- The Defendant Costs Specialists

Costs Law Update – Ongoing challenges to CFAs

Litigation concerning the validity of pre-1st November 2005 Conditional Fee Agreements (CFAs) continues unabated as the following judgments show. Although these cases are not binding, such decisions are routinely referred to on detailed assessment and reveal some of the current thinking in this area.

Bevan v Power Panels Electricals Systems Ltd

The case of *Bevan v Power Panels Electricals Systems Ltd* [2007] EWHC 90073 (Costs) concerned a claim conducted under a CFA where the case was referred to the solicitors by the claims management company Accident Advice Helpline (AAH). The defendant challenged the validity of the CFA on the grounds that there had been a breach of the now revoked CFA Regulations 2000 and, in particular, the duty on the solicitors to advise whether they had an interest in recommending a particular insurance policy (Regulation 4(2)(e)(ii)) and whether they considered that the client had the benefit of an existing contract of insurance that would cover his potential liability in respect of legal costs (Regulation 4(2)(c)). It was further argued that in failing to state in writing that the solicitors had an interest in recommending the insurance policy there had also been a breach of Regulation 4(5), which required the information under Regulation 4(2)(e)(ii) to be given both orally and in writing.

The CFA, which was a standardised document that all AAH solicitors were obliged to use, stated that "save in so far as we are approved solicitors on the Panel of Accident Advice Helpline with whom you have entered into an agreement which provides for the insurance to be arranged we confirm that we do not have an interest in recommending this particular insurance policy or funding arrangement". The solicitors believed that in truth there was such an interest, because they were obliged to recommend the policy under the arrangement with AAH, and therefore prepared a separate Oral Explanation sheet to address this issue. That read:

> "We do have an interest in recommending this particular insurance because we are tied by our membership of AAH to offer all clients who enter into a CFA with us this insurance. We are not insurance brokers and there may be cheaper different insurance available. In all the circumstances we believe this is a reasonable insurance policy to fund this claim."

In relation to the appropriate enquiries to make concerning pre-existing insurance, this had been the subject of detailed guidance by the Court of Appeal in *Myatt v National Coal Board* [2006] EWCA Civ 1017. That Court recognised that the appropriate enquiries to make of a client would depend in part on the nature of the client:

> "If the client is evidently intelligent and has a real knowledge and understanding of insurance matters, it may be reasonable for the solicitor to

> ask him not only (i) whether he has credit cards, motor insurance or household insurance or is a member of a trade union, (ii) whether he has legal expenses insurance, but also (iii) the ultimate question of whether the legal expenses policy covers the proposed claim and, if so, whether it does so to a sufficient extent. Litigants such as the *Myatt* claimants and Ms Garrett plainly do not fall into this category: few litigants will. If the solicitor does ask such questions, he will have to form a view as to whether the client's answers to the questions can reasonably be relied upon."

In *Bevan*, the solicitors had asked the client: "have you got insurance". It was argued for the Claimant that this was the least specific question that could be asked and therefore the least likely to miss the existence of BTE legal expenses insurance. If the question was answered in the affirmative, then the solicitor would ask to see the insurance polices to determine whether BTE cover was attached. Here, the Claimant had confirmed that neither he nor any member of his family had any insurance of any kind.

The judge held that the Claimant had been asked the wrong question to determine the existence of BTE cover. Although it was accepted that the Claimant was intelligent and articulate, he was a 22 year old electrician and the judge was of the view that he was not likely to have had much experience of insurance polices. In his view:

> "…I do not agree with Mr Filar's view (at least in this case) that the question 'Do you or your family have any insurance' was overwhelmingly likely to be answered correctly. The question most likely to produce a correct answer would, in my judgment, have added words which focussed on the sorts of documents there might have been such as credit cards, motor insurance or household insurance and whether he or any of his family had trade union membership."

He concluded that the specific guidance given in *Myatt* should have been followed. As such there was a material breach of Regulation 4(2)(c) such as to render the CFA invalid. This aspect of the decision is perhaps surprising as a client who states he does not have any insurance is unlikely to believe he does in fact have, for example, household insurance.

In relation to Regulation 4(2)(e)(ii), the judge was satisfied that the oral advice given to the Claimant did properly disclose the solicitors' interest in recommending the policy. He concluded that the Regulation was complied with simply by stating whether they had an interest in recommending the policy. It was not necessary to explain what that interest was. This aspect of the decision should be compared with *Brady v Rec-Tech Leisure Ltd* (Tunbridge Wells County Court, 24/4/07) (see http://www.gwslaw.co.uk/downloads/costs-law-update-23-05-07.pdf).

However, there had nevertheless been a breach of Regulation 4(5) in failing to also give the information in writing. That breach had a materially adverse effect on the protection afforded to the client. It further had a materially adverse effect on the administration of justice because express provisions relating to the steps to be taken in litigious matters should be observed. It followed that the CFA was unenforceable.

McFayden v Liverpool CC

In our last *Costs Law Update* we reported the decision of *Myers v Bonnington (Cavendish Hotel) Ltd* [2007] EWHC 90077 (Costs), where a costs judge had held there to be breach of Regulation 4(2)(e)(ii) where the Claimant's solicitors had recommended an ATE policy but had failed to notify the client that they had an interest in recommending the policy because they were obliged to recommend the policy as part of their membership of the Accident Line scheme. However, he held that the breach was not material because the number of referrals received from the Scheme represented only a small proportion of the firm's income and that the interest they had not notified of was therefore *de minimis*.

The Court was faced with an identical challenge, also concerning the Accident Line scheme in the case of *McFayden v Liverpool CC* (Liverpool County Court, 9/5/07). District Judge Heyworth also found there to have been a breach of the Regulations. However, unlike in *Myers*, he found the breach to be material as it adversely affected the client's protection. The client "was placed in a no choice situation" because this was the only policy that could be recommended to him. The Claimant here does not appear to have tried to argue the *de minimis* point.

Combined with the *Myers* decision, there are now strong grounds for believing that similar challenges to claims conducted under this scheme will also succeed in showing that there has been a breach of the Regulations. There must also be good grounds for believing that some, if not all, such breaches will also be found to be material.

Willoughby v Sempra Energy Trading (UK) Ltd

The same issue, although this time with the case being referred by Accident Assurance Limited, was considered in *Willoughby v Sepra Energy Trading (UK) Ltd* (Liverpool County Court, 5/4/07). District Judge Smedley, sitting as a Regional Costs Judge, found that there had been a breach of Regulation 4(2)(e)(ii) in that the solicitors had incorrectly stated that they did not have an interest in recommending the policy. The Claimant here did seek to run the *de minimis* argument on the basis that the referrals the solicitors received from this claims management company amounted to about 40 cases compared to the 300 cases they were receiving from another scheme. In addition the firm undertook private client work.

Although the judge accepted that the referrals represented only a small proportion of the firm's work, and that half a dozen cases in a year would be insignificant, he calculated that the income generated by the 40 odd cases must have been in excess of £50,000 which could not be considered insignificant. On that basis the breach was material and the CFA was invalid.

The number of cases where this type of challenge continues to be available (claims where the old CFA Regulations apply) is reducing over time. However, the individual value of these cases is correspondingly increasing and the success that defendants have been achieving is likely to justify such challenges continuing for the foreseeable future.

Contact

If you wish to discuss the contents of this update in more detail contact:

Simon Gibbs
Tel: 020-7096-0937
Email: simon.gibbs@gwslaw.co.uk
Address: Gibbs Wyatt Stone, 68 Clarendon Drive, London SW15 1AH
DX: 142502 Enfield 7 (please note our change of DX address)
Website: www.gwslaw.co.uk

Gibbs Wyatt Stone
Dedicated to providing the level of expertise expected from specialist costs counsel and the range of services provided by traditional costs draftsmen.