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Essential reading for business lawyers

# Legal Week

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**EXPERTS: CFAs**  
**The no-win situation**  
**By Keith Carter**

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# EXPERTS: CFAs

## The no-win situation

Keith Carter examines how the new civil procedures are complicated by the growth in conditional fees

As the 'no win no fee' approach increases, solicitors are being obliged to become effective business managers and risk assessors. The prospect of not earning any fees as a result of losing a case forces some hard decisions early on. For this reason, it looks as if the growth in conditional fees will make it more important to get advice from a reliable and independent expert promptly to help decide whether a case is worth pursuing.

However, this is severely complicated by the new civil procedures. While the aims of the procedures — principally to improve justice while speeding up litigation and offering it at lower cost — can only be welcomed, it seems that the reforms may not be appropriate in an era of conditional fees.

Many of the new civil procedures relate to the way in which solicitors and experts work together, particularly with regards to funding and the pre-action stages of personal injury claims. The management of experts becomes the authority of the courts: from the decision as to if and when an expert is appointed, to the number of experts, their fees, the depth of their report and so on.

However, in no win no fee cases, with their inevitable impact on the profitability of a firm, the instructing lawyer might prefer to be in control of the use of experts. While nobody knows exactly how the new civil procedures will work in practice, it looks as if they may reduce the authority of acting solicitors as the courts take overall control of the use of experts.

By handing over the appointment of experts to the courts, some members of the legal profession have even questioned the potential effects on justice. For example, an opportunist defendant might be tempted to argue that an expert was not required, or might negotiate down the allowed fee, thereby preventing the plaintiff from presenting the substantive detail he sought to.

One of the possible outcomes of the new rules is an increase in the 'single' or 'joint' expert, which will be determined by the courts. Indeed, this signifies one of the most controversial areas of Lord Woolf's reforms and although tested by some lawyers, continues to be a matter for debate.

It is, of course, particularly relevant in conditional fee cases where experts may play a particularly important part as confidential advisers within their professional field. Indeed, an expert's advice can be invaluable at the outset to help lawyers make a business decision about whether or not to accept the case. The new civil procedures do not seem to recognise this need.

The new procedures appear to prohibit such a close working relationship between an expert and lawyers, not only by encouraging the use of 'joint' experts, but also by demanding the court's

approval before an expert is even appointed.

While at first sight, the appointment of a shared, impartial expert looks to be a good way to reduce costs, solicitors may want to get a second opinion. Each legal team may therefore appeal to the judge so they can appoint another expert to comment on the findings of the joint expert. Obviously, this would delay the resolution of the case and increase costs. In no win no fee cases, this makes the stakes even higher.

In the new Civil Procedure Rules plaintiffs have the opportunity to make a pre-emptive offer to settle. But to quantify a figure, the solicitor will, in many circumstances, require specialist advice on a confidential basis. This need is compounded when fees are conditional on winning.

To prepare the case properly and quickly, a good working relationship is required between a solicitor and an expert of their choice — preferably one with whom the solicitor has worked

before, not one who has been imposed on them.

So that the defendant can carefully consider this offer, they too will require impartial expert advice — but from a different source. This aspect of the new procedures therefore appears to be inconsistent with the apparently open 'inquisitorial' style that typifies many of the reforms and that encourages the use of the joint expert.

While the aims behind the new civil procedures can only be applauded, the knock-on effects may be less welcome. In no win no fee cases, where solicitors often need assistance before even accepting a case, the new civil procedures could hamper rather than promote justice. *Keith Carter is an employment consultant at Keith Carter & Associates.*

### THE IMPACT OF THE NEW CIVIL PROCEDURES ON NO-WIN-NO-FEE CASES

- Courts to manage/control overall use of experts
- Reduces authority of acting solicitors
- Makes it more difficult for a solicitor to decide if a case should be pursued
- Appointment of experts decided by the courts
- Potentially, legal teams cannot fully prepare their case as they intend
- Likely growth in the use of joint experts
- Solicitor 'deprived' of team advisers
- Potential increase in plaintiff's pre-emptive offer to settle; and
- Difficult to operate with single, shared expert