Herbert v HH Law

What does it mean for you?

PJ Kirby QC

The Headlines

"Upsurge in costs challenges looms after court rules on 100% success fee ... ... The ruling will set alarm bells ringing in the personal injury sector, with many firms having adopted the policy of setting a 100% success fee and claiming the maximum limit of 25% of total damages." Law Society Gazette

"Success fee ruling could open assessment "floodgates"" – Litigation Futures

"... few can doubt that life for low-value personal injury claimant solicitors has become increasingly difficult over the past decade. ... Herbert v HH Law ...provides no respite." Partners in Costs

"Court of Appeal rules against blanket 100% success fee in low-value PI claims since LASPO" – Association of Costs Lawyers

"Court of Appeal holds that 100% success fee lawful provided solicitor can show informed consent ... No problem if you see your client and explain" – Kerry Underwood

"Going forwards, it is likely to be an uphill struggle, when entering into new CFAs, to show that the average lay client has given informed consent to a success fee that does not fairly reflect the risks of the case." Simon Gibbs of GWS

Introduction

The Court of Appeal's decision in Herbert v HH Law [2019] EWCA Civ 527 is of great importance for solicitors and their clients and in particular for claimant solicitors in the personal injury sector.

The claim giving rise to the costs was a modest straightforward RTA. Ms. Herbert was injured when her vehicle was shunted by a bus in October 2015. She engaged HH Law solicitors and signed a CFA which provided for a success fee of 100% capped at 25% of her general and existing pecuniary damages (as required by the CFA Order 2013). In addition, she purchased an ATE policy from Centron Insurance, a Vanuatu based insurer(!), at a cost of £349.

The claim was issued in the portal but fell out and proceedings were issued. It was later settled for the sum of £3,400.

HH Law charged Ms Herbert £829.21 in relation to the success fee as well as £349 for the ATE premium. She then instructed new solicitors to apply for a Solicitors Act assessment. A statute bill was delivered which included the success fee but not the ATE. Ms Herbert applied to have the success fee assessed.

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Her central complaint was that the success fee had been set at 100% when the risks of the claim should have meant a modest success fee was appropriate.

In answer to this, the solicitors argued that, post LASPO, there was no need to individually risk assess the claim in order to formulate the success fee. The solicitors' business model post-LASPO was to apply a 100% success fee across the board regardless of risk. It was argued that the key issue for the client was the protection that the 25% cap provided for her.

Furthermore, the solicitor relied on the client's explicit approval of the 100% uplift by her signature to the CFA and retainer, citing CPR r46.9.(3) which states:
"costs are to be assessed on the indemnity basis but are to be presumed –
(a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client"

The first instance decision

The success fee issue was dealt with at first instance in Sheffield by DJ Bellamy who held that the presumption above was rebutted because there was no clear evidence that the client had given 'informed consent' to incur a success fee of 100% in a straightforward RTA claim.

The DJ then referred to r.46.9(4) which provides:

"Where the court is considering a percentage increase on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied."

As a result the success fee was reduced from 100% to 15%.

As the ATE had not been included within the statute bill, it was not assessed. As is usual, the judge then determined the cash account. The claimant argued that the ATE premium should be removed from the cash account because it was a professional disbursement which should appear within the statute bill.

As Cook on Costs (2019) summarises: "In effect the cash account deals with money expended by the solicitor on behalf of the client for anything which is not in the bill (or which ought not to be there)." This includes: "items which the solicitor is not bound by law or custom to make."

The DJ agreed. The result of this was that the solicitor had to refund the £349 to Ms. Herbert because the cash account now had a balance of that amount in her favour (although in theory they could have delivered a further statute bill, with the consent of the client or permission of the court, which included the ATE premium).

HH Law appealed against both decisions.

The first appeal

At the first appeal Soole J upheld both decisions.

The judge found that the 100% success fee was not recoverable merely by virtue of the client's approval because there must be informed consent. The rule at r.46.9(4) meant that risk was likely to be a primary factor when a court assessed the success fee. Ms. Herbert would have to have been clearly told that HH Law took no account of the risks of her specific case when setting the success fee for the consent to have been 'informed'.

As to the ATE, the question of whether the disbursement should appear within the statute bill or the cash account depended upon whether it was a client disbursement or a solicitor's disbursement. If it was the former it should be included in the cash account; if it was the latter it should be in the bill.

Soole J held that the ATE was part of the package of services offered by the solicitor and was made in the pursuance of the professional duty undertaken by a solicitor which he is bound to perform. Additionally, he found that the custom of the profession was that the ATE was to be treated as a solicitor's disbursement.

The court of appeal

The Master of the Rolls ("MR"), giving the judgment of the Court of Appeal, upheld the decision on the success fee but reversed the decision on the question of the ATE. The judgment also provides important guidance about the presumptions at r.46.9(3).

The Presumptions:

It was accepted by both parties that 'approval' by the client was not simply by consent but that there had to be informed consent which requires that "approval was given following a full and fair explanation to the client" [37].

However, HH Law argued that it was the client not the solicitor who bears the burden of satisfying the court that the approval was not given. Ms. Herbert argued that it was for the solicitors to satisfy the court that informed consent was given.

The court held that it was the solicitor who has the burden of showing that informed approval was given:
"We consider that where, as here, the client brings proceedings under the Solicitors Act 1974 s.70(1), it is for the client to state the point of dispute and the grounds for it. If the solicitor wishes to rebut the challenge by relying on the presumption in CPR 46.9(3)(a) or (b), the burden lies on the solicitor to show that the pre-condition of the presumption, informed approval, is satisfied.

Once the solicitor has adduced evidence to show that the client gave informed consent, the evidential burden will move to the client to show why, as a result of having been given insufficiently clear or accurate or comprehensive information by the solicitor or for some other reason, there was no consent or it was not informed consent. The overall burden of showing that informed consent was given remains on the solicitor." [38]

Thus, where a client objects to an item and the solicitor wishes to rely upon the presumption, it is for the solicitor to adduce evidence that informed consent was given. Only if they can show that there was informed consent is the client required to rebut the presumption. However, if the solicitor cannot provide such evidence, the point goes no further and the presumption is rebutted.

The success fee

It was held that the fixing of success fees in the context of CFAs had traditionally been related to an assessment of the risk of the individual proceedings. Although post LAPSO the Costs Practice Direction relating to assessment of risk had been revoked, the present r.46.9(4):
"…shows that it was envisaged that a success fee would be related to risk: the reference to the perception of the solicitor or counsel when the conditional fee agreement was entered into or varied closely reflects the language in the former 44PD para. 5 11.7 and 48PD.6 para. 54.5(2)". [50]

The argument of HH Law that its business model of setting the success fee at 100% in all cases, subject to the 25% cap, was fair and reasonable was rejected because it did not answer the point that a success fee is set in relation to litigation risk.

The MR stated:
"I do not consider that either HH's justification for its charging model or the 25% cap answer the point that in this country, in the context of a conditional fee agreement, 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. Across the broad range of litigation, it would be unusual for it not to be. It continues to be the case in those limited areas, such as publication and privacy proceedings and mesothelioma claims, where success fees are still recoverable from the losing party".[53]

Furthermore, the mere fact that many other firms used the same model was insufficient to avoid the need for informed consent, particularly in relation to telling the client that the success fee took no account of any individual risks but was charged as standard in all cases.

As a result, DJ Bellamy's decision to reduce the success fee to 15% was upheld.

The ATE

Having considered the case law, the question of what is a solicitor's disbursement was put thus:
"It follows that a disbursement qualifies as a solicitors' disbursement if either (1) it is a payment which the solicitor is, as such, obliged to make whether or not put in funds by the client, such as court fees, counsel's fees, and witnesses' expenses, or (2) there is a custom of the profession that the particular disbursement is properly treated as included in the bill as a solicitors' disbursement."

It was held that the ATE fell into neither category. It is a premium on a policy of insurance under which the client is insured pursuant to a contract between herself and the insurer. It is not strictly speaking a litigation cost at all (per BNM v MGN).

The premium is not a payment which the solicitor is obliged to make irrespective of whether the client has put him in funds. Nor was there evidence that there was a custom of including the ATE within a solicitor and own client bill (as opposed to an inter-partes bill when the same were recoverable pre-LASPO).

In consequence, the decision of the DJ in respect of the cash account was reversed.

Consequences

The consequences of this judgment are important. Since LASPO, many firms have used the same model as HH Law in modest claims where the individual risk was low. Unless (which is unlikely) they have advised their client when the CFA was signed that the success fee was not set on the basis of the risks of the case, the client will be able to reduce the success fee on a Solicitors Act assessment.

There are likely to be a significant number of clients who have the ability to do so, even if they have to rely on special circumstances, to challenge the bill at this stage. However if the bill was paid more than 12 months ago they will not be able to challenge the bill under a Solicitors Act assessment – see s70(4) Solicitors Act 1974.

It is possible to have 100% success fee the question is whether the client has given informed consent to the same. It is unlikely that a court would be satisfied that informed

consent had been given unless there had been a face to face meeting with the client where the fees had been explained and where it had been made clear that the success fee that was being charged was not based on the risk involved in their particular case. It would probably also be necessary to explain that success fees had previously always been calculated by reference to risk and that a risk related success fee would be much lower. It may also be necessary to explain that other solicitors may charge a success fee by reference to the risk involved and that they would therefore deduct a smaller amount from the recovered damages.

Please note that the success fee is capped at 25% of general damages it is not a 25% success fee. So in Herbert it was a 100% success fee capped at 25% of non-future damages.

As to ATE, the judgment means that a client can never challenge the premium on a Solicitors Act assessment. The MR acknowledged this fact and ended the judgment thus:
"No doubt, if this outcome is considered unsatisfactory within the profession, the Solicitors Regulation Authority and the Law Society can consider what could be done to bring an ATE insurance premium within the principle as to what is a solicitor's disbursement." [71]

In the meantime, clients who wish to object to a deduction from damages in respect of ATE have very few options open to them within a Solicitors Act assessment. They will have to challenge this in separate proceedings if the solicitor failed to advise about the ATE deduction properly.

Notes by PJ Kirby QC and Robin Dunne who appeared for Ms Herbert in the Court of Appeal