JUDGMENT : District Judge Bellamy QBD. 26th October 2002.

Background

1. In 1997 the claimants purchased 4 Thomas Moore, Thornes, Wakefield with the assistance of a mortgage provided by the defendant. In order to ascertain the value of the property for mortgage purposes the defendant obtained a mortgage valuation. The property was valued at £65,000. The claimants alleged that the valuation bad been carried out negligently in that the valuer had failed to notice that the property was, in fact, suffering from ongoing subsidence damage, that as a result of this the real value of the property was only £35,000 and that they had relied upon the valuation in making their decision to proceed with the purchase. The first claimant also alleged that having to live with serious defects in the property had prolonged a depressive illness from which he had been suffering at the time of the purchase. Proceedings for damages for negligence were issued on 5th October 2001. On 6th March 2002 the court approved an application for a Tomlin order which provided for a total payment to the claimants of £32,500. The consent order also provided for the defendant to pay the claimant's costs to be dealt with by a detailed assessment in default of agreement.

2. The parties were unable to agree costs. A detailed assessment took place before me on 26th September 2002. During that hearing I went through the defendant's objections and disallowed or reduced some of the items in the bill. There were three specific issues in respect of which I reserved judgment. Those issues are:
   (a) the level of success fee appropriate in this case;
   (b) the extent to which, if at all, the claimants should be deprived of their success fee for the period 20th October 2000 to 17th October 2001; and
   (c) the question of whether such success fee as I may allow should also apply to the claimants' costs of the assessment procedure including the preparing and filing of their bill and if so at what rate.

   This is my judgment on those issues

3. Although in paragraph 1 above I have set out a brief overview of the issues in the case the procedural history of the case is also relevant to the-first two issues I have to determine. I therefore set that history out in some detail.

4. Initially the claimants had endeavoured to resolve their dispute without recourse to solicitors. On 16th February 2000, during the course of their correspondence with the defendant, the claimants received a `***without prejudice***' offer of £16,000 to settle the claim. It was at that stage that they consulted solicitors for advice upon the offer.

5. The claimants' solicitors continued the correspondence with the defendant. They also obtained experts' reports as to the cost of repairing the damage to the property and as to the value of the property in its damaged state. Having obtained that evidence, in August 2000 the solicitors took counsel's opinion on the merits of the claim. In the light of that opinion the claimants rejected the defendant's offer of £16,000 and put forward a counter-offer of £35,000. The counter-offer was not accepted. On 15th September 2000 the defendant put forward an improved offer of £18,000. The claimants rejected that offer.

6. In October 2000 the claimants entered into a conditional fee agreement with their solicitors in the Law Society's model form. I shall consider that agreement in more re detail later in this judgment. The claimants did not at that stage notify the defendant that they had ad entered into a conditional fee agreement.

7. The defendant suggested that the claim be referred to alternative dispute resolution. The claimants agreed. The parties attended before a mediator on 21st March 2001. Whilst the parties are to be commended for this attempt to resolve the dispute without recourse to litigation, regrettably the attempt was not successful.

8. Following the failed attempt at mediation the claimants made a Part 36 offer to settle their claim in the sum of £32,000. That offer was rejected by the defendant and a counter-offer made of £27,500. Although the gap between the parties had narrowed considerably it had not narrowed enough to

satisfy the claimants. As a result, proceedings were issued in the Barnsley County Court on 5th October 2001.

9. On 31st October 2001 the defendant made a payment into court of £27,500, The payment in was not accepted. A defence was served on 14th November. Both parties then filed their Allocation Questionnaires. Upon consideration of the Allocation Questionnaires, District Judge Mort allocated the case to the multi-track and listed it for a case management conference. Shortly before that case management conference was due to take place the parties filed an application for a consent order transferring the claim to the Technology and Construction Court in Leeds. That application was approved.

10. The case was accepted by the TCC and a date fixed for a case management conference before His Honour Judge Behrens. Shortly before the date of that case management conference the parties notified the court that they had managed to negotiate a settlement of the claim as a result of which that hearing was vacated. A Tomlin Order was subsequently made by the court in the terms to which I have already referred.

The Success Fee

11. The conditional fee agreement entered into on 20th October 2000 provided for a success fee of 100% of which 10% was said to be to take account of the fact that even if successful the solicitors would not receive payment of their fees until the end of the case and also to take account of the arrangement reached between the claimants and their solicitors concerning the payment of disbursements. It was accepted at the assessment hearing before me that as a result of the provisions of CPR rule 44.3B(1)(a) the claimants were only entitled to seek to recover a success fee of 90% from the defendant.

12. In support of their claim to a success fee of 90% the claimants contend that this was a hotly contested case. From the outset, despite its apparent willingness, to negotiate, the defendant repeatedly made clear that it did not accept that the claimants had a valid claim. The position adopted in the defendant's letter dated 15th September 2000 was, say the claimants, the position adopted almost throughout.

13. Furthermore, at the time when they entered into the conditional fee agreement (October 2000) the claimants' solicitors had also investigated the possibility of taking out '***After the Event***' insurance. The cost of such insurance was found to be prohibitively high, the lowest quote obtained being £7,500. This, say the claimants, is an indication of the level of risk as perceived by an independent body, namely an insurance company.

14. For the defendant it was contended that in this case the claim had been investigated to a far greater degree than is usual before the conditional fee agreement was entered into. By August 2000 the claimants had already received an offer of £16,000 from the defendant (an indication that the defendant was taking the claim seriously), had obtained experts' reports and had obtained an opinion from counsel on the merits of the claim. The claimants therefore entered the conditional fee agreement with the benefit of an opinion from counsel sufficiently strong to persuade them to reject the defendant's initial offer of £16,000, make a counter-offer of £35,000 and, when that was not accepted, reject the defendant's improved offer of £18,000 made in September 2000.

15. Both parties make reference to the ready-reckoner for determining the level of a success fee suggested by His Honour Judge Michael Cook, author of a well-known and well-respected book on costs. Judge Cook suggests that in a case where the prospect of success is assessed as 50:50 (the most unfavourable assessment of success upon which an average solicitor would be likely to be willing to enter into a conditional fee agreement) the appropriate success fee is 100% (the maximum permitted by the rules). The claimants contend that at the date the conditional fee agreement was entered into in this case it was entirely reasonable for their solicitor to assess the prospects of success at 50:50 thus justifying the 100% success fee contained in the conditional fee agreement. For the defendant it was contended that in the light of the factors to which I have already referred it would have been appropriate for the solicitors to have assessed the prospects of success at 70% which, according to Judge Cook's ready-reckoner, produces a success fee of 40%.

16. The task of assessing the level of a success fee - both for a solicitor considering whether or not to enter into a conditional fee agreement and for a court at a detailed assessment hearing - is an alt and not a science. This is reflected in the guidance given in the rules and in the Costs Practice Direction. Where costs are being assessed on the standard basis, as here, the court must consider whether the costs were proportionately and reasonably incurred and whether they are proportionate and reasonable in amount - see rule 44.5(1). The issue of proportionality applies as much to the determination of the success fee as it does to the assessment of the base costs. Paragraph 11 of the Costs Practice Direction then goes on to give this guidance:

    11.1 In applying the test of proportionality the court will have regard to rule 1.1 (2)(c)...

    11. 7 Subject to paragraph 17.8(2), when the court is considering the factors to be taken into account in assessing an additional liability, it wall have regard : o the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into...

    11.8(1) In deciding whether a percentage increase is reasonable e relevant factors to take into account may include

    (a) The risks that the circumstances in which the costs, s, fees or expenses would be payable might or might not occur;

    (b) the legal representative's liability for disbursements,

    (c) what other methods of financing the costs were available to the receiving party. (2) The court has the power, when considering whether a percentage increase is reasonable, to allow different percentages for different items of costs or for different periods during which costs were incurred.

17. How should those factors be taken into account in this case? Paragraph 11.7 of the Costs Practice Direction makes it clear that the court must avoid the temptation to apply the benefit of hindsight in determining what the level of risk was. It must try to put itself in to the position of the solicitor who was faced with the task of assessing the level of risk in the light of all of the facts and circumstances of the case as they were known to him at the time when the conditional fee agreement was entered into. In this case, as I have already indicated, the claimants' solicitor was in possession of far more information than will often be the case at the time when a conditional fee agreement is entered into. He also had the benefit of an opinion from counsel based on all of that information.

18. Avoiding the temptation to apply the benefit of hindsight raises an interesting issue in this case. As a result of the claimants' inclusion in their Particulars of Claim of a claim that one of the consequences of the defendant's negligence was the prolongation of the first claimant's depressive illness; the defendant pleaded in its defence that the claim was statute barred. In the light of the decision of Singer J. in **Oates v Harte Reade & Co (A Firm)** [1999] 1 FLR 1221 there must have been a very high risk that in the event of the claim proceeding to trial the court would hold that the claim was indeed statute barred and that the entire claim would therefore fail. It is clear that even before the conditional fee agreement was signed the claimants were already investigating this aspect of the claim. This is apparent from the fact that the medical report that was eventually attached to the Particulars of Claim, and which had been obtained by the claimants' solicitors, is dated 24th July 2000. Does the fact that this aspect of the claim was apparently a live issue at the time the conditional fee agreement was signed mean that I should therefore regard this case as one of maximum risk justifying the 90% success fee now claimed?

19. In my judgment, had the claim failed at trial on the limitation point it is likely that the claimants would have had a good claim against their legal representatives. In carrying out the assessment required by paragraphs 11.7 and 11.8 of the Costs Practice Direction it seems to me that the court should assume that the claim would be prosecuted with all due care and skill and that unnecessary and potentially fatal risks would be avoided. In other words, in this case, that I should assume that between the signing of the conditional fee agreement and the issuing of proceedings the solicitors would have appreciated the risks inherent in the inclusion of a claim for damages for personal injuries (which in any event was clearly, on any view, a relatively minor aspect of the claim) and would therefore not have done so. The fact that history discloses that in the event such an assumption is misplaced should not, in my judgment, dissuade the court from making that assumption. In assessing

the appropriate level of the success fee I therefore take no account of the potentially fatal problems that might have been caused by the inclusion of the first claimant's claim for damages for personal injuries.

20. So far as the position relating to disbursements is concerned, the Law Society's model conditional fee agreement provides that the solicitor will fund the disbursements during the course of the litigation (unless an interim payment or provisional damages are awarded) but that in the event that the claim fails the client will, at that stage, have to reimburse the solicitors for all disbursements incurred. That is the provision that applied in this case.

21. With respect to the question of other methods of financing the costs of this litigation it is clear that although the claimants were advised to explore the possibility of taking out 'After the Event' insurance the premiums on offer were prohibitively high and were beyond the reach of these claimants. As a result, the most that the claimants could do to reduce their exposure to the full costs of the litigation was to enter into this conditional fee agreement knowing that if the claim failed they would be faced with having to pay all of the defendant's costs together with all of their own disbursements. So far as the solicitors are concerned, and it is their exposure that is relevant in determining the level of success fee, in entering into the conditional fee agreement they took the risk that if the claim failed they would receive no fee but merely reimbursement of the disbursements incurred. They knew that if they were to agree to act for the claimants that was the only basis upon which the claimants could instruct them.

22. Weighing all of these factors in the balance I have come to the conclusion that the appropriate success fee in this case is 50%.

The Failure to Give Notice

23. The CPR make special provisions for the recovery of costs under funding arrangements. Such costs are broken down into what the rules call `base costs' and `additional liability'. CPR 43PD2.2 provides that *" 'base costs' means the costs other than the amount of any additional liability"*. CPR 43.2(1)(o) defines `additional liability' as *'the percentage increase, the insurance premium, or the additional amount in respect of provision made, by a membership organisation, as the case may be.* The `percentage increase' is commonly referred to as a `success fee'.

24. I have already noted that it was not until proceedings were issued in October 2001 that the claimants gave notice of the funding agreement they had entered into in October 2000. The defendant submits that the claimants ought to have given notice of the funding agreement immediately they had entered into it and that their failure to do so should be reflected by the court refusing or reducing the recovery of the success fee on any costs incurred between the date of the agreement and the date of issue of proceedings. In order to consider that submission it is necessary to consider in detail some of the rules and practice directions dealing with funding arrangements.

25. CPR 44.38 deals with the limits on recovery under funding arrangements. It provides: *'(1) A party may not recover as an additional liability... (c) any additional liability for any period in the proceedings during which he failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order. '*

26. Rule 44.15(1) provides that "*A party who seeks to recover an additional liability must provide information to the court and to other parties as required by a rule of practice direction.'*

27. Paragraph 4A of the *`Practice Direction-Protocols'* is headed *`Information about Funding Arrangements'*. It provides that:

    4A.1 Where a person enters into a funding arrangement within the meaning of rule 43.2(1)(k) he should inform the other potential parties to the claim that he has done so.

    4,4.2 Paragraph 4A.1 applies to all proceedings whether proceedings to which a pre-action protocol applies or otherwise.

28. Paragraph 19.2(5) of the Costs Practice Direction provides that '*There is no requirement in this Practice Direction for the provision of information about funding arrangements before the commencement of proceedings. Such information is however recommended and may be required by a pre-action protocol.'*

29. These provisions make it clear that whereas it is an absolute requirement that once proceedings are issued a party must give information about a funding arrangement as a pre-condition of being entitled to recover a success fee from the other party that is not the position before the commencement of proceedings. Before the issue of proceedings the Costs Practice Direction recommends that notice should be given but does not make it an absolute requirement to do so. Though that practice direction says that the provision of such information even before the issue of proceedings *'may be required by a pre-action protocol'* it is accepted by the defendant that there is no applicable pre-action protocol in this case.

30. There was some discussion before me as to the meaning of the word `proceedings'. The defendant drew my attention to the provisions of section 58A(4) of the Court's and Legal Services Act 1990 which defines `proceedings' as *`any sort of proceedings for resolving disputes (and not just proceedings to a court) whether commenced or contemplated'*. Whilst I note that definition, in my judgment paragraph 19.5(2) of the Costs Practice Direction makes it plain that in the context of the rules relating to costs the word `proceedings' refers to the issuing of the court process. If further support for this is needed it can be found in paragraph 1 of the `Practice Direction Protocols' which provides that

    I.3 Pre-action protocols outline the steps parties should take to seek information from and to provide information to each other about a prospective legal claim.

    1.4 The Objectives of pre-action protocols are:

    (1) to encourage the exchange of early and full information about the prospective legal claim,

    (2) to enable parties to avoid litigation by agreeing a settlement of the claim ***before the issue of proceedings*** *[my emphasis].*

    (3) to support the efficient management of proceedings where litigation cannot be avoided.

    That wording gives a clear indication that `proceedings' relates to a situation where a Claim Form has been issued and the court process begun.

31. It follows from the above analysis that claimants' failure to give notice of the funding arrangement prior to the issue of proceedings does not automatically disentitle the claimants to the right to recover the success fee from the defendant. However, in my judgment it is clear from the rules and the practice directions that the court is entitled to consider disallowing all or part of the success fee as a result of the claimants' failure to give notice.

32. Rule 44.5 is headed *`Factors to be taken into account in deciding the amount of costs'*. Rule 44.5(3) provides that

    'The court must also have regard to -

    (a) the conduct of all the parties, including in particular -

    (i) conduct before, as well as during, the proceeding,; and

    (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute.'

33. Is the claimants' conduct before the proceedings in failing to give notice of the funding arrangement conduct which the court is entitled to take into account in deciding whether to withhold or reduce the claimants' entitlement to recover a success fee? In answering that question I remind myself that there is nothing in either the rules, the practice directions or any pre-action protocol requiring the claimants to give notice but merely a recommendation that they should do so. The claimants draw an analogy with the position which used to exist in those cases where a party was legally aided. It was never required that a claimant who was granted a legal aid certificate prior to the issue of proceedings should give notice of that fact to the intended defendant. There was no requirement to give notice of the granting of a legal aid certificate until proceedings were issued.

34. Furthermore, in this case the claimants say that at the ADR in March 2001 they indicated that they had been considering taking out a policy of `After the Event' insurance at a cost of £7,500 - a step they would be unlikely to have taken were they not then at least considering entering into a conditional fee agreement. It follows, say the claimants, that the defendant must have been aware, or at the very least ought to have assumed, that the claimant had entered into a conditional fee agreement.

35. In my judgment, before it would be right for the court to penalise a party for failure to give notice of a funding arrangement prior to the issue of proceedings the paying party must first establish some prejudice arising from that failure. Questions then arise as to the nature and extent of the prejudice that must be shown. However, it is not necessary for me to consider those questions in the particular circumstances of this case. It is clear from the correspondence between the parties, in particular the defendant's letter dated 15th September 2000, that notwithstanding its offer to settle and its subsequent suggestion of the use of ADR, the defendant's underlying position was one of total rejection of the claim. That fact is reflected in the defendant's defence which was itself served at a time when the defendant had received notice of the claimant's conditional fee agreement. There is nothing in the correspondence I have seen to suggest that the defendant would have adopted a different stance before proceedings were issued had it known that the defendant had entered into a funding arrangement. At the assessment hearing Mr Proctor, the costs draftsman who appeared for the defendant, was not able to point to any cogent evidence of prejudice suffered by the defendant.

36. I have come to the conclusion that whilst I have the power to reduce or even withhold the success fee for the period between October 2000 and October 2001 there is nothing in the circumstances of this case that would make it either fair or appropriate for me to do so.

The entitlement to a success fee on the costs of the assessment process

37. The defendant contends that although the claimants are entitled to a success fee in addition to the base costs of prosecuting their claim that entitlement only relates to the costs incurred up to the obtaining of judgment and not to the costs of dealing with the assessment of the costs provided for by that judgment.

38. There is nothing in either the rules or the Costs Practice Direction to suggest that `base costs' should be limited to the-costs up to the obtaining of judgment and not to the costs of assessing the costs of the claim where the terms of the judgment include a provision for the unsuccessful party to pay the successful party's costs.

39. The defendant points to the terms of the conditional fee agreement between the claimants and their solicitors. Under the heading `What is covered by this agreement' the agreement sets out four areas that are covered. They are then stated to be:
    - *Your claim for damages against the Leeds & Holbeck Building Society arising out of a mortgage valuation report dated 9 January 1997.*
    - *Any appeal by your opponent.*
    - *Any appeal you make against an interim order during the proceedings.*
    - *Any proceedings you take to enforce a judgment, order or agreement.*

40. Put simply, the defendant contends that there is no mention in that four-point list to the issue of quantifying the costs awarded in favour of the claimant. The agreement does not, therefore, entitle the solicitors to charge a success fee on that aspect of the claim and thus the claimants are not entitled to recover a success fee from the defendant. The issue raised by the defendant thus relates to the proper construction of the first of the four bullet points noted above.

41. In my judgment, a claim cannot be divorced from the costs of bringing that claim. Where any claim is determined by the court it is the invariable rule that the court will then determine where the costs of the claim shall lie and in particular whether one party should be required to pay the costs of the other. In effect, the costs of the claim are an intrinsic part of the claim itself. To determine otherwise is, it seems to me, to make an artificial distinction. The obligation on the solicitor to take appropriate steps to quantify and recover any costs awarded in favour of the client is an essential part of his retainer. To require that a conditional fee agreement should state specifically that the agreement - and thus the retainer - relates to the costs which might be incurred in dealing with the assessment of any costs awarded in favour of the client in addition to the costs of pursuing the claim itself would, in my judgment, be a wholly unnecessary requirement.

42. A similar point was recently considered by the Court of Appeal in **Halloran v Delaney** [2002] EWCA Civ 1258. The dispute in that case related to the interpretation of the Law Society's model form of

conditional fee agreement and in particular to the first of the bullet points to which I have already referred. In that case the claim was settled without recourse to the issue of proceedings but it was not possible for the parties to reach agreement on the quantification of the claimant's costs. The claimant therefore issued costs only proceedings under CPR rule 44.12A. The Court of Appeal held that the bringing of costs only proceeding wan an integral part of the claim itself and was therefore covered by the terms of the conditional fee agreement. As a result, the claimant was entitled, as a matter of principle, to seek recovery of a success fee in respect of the costs aspect of the case.

43. I can see no distinction between costs only proceedings, issued where a claim is settled before the issue of proceedings, and the process for dealing with the detailed assessment of costs in a case where proceedings have been issued and have lead to a judgment of the court which includes an order for costs. Indeed, in my judgment the argument for saying that the work carried out in dealing with the detailed assessment process is part and parcel of the claim itself is as strong as, and arguably even stronger than, the argument for saying that costs only proceedings are part of the claim itself. I therefore reject the defendant's submission on this issue.

44. However, that is not the end of the matter. As I have already noted, paragraph 11.8(2) of the Costs Practice Direction gives the court the power to allow different percentages for different items of costs or for different periods during which the costs were incurred. Where a claimant obtains a judgment which includes an order for payment of his costs by the defendant it is often likely to be the case that the risks involved in any subsequent detailed assessment proceedings will be less than the risks involved in prosecuting the claim itself. Indeed, the greater the risk involved in bringing the claim the more likely it is that if the claim succeeds the risks attendant upon the subsequent detailed assessment proceedings will be lower than the risks involved in bringing the claim. I find that to be the position in this case.

45. In the light of the increasing body of case law relating to funding agreements and `After the Event' insurance it is clear that the number of significant issues of principle open to argument is gradually reducing. I do not regard the detailed assessment of costs in this case as having raised any significant issue of principle nor to have had any significant level of risk attached to it. I do therefore consider it appropriate to allow a lower percentage success fee on the costs of preparing and filing the bill of costs and of dealing with the detailed assessment process than I have allowed for the costs of arriving at the eventual Tomlin order. In the light of the guidance recently given by the Court of Appeal in **Halloran v Delaney,** I, shall allow a success fee of 5% on this aspect of the case.

Summary

46. In summary, I therefore conclude that the claimant is entitled to receive a success fee of 50%; that that success fee should not be reduced either in whole or in part as a result of the claimants failure to give notice of the funding arrangement prior to the issue of proceedings in October 2001; that the claimants are entitled to a success fee in respect of the costs of preparing and filing the bill of costs and dealing with the detailed assessment process but that the appropriate level of success fee on that part of the costs is only 5%

47. Finally, I record that it was agreed at the detailed assessment hearing that if either party wishes the court to determine the costs of the detailed assessment procedure then they should so indicate to the court in writing within 28 days of receipt of this written judgment.