IN THE TUNBRIDGE WELLS COUNTY COURT 4CT02449.

Tunbridge Wells County Court,
Wyevale House,
London Road,
Tunbridge Wells.

Tuesday, 24th April 2007.

Before:

DISTRICT JUDGE LETHEM

CHELSIE BRADY Claimant

- v -

REC-TECH LEISURE LTD Defendants

MISS C. TRUSCOTT *(instructed by Branton Edwards)* appeared on behalf of the Claimant.

MR S. GIBBS *(instructed by Gibbs Wyatt Stone)* appeared on behalf of the Defendants.

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JUDGMENT
(Approved)

Tuesday, 24 April 2007.

JUDGMENT:

JUDGE LETHEM:

01 This judgment concerns the enforceability of a conditional fee agreement entered into by the Claimant with her solicitors Branton Edwards, and in particular the paying party, represented by Mr Gibbs, have alleged breaches of the Conditional Fee Agreement Regulations 2000 in respect of Regulation 4(c).

02 The background to the funding arrangements are set out in part in a witness statement of Timothy Branton dated 22 January 2007 to which I have been referred and which I have read. In summary, Mr Branton and a Mr David Edwards were partners along with Paula Bridge in a solicitors' firm, Branton Edwards. In 2000 they set up a claims management company Result Claims Management Limited (*'Result'*) and that company was owned 50% by Mr Branton and 50% by Mr Edwards at all material times. The witness statement tells me that further shareholders were introduced later in the company's life but that is not material to my decision today. The picture that emerges from Mr Branton's witness statement is that Result would obtain clients and refer on those clients to panel solicitors. In truth there was only one firm of solicitors on Result's panel; not surprisingly it was, of course, Branton Edwards. Branton Edwards would enter into a conditional fee agreement with the client whereby they would recommend after the event insurance either in the form of policies offered by NIG or by IOMA and payment of the insurance policies was made to a company called LIM on behalf of NIG. For each of the policies that were taken out pursuant to this agreement Result obtained a payment from LIM of £300 per case.

03 In so far as this particular case is concerned, Chelsie Brady, an infant, was playing in the Happy Hippo indoor play area at the Margate Hippodrome when she fell and fractured her arm. The fracture did not resolve itself entirely satisfactorily and indeed it would be right to say that the case eventually settled for £9,750 on 29 November 2005.

04 Earlier on 03 October 2002, Chelsie's Litigation Friend, her mother Sharon Brady, had received a number of documents from Result including a 'Fair Trade Agreement' which contains the following relevant clauses. Under the heading of 'Legal Expense Insurance with RML' (and RML is Result) it reads as follows:

> '1. I understand that RML will appoint a solicitor (the panel solicitor) to investigate the circumstances of my claim and to consider whether my claim has a more than 50% chance of success and likely damages in respect of my injury in excess of £1,000 (the criteria)
>
> 2. Based on the panel solicitor's advice RML will assess the level of legal expense insurance required together with the appropriate premium;

> 3. I have signed a consumer credit agreement with a credit limit of £3,000 and I authorise RML to purchase a policy of legal expense insurance in a sum not exceeding £900 plus IPT and I also authorise the panel solicitors to draw down any RML-authorised disbursements necessary to pursue my claim to the balance of my credit limit of £3,000.'

05 The second document that Sharon Brady received is entitled 'Claim funding agreement.' It is something of a hybrid document. The first page is Branton Edwards' client care letter. The document then seamlessly moves on to p. 2, which is the conditional fee agreement, and on the last page there is a claim funding checklist. The relevant aspects of this document are as follows. In the client care portion of the document under the heading 'Legal expense insurance through Result' it says: 'You have signed a Fair Trade Agreement with RML and have agreed to purchase a legal expense insurance policy (the policy) underwritten by one of RML's nominated insurers (see Schedule 2)' and at the end of that page and in bold type the following note appears:

> 'Please note that Tim Branton and David Edwards, who are partners in the firm of Branton Edwards, have a financial interest in Result Management Limited. We confirm that Branton Edwards receives no financial benefit from the arrangements for the funding and insurance of your case.'

06 Turning then to the CFA portion of the document, and under the headings 'Other points' it says at clause (e):

> 'On the information currently available to us, we believe that a contract of insurance with either NIG or IOMA is appropriate. Detailed reasons for this are set out at Schedule 2. We confirm that we do not have an interest in recommending this particular insurance agreement.'

07 The checklist on the back refers to matters which the solicitor would go through and the claims manager would go through with the client, in this case Miss Brady. As I have indicated, that document was signed contemporaneously with the Fair Trade Agreement on 03 October. There was then a gap of approximately a month to 01 December 2002 when the witness statement of Mr Branton picks up the story, and at para. 8 of his statement he says this:

> 'The conditional fee agreement in this case was entered into on 02 December 2002. Prior to that, Sharon Brady was provided with a copy of the Claim Funding Agreement which contained written information set out above. On 01 December 2002, there was a conversation between Sam Firth, the fee earner having conduct, and the Claimant. During this conversation, Sam Firth would have explained the CFA to Sharon Brady in accordance with Regulation 4 CFA Regulations 2000. As part of a standing instruction to fee earners Sam would have drawn her attention to the wording in the client care letter set out in para. 7 above.'

08 That is the reference to the bold type appearing on the client care portion of the document advising the client that Mr Branton and Mr Edwards had a financial interest in Result Management Limited.

09 On the following day, i.e. 02 December 2002, the agreement was entered into by Branton Edwards and thus became complete.

10 The Regulations that I have to consider read as follows and I am quoting here just Regulation 4(e). It is prefaced by the start of Regulation 4:

> 'Before a conditional fee agreement is made the legal representative must (e) state whether the legal representative considers that any particular method or methods of financing any or all of those costs is appropriate and, if he considers that a contract of insurance is appropriate or recommends a particular such contract his reasons for doing so and whether he has an interest in doing so.'

11 So arising out of that law and that background three issues arise for my determination today. The first is whether Branton Edwards had a financial interest either direct or indirect in recommending the NIG policy that they did. If I find that there was such an interest then the second issue arises, which is whether there was an adequate declaration of that interest either written or oral.

12 If I decide that there was an inadequate declaration of interest then of course I have to go on and consider whether that breach of Regulation 4 was material, applying the test in **Hollins v. Russell**. I therefore turn to consider those three issues in turn in so far as I have to.

13 Firstly, I consider whether Branton Edwards had an interest in recommending the NIG policy. What Mr Gibbs, for the paying party, says is that Result were a company 100% owned by two of the partners of Branton Edwards; that those two partners received dividends from Result and thus had a financial interest in the success of Result. He has dealt in some detail with who has to make disclosure, which is not actually an issue I have to decide (though I will touch on it later) and what he says in that respect is that it is not simply a question of the firm disclosing or the individual solicitor disclosing but that the client has to be aware of any financial interest that any members of the firm have in the policy. So he says by virtue of the nature of the relationship between the partners of Branton Edwards and the ownership of Result, there was an indirect financial interest.

14 If he is wrong in that respect then he falls back and asks me to consider that this case is really indistinguishable from the recent decision of the Senior Costs Judge Peter Hurst in the case of **Andrews v. Harrison Taylor Scaffolding and others**, and in particular my attention is drawn to para. 64 of that judgment where the Senior Costs Judge said of the solicitor: 'It is beyond doubt that her interest in keeping the profitable joint venture going meant that she and her firm had a declarable interest in recommending the NIG policy.' So what Mr Gibbs says is that because of the nature of the financial relationship between Branton Edwards and Result there was a similar financial interest in

keeping that relationship going, and in this respect he points me to part of Mr Branton's witness statement at para. 6 where Mr Branton says this:

> 'The principal reason for the company's existence was to maintain Branton Edwards' market share of personal injury referrals without us having to become members of other claims management companies such as Claims Direct and the Accident Group.'

15 With that statement, Mr Gibbs says there is a plain financial interest for Branton Edwards in the continuing relationship. It was in terms the whole *raison d'être* of Result being set up in the first place.

16 In response, Miss Truscott, who has appeared on behalf of the receiving party, says that I must be careful to distinguish Result from Branton Edwards, and she quite rightly says to me that Result of course is a limited company, with directors who were not Messrs Branton and Edwards nor (so far as I am aware) any solicitor employed by them but an independent board of directors, whereas on the other hand Branton Edwards are a partnership of a number of solicitors.

17 She makes the point that the monies received under the arrangements as I have described them are not received by Branton Edwards at all; that it is a situation where NIG pay the £300 to Result but not of course to Branton Edwards. Thus she draws a distinction between the case before me and the leading case of **Garrett**. What she says in that respect is that the financial interest identified by the Court of Appeal in **Garrett** was the fear that the solicitors would be removed from the panel in the event that they did not recommend the NIG policy in that case. This she says is a wholly different proposition. There was only one panel statement, namely, Branton Edwards. The ownership of Result meant that in essence Result were not going to take any step that would detrimentally affect Branton Edwards' profitability. I accept that in **Garrett** she has correctly described the financial interest identified by the Court of Appeal in that case, and I also accept that this is not the same situation by any means; indeed, it might be said to be quite the opposite, where there is no danger that the solicitors will be removed from the panel no matter how they act. Thus she says that **Garrett** does not bind me and that I should distinguish this case from the facts of **Garrett**.

18 Turning to **Andrews**, she says that again this case is somewhat different, although she has to accept that para. 6 of the witness statement to which I have just referred does suggest that there is a financial link. What she says in fact is that in **Andrews** 95% of the solicitors' business was coming from one referral agency. There is no evidence, she says, that this is the same in this particular case. Indeed, she says that one can assume the alternative, that the reality is that Result eventually went into liquidation with Messrs Branton and Edwards having to pay something in the order of £150,000 apiece or losing £150,000 apiece in that liquidation, so far from this being a steady stream of business to Branton Edwards, she says that the opposite can be inferred.

19 If she is wrong in that submission, she makes a somewhat bolder submission and she says that **Andrews** was wrongly decided. In essence, that the Senior Costs Judge has thrown the net too wide in deciding that a simple interest in keeping a profitable joint venture going was sufficient interest to be declared under Regulation 4.

20 Those are the competing arguments. Having listened to them carefully and read the papers to which I have referred, I hold that Branton Edwards did have a declarable interest in the sale of the insurance policy and I arrive at that conclusion by one of two routes. The first arises from the direct financial nexus between Messrs Branton and Edwards and Result. It seems to me that that direct financial nexus is demonstrated in two ways. Firstly, they received the dividends from Result, so as Result prospered so their dividends might be expected to increase. While I accept that the witness statement says that Result was not essentially a profit-making organisation, the witness statement equally tells me that dividends were received, so there is that direct financial nexus.

21 There is, it seems to me, a second direct financial nexus which is one that I have already touched upon, which to the extent that Messrs Branton and Edwards had invested money in Result so they had an interest in Result prospering for fear of losing that money, and indeed at para. 6 in Mr Branton's witness statement he says: 'When the company went into liquidation in May 2004 David Edwards and myself lost about £150,000 each in respect of capital invested in the company' so that it seems to me was a direct financial link.

22 That of course is not sufficient to create a financial interest in the sale of the policy. It seems to me that that link is formed because Result received a payment of £300 per policy from NIG (and a similar amount, as I understand it, from IOMA) for each policy that was taken out with them. Thus the actions of Branton Edwards as a firm will have a direct effect on the profitability of Result and through them income in the form of dividends for Messrs Branton and Edwards, and also exposure to losses, as indeed happened. So by that route Messrs Branton and Edwards had a financial interest in the sale of the NIG policy.

23 If I am wrong in that respect, then I would still find that there was a declarable interest by the same route adopted by the Senior Costs Judge in the case of **Andrews v. Harrison Taylor Scaffolding**. It seems to me - and this is a matter upon which I will touch again later - that the court has to consider the purpose of the Regulations. As is made clear at para. 101 of the **Garrett** decision, they are to protect the client, to ensure in so far as is possible that she understands what she is letting herself in for and is able to make an informed choice amongst the funding options available to her. The words 'informed choice' suggests a degree of transparency so that the client is able to gauge for herself what links, if any, exist resulting out of the sale of the policy. Just as the Senior Costs Judge in **Andrews** decided that an interest in keeping a profitable joint venture going was sufficient interest, I would follow the same route. But I think in this case with more force, because Miss Truscott's argument about the fact that Result went into liquidation really founders on the paragraph to which I referred earlier in this judgment when Mr Branton tells me that the principal reason for the company's existence was to maintain Branton Edwards' market share of personal injury referrals. So the fact that two years or so after this CFA was entered into Result went into liquidation was, it seems to me, not a matter that was in the minds of the solicitors at the time that this CFA was entered into. So just as there was a financial imperative in **Andrews**, so it seems to me there is an even closer financial link in this particular case and in that respect Mr Branton has made that link expressly clear in his witness statement.

24 I mentioned earlier on, that there had been trailed in Mr Gibbs' submissions a possible argument about whether the disclosure had to be by the individual solicitor, the firm or something in between. That is not an argument that Miss Truscott has taken up, quite properly, in my judgment. It seems to me abundantly clear that what is contemplated by the Regulations is that any financial interest between the company, whether it be individual solicitor, partners or the company as a whole, has to be declared, and again that is a matter upon which I will touch shortly. Thus I would answer the first question in the affirmative; there was a declarable interest.

25 That takes me then to the second issue, which is whether there was adequate declaration of the interest in this case. I pause to reflect that this is not a case where the solicitors sought to hide the fact of a relationship between Mr Branton and Mr Edwards on the one hand and Result Management Limited on the other. That much is made very clear from the words which appear in bold typeface on the client care portion of the Claim Funding Agreement. Equally, I have to accept that under the heading 'Other points' the company - the firm - say 'We have no interest in recommending the NIG policy.' Mr Gibbs lights upon that second observation and he says that in light of my finding that there is a declarable interest what is put in the other points is wrong; they do have a financial interest in recommending the policy. But he goes further than that. He says that what is not disclosed is the relationship between NIG and Result. It is one thing for a client to know that Messrs Branton and Edwards have an interest in Result; it is quite another thing for the client to be aware that for every policy sold to NIG, NIG will in turn pay £300 to Result. He says that the client is therefore unable to understand the relationship between the three principal elements of this funding arrangement and thus it is not a question of whether there is adequate disclosure, there is actually no disclosure of the relevant aspect of the funding arrangement.

26 He goes on to say that there is a further breach of the Regulations in that the client signs away their right to nominate an insurance company when they sign the Fair Trading Agreement and that by the time the CFA is explained the decision is no longer theirs, and that by virtue of paras. 1, 2 and 3 of the Fair Trading Agreement. He says there is nothing to suggest that the oral explanation of the Agreement by Mr Firth on 01 December added anything to the papers that we have, and it would be right to say that I have no witness statement from Mr Firth.

27 What Miss Truscott says on the point is that on a proper construction of Regulation 4 all that is required is a declaration that there is an interest; one does not have to go further and explain the interest. In terms, what she says is that when the Regulations say that a solicitor must declare whether he has an interest in doing so the Regulations could have been written 'whether he has an interest in doing so, and if so, what that interest is' but it does not say that. So once a declaration of interest is made, then the wording of the Regulations are met, an adequate declaration is made.

28 She goes on to say that in truth the funding arrangements between the principal players under an agreement is not a matter for the client, but looking at para. 101 of **Garrett**, that the client simply has to know what she is letting herself in for, and that looking at this particular arrangement, she knows that she is going to buy an insurance policy, she knows that it will be a policy arranged through Result, she knows that it will be with NIG or IOMA, she knows that there will be a premium payable and that that is

properly explained and the funding of that is explained in the documents, and so in truth she knows what she is letting herself in to.

29 Further, she says that if you look at the Fair Trading Agreement and the CFA together then the position becomes entirely apparent. That Result will take out a policy; that will be on the advice of the panel solicitors; she knows that Messrs Branton and Edwards have an interest in Result; and she knows that the policy will be with NIG or IOMA.

30 In response to part of those submissions, Mr Gibbs says that the narrow interpretation of Regulation 4 urged upon me by Miss Truscott is wrong and that I have to look wider, and that if I therefore look at 4(e) in its entirety it is not only a declaration of whether somebody has an interest in recommending a particular policy but also has to set out the reasons for recommending the policy, and that given the financial arrangements in this particular case that must include the arrangements between NIG, Result and Branton Edwards. So, he says, looking at those two clauses together, it is plain that there must be a disclosure of an interest and what that interest is.

31 He also refers me back to para. 101 of **Garrett** and makes it clear that what is required is an informed choice. I think it right that I remind myself at this stage of exactly what para. 101 of **Garrett** says, and it says this:

> 'At para. 90 of **Hollins v. Russell**, the court recorded the submissions of Mr Drabble that the statutory regulation had two distinct aims. The second, he submitted, was "to protect the client - to ensure so far as possible that she understands what she is letting herself in for and is able to make an informed choice amongst the funding options available to her." The court seems to have accepted this submission. We certainly would. In our judgment, by informing Miss Garrett that they were on the Ainsworth panel, the Websters' representative did not disclose the real financial interest that they had in recommending the NIG policy.'

32 It seems to me that on considering that extract from **Garrett** it becomes clear that Mr Gibbs is right to suggest to me that a broader interpretation encompassing both clause 1 and clause 2 of Regulation 4(e) is appropriate, and it seems to me that there are two aspects of the extract which direct me in that particular way. The first is that the client has to make an informed choice, and that to my mind is a choice based on all the relevant information, because anything less will be an uninformed choice. The second aspect of that extract from **Garrett** which assists me is the reference to Websters not disclosing 'the real financial interest' and so what the court is saying in that extract is that the client has to have information and all the relevant information and that that information has to include the real financial interest that a firm has in recommending a particular policy.

33 Applying that to this particular case, I am not satisfied that the client looking at the documentation is aware that there is a direct financial link between NIG and Result in the form of the £300 payment. It may be possible to ascertain from the documents that Result will place the insurance with either NIG or IOMA and that that will be on the basis of a

panel solicitor's information, but the real financial interest in this case was that Result were obtaining a payment of £300 from NIG, and that is not clear.

34 I also take into account the fact that the explanation under Regulation 4 has to be made by the legal representative, and of course when the conversation took place on 01 December 2002 the Fair Trading Agreement had been handed to Miss Brady but there is no guarantee that that document was included in the explanation at all. In coming to that conclusion, I have considered the claim-funding checklist set out on the end of the CFA. It must also be the case that Mr Firth at the time that he was giving the explanation would have been doing it on the basis of the documents, i.e. that Branton Edwards had no financial interest in the selling of the policy, and in that respect he was wrong.

35 I have therefore come to the conclusion that the disclosure in this case was inadequate and did not put Sharon Brady in a position where she was able to make an informed choice because Branton Edwards had not disclosed their real financial interest in this matter. I therefore find that there has been a breach of Regulation 4 of the CFA Regulations.

36 That takes me of course to the third of the issues, because it is almost trite law that not every breach of the CFA Regulations will lead to a policy being held to be unenforceable, and a solicitor losing all their costs as a direct result. Rather I have to apply the test set out in **Hollins v. Russell** in the following terms; has the particular departure from a Regulation pursuant to Section 58(3)(c) of the 1990 Act either on its own or in conjunction with any other such departure had a material adverse effect either upon the protection afforded to the client or upon the proper administration of justice. Miss Truscott says that the arrangements from the documents are transparent and that if I reach the point that I have now reached that I should typify this breach as trivial and not one that is material. I am against her in that submission. In my judgment, this is a material breach. The arrangements as I have found them to be in this judgment are tripartite arrangements whereby money flows round the circle, from Branton Edwards' clients to NIG, from NIG to Result, and from Result to the partners and the firm of Branton Edwards. That triangle of funds is veiled and is not apparent to the client of Branton Edwards. Indeed I would describe those arrangements as opaque and missing crucial elements of information which strip away from the client the protection that the Regulations were designed to afford them. In those circumstances, I hold that the conditional fee agreement in this matter is unenforceable.
