CBAs under the microscope in Berezovsky estate dispute

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Dispute Resolution analysis: What is the significance of the decision in Addleshaw Goddard LLP v Wood over the challenge to recover legal fees from the administrators of the estate which instructed the law firm? Alex Bagnall, associate and costs advocate of Just Costs Solicitors, comments on the potential implications of this decision.

Original news

Addleshaw Goddard LLP v Wood and another [2015] EWHC B12 (Costs), [2015] Lexis Citation 160

The administrators of the estate said it was insolvent and disputed the level of fees sought by the solicitors Addleshaw Goddard LLP (the firm). The firm acted for the late Mr Berezovsky (the client) under a contentious business agreement (CBA). This was complex and high value litigation relating to a $6.5bn dispute with Mr Abramovich. The firm's client incurred fees of £12,663,822.95. The firm wanted a charge for these fees over sums it had realised until the administrators of the estate paid their fees. The administrators disputed the validity of the CBA, the success fee and the amount of fees that the solicitors were seeking to claim under the retainer. The CBA has a 100% success fee and this was challenged as not being fair and reasonable

The matter was referred to detailed assessment in the Senior Courts Costs Office (SCCO). Master Campbell determined that the CBA was valid and the firm was entitled to the fees they sought in full. The Master also made an order under the Solicitors Act 1974, s 73 (SA 1974) that the solicitors held a valid charge on moneys recovered by the administrators of the estate for their fees. Although the judgment was handed down on 8 April 2015, Master Campbell only permitted a redacted version of his judgment to be released into the public domain on 29 July 2015.

What is the background to this case? What are the key issues?

The firm acted for the late client in his $6.5bn dispute with Mr Abramovich (*Berezovsky v Abramovich* [2012] EWHC 2463 (Comm), [2012] All ER (D) 116 (Sep)). The client signed two engagement letters--one in May 2009, another in October 2009--laying out the terms on which the firm would act. This CBA gave the client a 50% reduction if his case failed but two levels of fee if the case was successful that were based on the amount recovered. The firm sought to recover its costs of £12.6m and interest.

The estate of the client was believed to be insolvent. The administrators of the estate, Mr Wood and Mr Hellard (the defendants in the SCCO case, of Grant Thornton)--had refused to pay the firm's fees. They claimed that the firm's retainer with the client had been a conditional fee agreement (CFA) rather than a CBA. They disputed the amount of the fees claimed and said that, due to the client's insolvency, the firm should rank alongside other unsecured creditors.

The Master had to determine six issues:

- Is the retainer a CBA in respect of which the court can direct that it should be enforced under SA 1974, s 61? In particular, was the client properly advised when he signed the retainer letter as to its consequences?
- If the retainer is a CBA, should the court also enquire into the hours worked to establish whether they are reasonable and/or excessive?
- If the retainer is a CBA, is the success fee of 100% fair and reasonable?
- Are the solicitors entitled to a charge under SA 1974, s 73?
- Must there also be an assessment of the fees in order to ascertain the amount of the SA 1974, s 73 charge?
- Should there be a stay pursuant to the Insolvency Act 1986 pending determination of a petition for the making of an insolvency administration order?

Master Campbell ruled for the firm on all issues. The Master said:

> 'The fees were hard earned on AG's part and without the firm's exertions, the creditors could usefully reflect that there would have been no fund over which they can now lay claim. Given too, that but for his death, the money would long since have been paid to Addleshaw Goddard, I consider it is only just that the firm's bills should be cleared without further delay.'

What are the requirements of a valid CBA?

SA 1974, s 59 (as amended) provides:

> 'Contentious business agreements
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> '(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.'

SA 1974, s 59(2) goes on to confirm that champertous agreements cannot be valid CBAs. A CBA may, however, include a CFA which may provide for a success fee. A CBA must be in writing, signed by the client (or his or her agent) and show all the terms of the bargain.

As is the case when entering into all retainers, solicitors must have regard to the Solicitors Regulation Authority code of conduct and the requirements to enter into retainers with clients that are legal, and which are considered suitable for the client's needs and take account of the client's best interests.

What are the effects of a CBA? How does a CBA differ from other types of retainer?

The primary effect of a CBA is set out at SA 1974, s 60. The costs of a solicitor in any case where a CBA has been made shall not be subject to detailed assessment on a solicitor/own client basis unless remuneration is agreed by reference to an hourly rate. SA 1974, s 61 provides that a CBA does not create a cause of action for a solicitor who wishes to enforce payment under the terms of the same. Instead, permission for leave to enforce it must be obtained.

Upon considering an application for permission to enforce, the court must consider whether the CBA is fair and reasonable. If it does, the court may enforce the CBA. If it does not, the court may set it aside and order the costs covered by it to be assessed as if it had never been made.

There is a rebuttable presumption that costs incurred under a non-CBA retainer have been reasonably incurred and are reasonable in amount (unless such costs are unusual and the client has not been advised that these unusual costs might not be recovered between the parties). No such presumption exists in relation to CBAs.

Where costs incurred under a non-CBA retainer are challenged by the client, the court is able to look at all aspects of the costs. Under a CBA, however, the client's ability to challenge the costs is limited to circumstances where the CBA provides for remuneration at an hourly rate (and even then is restricted to the hours spent).

Is a 100% success fee fair and reasonable under a CBA?

The CBA provided that the firm could charge the client 50% of their basic fees irrespective of the outcome of the case. In the event the case was successful, the firm's full basic fees plus a success fee of 100% became payable. Such an agreement is often referred to as a 'discounted fee agreement'.

Ordinarily, one would expect a discounted fee agreement to calculate the success fee by reference to the costs that were at risk of not being paid in the event a 'success' was not achieved. It was therefore argued by the administrators that a 100% success fee in circumstances where the firm would recover as a minimum 50% of their basic fees regardless of the outcome of the case was unreasonable.

The court had regard to the fact that the client was an experienced businessman who did not have the financial luxury of being able to pay his legal bills when they fell due. Before entering into the CBA, the client had been advised of the appropriateness of the same by his client team which included people of business, an English solicitor and an Israeli

lawyer. The CBA represented give and take on both sides and represented a commercial solution to the client's need for legal services in the absence of being able to fund the same on the basis of a traditional retainer.

In the circumstances of this particular case, the court concluded that a 100% success fee was not unreasonable or unfair.

What is needed for a valid charge under SA 1974?

SA 1974, s 73 deals with charging orders for costs. It provides that:

> - '(1) Subject to subsection (2), any court in which a solicitor has been employed to prosecute or defend any suit, matter or proceedings may at any time--
>   - (a) declare the solicitor entitled to a charge on any property recovered or preserved through his instrumentality for his assessed costs in relation to that suit, matter or proceeding; and
>   - (b) make such orders for the assessment of those costs and for raising money to pay or for paying them out of the property recovered or preserved as the court thinks fit;
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> and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the solicitor.
> - (2) No order shall be made under subsection (1) if the right to recover the costs is barred by any statute of limitations.'

The firm submitted that the charging order provision applied and that it held a valid charge for its fees over the property recovered from its late client in the litigation. The Master agreed and said that an assessment of the firm's costs was not required before an SA 1974 charging order could be granted. This point had been decided previously in two other cases:

- *Fairfold Properties Ltd v Exmouth Docks Co Ltd (No 2)* [1993] Ch 196, [1992] 4 All ER 289, and
- *Harrod's Ltd v Harrod's (Buenos Aires) Ltd and Another* [2014] 6 Costs LR 975

What enquiry should a costs judge make as to quantum under SA 1974, s 64? Why are the charges in this case so high?

SA 1974, s 64 sets out what a costs judge should do where there is not a CBA in place. It provides as follows:

> 'Form of bill of costs for contentious business
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> - (1) Where the remuneration of a solicitor in respect of contentious business done by him is not the subject of a contentious business agreement, then, subject to subsections (2) to (4), the solicitor's bill of costs may at the option of the solicitor be either a bill containing detailed items or a gross sum bill.
> - (2) The party chargeable with a gross sum bill may at any time--
>   - (a) before he is served with a writ or other originating process for the recovery of costs included in the bill, and
>   - (b) before the expiration of three months from the date on which the bill was delivered to him,
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> require the solicitor to deliver, in lieu of that bill, a bill containing detailed items; and on such a requirement being made the gross sum bill shall be of no effect.
> - (3) Where an action is commenced on a gross sum bill, the court shall, if so requested by the party chargeable with the bill before the expiration of one month from the service on that party of the writ or other originating process, order that the bill be assessed.'

Here the administrators submitted that the CBA was not valid and that the firm had to follow the SA 1974, s 64 process which meant the firm had to deliver a detailed bill rather than a gross sum one. The costs judge disagreed with this submission as he found that the CBA was valid. This meant that the firm did not need to submit a bill containing detailed items.

Had the court concluded that the administrators were entitled to have the bill assessed, the procedure would have demanded the service of a detailed breakdown of the gross sum bill followed by service of points of dispute by the administrators, replies to the points of dispute by the firm and then, ultimately, an assessment hearing.

The manner in which costs are assessed on a solicitor/own client basis is different to that on a between the parties basis. There is a presumption that costs have been reasonably incurred and are reasonable in amount (unless such costs are

unusual and the client has not been informed that they may not be recovered between the parties, in which case these costs are presumed to be unreasonably incurred and unreasonable in amount). Costs are assessed on the indemnity basis, so there is no requirement for proportionality.

Liability for costs of the assessment proceedings is determined by reference to the level of the reduction to the bill. If the bill is assessed at 80% or less than the amount claimed, the solicitor pays the costs--if the bill is assessed at more than 80% of the amount claimed, the client pays the costs.

Are there any grey areas remaining?

One of the interesting aspects to this case is that not only did the costs judge have to deal with the substantive dispute about costs under the CBA, but he also had to consider what the effect was of the client's estate being insolvent. This is something that probate practitioners frequently come across. The Administration of Insolvent Estates of Deceased Person Order 1986, SI 1986/1999, sets out the procedure for dealing with insolvent estates.

Here the administrators submitted that because the estate is insolvent, by allowing the firm to take a charge over the realisations for its costs it would put them in a preferential position to other creditors of the estate. This point is not without difficulty and there is no prior authority that is directly in point in relation to CBAs. However, in the end, the Master derived support from a first instance decision of HHJ Langan QC in *Hammonds v Thomas Muckle & Sons Ltd* [2006] BPIR 704. Muckle became insolvent and a dividend was paid to the administrators.

Master Campbell found *Muckle* 'helpful' and ruled that the firm had a chose in action to which its lien for its costs could attach a fund in sight over which it could be exercised. Developing this, the Master ruled (at para [105]) that:

'By this means, as it seems to me, the solicitor enjoys priority ahead of the claims of the general body of creditors, which is exactly the intention of s 73.'

By taking this route, the Master ruled that the firm was not getting a preference over the other unsecured creditors of the estate. Since the hearing an insolvency order has been made against the estate.

CBAs are not a common feature of litigation. The Civil Procedure Rules 1998, SI 1998/3132, PD 6.1 permits solicitors and their clients to agree any terms which they consider appropriate, subject to a safeguard of requiring the solicitor to give advice regarding 'unusual' costs. There is, therefore, no need for a formal CBA in many circumstances.

What should lawyers do next?

One of the reasons for the delay in issuing this judgment into the public domain was that Master Campbell had to deal with a number of matters arising from his judgment. The administrators sought permission to appeal the judgment. Limited permission to appeal the judgment has now been granted. This will be heard by a High Court judge and listed in due course. Since the hearing, the insolvency order sought has been granted against the estate. If an appeal does proceed, then there may be rulings in due course on this CBA which could differ from that set out by Master Campbell in his carefully reasoned, lengthy and reserved judgment. Where lawyers are acting for paying parties under a CBA and are seeking to challenge its validity, then they may wish to consider a stay of any costs proceedings while an appeal in this case is determined.

Interviewed by David Bowden.

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