christopher also recently acted for APIL, led by Katherine Apps KC, in a judicial review of elements of the new fixed costs regime which concluded by consent following concessions by the Government. Christopher regularly appears in the County Court on a variety of costs matters and has also been instructed to appear in the Senior Courts Costs Office, and Family Court where he successfully opposed the making of a non-party costs order.

christopher.moss@39essex.com

Chief Executive Officer: Lindsay Scott
Director of Clerking: Andrew Poyser

clerks@39essex.com • DX:London/ChanceryLane298 • 39essex.com

81 Chancery Lane
London
WC2A 1DD
DX: London/Chancery Lane 298

Tel: +44 (0)20 7832 1111

82 King Street
Manchester
M2 4WQ

Tel: +44 (0)16 1870 0333

28 Maxwell Road
#04-03 & #04-04
Maxwell Chambers Suites
Singapore 069120

Tel: +65 6320 9272

#02-9, Bangunan Sulaiman
Jalan Sultan Hishamuddin
50000 Kuala Lumpur
Malaysia

Tel: +60 32 271 1085

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