© iStockphoto/adobe

Costs 2019: reveal all or be damned?

With an uncertain number of costs challenges on the horizon, Dominic Regan's advice: explain everything to the client or suffer the consequences

It beggars belief that some solicitors still fail to give their client the obligatory guidance on costs.

'The ultimate requirement is to treat the client fairly and to ensure that the solicitor complies with the duty to act in their best interests, even if that might mean advising them of a form of funding which the firm does not offer which means that the client chooses to instruct a different firm.

'Provided this is done, it is entirely proper to indicate that if the client wishes to instruct the firm the only terms which the firm is prepared to offer are… those specified by the practice', says the sublime Roger Mallalieu at p535 of the 2019 edition of *Costs & Funding following the Civil Justice Reforms* ((Peter Hurst, Simon Middleton and Roger Mallalieu (eds), 5th edition, Sweet & Maxwell, 2019).

In *McDaniel & Co v Clarke* [2014] EWHC 3826 (QB) the High Court agreed that a bill in the sum of £57,437.45 be assessed at nil. The claimant had been injured while attending a seminar at Eversheds. Her solicitors signed her up on a conditional fee agreement (CFA) without considering viable alternatives. Miss Clarke was a member of the GMB trade union which would happily have funded the claim. Section IB (1.16) Solicitors' Code of Conduct 2011 requires that one should indeed discuss options which could include public funding, insurance and, as here, union support.

Where charging details are clearly explained, the recovery can be substantial. What turned out to be a lucrative funding arrangement was the non-contentious business agreement in *Bolt Burdon Solicitors v Tariq* [2016] EWHC 1507 (QB), [2016] 4 WLR 112. It must be appreciated that this case was far from straightforward. It was a bank interest rates swap claim. Barclays had rejected a claim from the client who did not want to commit to paying fees regardless of outcome. The firm signed him up to an agreement whereby it would take 50% of any recovery. There was some £50,000 of billable time recorded, when the bank capitulated and paid out £800,000. A challenge by the ungrateful client was dismissed. He was an experienced businessman. The terms of engagement were fully explained to him. He consented to them. There was no obligation to send him away to obtain independent legal advice.

I attended every moment of the Court of Appeal hearing in *Herbert v HH Law Ltd* [2019] EWCA Civ 527, a decision causing serious concern to many personal injury firms. It was a modest car passenger injury claim which settled within a month of issue for £3,400. The claim was conducted using a CFA with the maximum success fee stipulated at 100% subject to the overall cap of 25% to be deducted from general and special damages. From the damages, the solicitor took £829.21, being 25% of damages plus £349 for after the event cover. Ms Herbert was left with £2,221.79. Post-settlement, she approached JG Solicitors who challenged the 100% success fee given the simplicity of the claim, which arose from a rear end shunt by a bus. From district judge upwards, every court agreed that the fee was unusual and slashed it to 15%. Thus, the fee was reduced from £691 to £276 (excluding VAT in each case), a reduction of £415. Nicholas Bacon QC told the Appeal Court that the costs awarded by the district judge amounted to £4,500.

HH asserted that the business model which it operated was the only one that enabled it to run low-value injury matters on a viable economic basis. It claimed that many other firms did exactly the same.

The appeal hearing concentrated upon whether the client had given *informed* consent to the CFA. She had certainly been sent documentation which told her about the deduction, but the appeal court unanimously concluded that more was required. Absent informed consent, there was no valid agreement to deduct so much. Critically, she should have been told that the fee was set arbitrarily without any risk assessment having been made. The subplot was that a well-informed client would not have made this bargain. In oral argument, the Master of the Rolls observed that the success fee should plainly be geared to risk despite the 2013 repeal of the rule requiring an assessment.

So, one can still take the maximum post-*HH*, but only where someone has carefully and comprehensively explained the arrangement to the client.

Excessive deductions

In 2013, Jeff Zindani astutely observed that courts would carefully scrutinise deductions in a book we wrote, *Surviving Jackson: Developing a Profitable Personal Injury Practice for the Future* (Jeff Zindani and Dominic Regan, Sun Legal Publishing, 2013).

What of the thousands of settled cases where seemingly excessive deductions have been made? If informed consent was secured, then all is well. The anxiety is that some clients did not give such consent. The costs will have been spent.

The one possible salvation is a decision about post-settlement applications for delivery up of the file of papers held by the original solicitor. Mr Justice Soole has determined the point in the first High Court case on this vexed issue. In *Hanley v J C & A Solicitors* [2018] EWHC 2592 (QB) he declared that the court had no inherent jurisdiction to compel a solicitor to supply a client or former client with documents which were the property of the solicitor, in a thorough judgment citing cases back to 1827. The business papers of a solicitor are owned by him, not the client. In many a settled case the client may have jettisoned their papers.

There is much trepidation as to how many challenges will now be launched. We must wait and see. Meanwhile, explain everything to the client from now on or suffer. **NLJ**

Professor Dominic Regan, City Law School & *NLJ* columnist (*@krug79*).