Conditional Fee Agreements and Contentious Business Agreements

Andrew Hogan
Are all conditional fee agreements also contentious business agreements? And, if so, how might that effect a client’s right to an assessment of the costs charged by her solicitor under the Solicitors Act 1974?

These are interesting questions but to start at the beginning, the Solicitors Act 1974 defines a contentious business agreement in these terms in section 59:

(1) Subject to subsection (2), a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him (in this Act referred to as a “contentious business agreement”) providing that he shall be remunerated by a gross sum or by reference to an hourly rate, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated.

(2) Nothing in this section or in sections 60 to 63 shall give validity to—

(a) any purchase by a solicitor of the interest, or any part of the interest, of his client in any action, suit or other contentious proceeding; or

(b) any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding, stipulates for payment only in the event of success in that action, suit or proceeding; or

(c) any disposition, contract, settlement, conveyance, delivery, dealing or transfer which under the law relating to bankruptcy is invalid against a trustee or creditor in any bankruptcy or composition.

Section 60 goes on to state so far as is material:

(1) Subject to the provisions of this section and to sections 61 to 63, the costs of a solicitor in any case where a contentious business agreement has been made shall not be subject to assessment or (except in the case of an agreement which provides for the solicitor to be remunerated by reference to an hourly rate) to the provisions of section 69.

(2) Subject to subsection (3), a contentious business agreement shall not affect the amount of, or any rights or remedies for the recovery of, any costs payable by the client to, or to the client by, any person other
than the solicitor, and that person may, unless he has otherwise agreed, require any such costs to be assessed according to the rules for their assessment for the time being in force.

(3) A client shall not be entitled to recover from any other person under an order for the payment of any costs to which a contentious business agreement relates more than the amount payable by him to his solicitor in respect of those costs under the agreement.

(4) A contentious business agreement shall be deemed to exclude any claim by the solicitor in respect of the business to which it relates other than—

(a) a claim for the agreed costs; or

(b) a claim for such costs as are expressly excepted from the agreement.

It can be seen that a key element of a contentious business agreement is that a client’s absolute right to an assessment of costs is removed by section 60(1). However, the client is not stripped of all consumer protection and left quivering and helpless before the solicitor’s indefeasible bill of costs. Quite the contrary, as section 61 makes plain:

(1) No action shall be brought on any contentious business agreement, but on the application of any person who—

(a) is a party to the agreement or the representative of such a party; or

(b) is or is alleged to be liable to pay, or is or claims to be entitled to be paid, the costs due or alleged to be due in respect of the business to which the agreement relates,

the court may enforce or set aside the agreement and determine every question as to its validity or effect.

(2) On any application under subsection (1), the court—

(a) if it is of the opinion that the agreement is in all respects fair and reasonable, may enforce it;

(b) if it is of the opinion that the agreement is in any respect unfair or unreasonable, may set it aside and order the costs covered by it to be assessed as if it had never been made;
(c) in any case, may make such order as to the costs of the application as it thinks fit.

(3) If the business covered by a contentious business agreement (not being an agreement to which section 62 applies) is business done, or to be done, in any action, a client who is a party to the agreement may make application to a costs officer of the court for the agreement to be examined.

(4) A costs officer before whom an agreement is laid under subsection (3) shall examine it and may either allow it, or, if he is of the opinion that the agreement is unfair or unreasonable, require the opinion of the court to be taken on it, and the court may allow the agreement or reduce the amount payable under it, or set it aside and order the costs covered by it to be assessed as if it had never been made.

(4A) Subsection (4B) applies where a contentious business agreement provides for the remuneration of the solicitor to be by reference to an hourly rate.

(4B) If on the assessment of any costs the agreement is relied on by the solicitor and the client objects to the amount of the costs (but is not alleging that the agreement is unfair or unreasonable), the costs officer may enquire into—

(a) the number of hours worked by the solicitor, and

(b) whether the number of hours worked by him was excessive.

(5) Where the amount agreed under any contentious business agreement is paid by or on behalf of the client or by any person entitled to do so, the person making the payment may at any time within twelve months from the date of payment, or within such further time as appears to the court to be reasonable, apply to the court, and, if it appears to the court that the special circumstances of the case require it to be re-opened, the court may, on such terms as may be just, re-open it and order the costs covered by the agreement to be assessed and the whole or any part of the amount received by the solicitor to be repaid by him.

As can be seen from the text of this section, the solicitor’s right to sue on the unpaid bill is removed, and any action brought under part 7 CPR by claim form is liable to be struck out, I would suggest, as a nullity. Instead the unpaid solicitor would have to make an application to enforce the contentious business agreement. He does so at risk that the contentious business agreement, if found to be unfair or unreasonable, might be set aside in its entirety and his claim to costs subject to the rigours of a solicitor-own client assessment. Further, as section 61(5) makes clear the
client has a like right to challenge the fairness and reasonableness of the contentious business agreement, with the potential prize of a solicitor-own client assessment.

So, there are advantages and disadvantages to a solicitor making a contentious business agreement, whether by way of conditional fee agreement or otherwise, but to return to the essential question: are all conditional fee agreements contentious business agreements because they are necessarily made in writing?

In *Hollins v Russell* [2003] EWCA Civ 718 the Court of Appeal stated this at paragraph 93:

In any event, as we have already said at paragraph 52 above, even if correct, this argument would be of no help to the receiving parties because of the indemnity principle. Again, a great deal of the argument before us was directed at qualifying the application of that principle in these cases. Ultimately, however, it became clear that a CFA is a contentious business agreement to which section 60(3) of the Solicitors’ Act 1974 (see para 23 above) applies. If the solicitor cannot enforce the agreement against his client, then the amounts provided for in the agreement are not payable by the client at all (as discussed in paras 113 to 116 below, the position as to the ATE premium and disbursements is different). In the present state of the law, therefore, they cannot be recovered from the other side.

Seemingly to confirm that all conditional fee agreements are contentious business agreements.

This approach was adopted by Master Gordon-Saker in the interesting case of *Vilvarajah v West London Law SCCO 17th May 2017 Master Gordon-Saker* where he concluded principally by reason of a high hourly rate of £420 being charged for relatively mundane litigation that it would be appropriate to set aside the conditional fee agreement under section 61 and assess the costs. A bill of costs totalling £31,945.48 was thus reduced to £15,323.20.

Of course, most Law Society model CFAs will include a recital that the conditional fee agreement is not a contentious business agreement. But just how effective is this recital to exclude the potentially sweeping effect of section 61? In the recent case of *Healys LLP v Partridge and Partridge* [2019] EWHC 2471 (Ch), the deputy High Court judge found that a conditional fee agreement was a contentious business agreement, but noted the absence of exclusionary wording in the agreement that she was concerned with:

38. That does not of course necessarily mean that every CFA will be a contentious business agreement for the purposes of Part III of the 1974 Act. I note, for example, that the Law Society’s model form CFA for personal injury and clinical negligence cases contains a specific clause providing that the agreement is not a contentious business agreement within the terms of the 1974 Act. Without expressing any view on the
construction and effect of agreements containing a clause of that nature, I note that the present CFA contained no such clause, nor anything else to suggest that it should fall outside the scope of the s. 59 definition.

It will be observed that there are many statutory contexts where the expressed intent of the parties as to a state of affairs may be ignored by the Court assessing the reality of the situation. Those who remember fondly their land law will recall Lord Templeman’s pithy encapsulation of why a document stated to be a licence was in fact a lease:

_It was submitted on behalf of Mr. Street that the court cannot in these circumstances decide that the agreement created a tenancy without interfering with the freedom of contract enjoyed by both parties. My Lords, Mr Street enjoyed freedom to offer Mrs Mountford the right to occupy the rooms comprised in the agreement on such lawful terms as Mr Street pleased. Mrs Mountford enjoyed freedom to negotiate with Mr Street to obtain different terms. Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade._

It remains to be seen, whether the Law Society model conditional fee agreement’s clause declaiming that it is not a contentious business agreement will prove to be a “fork”, or a “spade”.

Andrew Hogan
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The author can be reached at andrewhogan@ropewalk.co.uk. His blog on costs and litigation funding can be found at [www.costsbarrister.co.uk](http://www.costsbarrister.co.uk). You can subscribe to the blog by entering your email address in the form on the right hand side of the homepage.

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