- The Defendant Costs Specialists

Costs Law Update –
Challenge to Accident Line Protect Scheme

Judgment has recently been handed down in a challenge to the validity of Conditional Fee Agreements (CFAs) entered into under the Law Society approved Accident Line Protect Scheme. The case was heard by a Master of the Supreme Court Costs Office (SCCO). A full copy of the judgment, *Myers v Bonnington (Cavendish Hotel) Ltd* [2007] EWHC 90077 (Costs), can be found here.

The case centred around the issue of whether there had been a breach of Regulation 4(2)(e)(ii) of the now revoked CFA Regulations 2000, which required the legal representative to inform the client before a CFA is entered into:

> "(e) 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 -
>
> (ii) whether he has an interest in doing so."

In *Garrett v Halton Borough Council* [2006] EWCA Civ 1017 the Court of Appeal had held to be invalid a CFA where the solicitors had failed to inform the client that they had an interest in recommending an insurance policy. This was on the basis that, although the solicitors had told their client that they were on a claims management company's panel, they had failed to inform the client that they thereby had an indirect financial interest in recommending the policy, because if they did not do so they would have their panel membership withdrawn. The Court concluded that the profit generated by cases referred was likely to be of greater significance to the solicitors than any commissions that might be paid on insurance premiums. It was this failure to disclose to a client that they had financial interest in remaining on the panel, which would be lost if the client did not accept their recommendation that they enter into this specific After-the-Event (ATE) policy, that amounted to a material breach of the regulations, as the client did not know that the solicitors were recommending the policy because this was dictated by their financial interest.

Similar challenges to the Accident Line Protect Scheme have long been on the horizon, but *Myers* appears to be the first reported decision. The Claimant's solicitors, in the CFA, had recommended that the client obtain an ATE policy with Accident Line Protect and stated that they did "not have an interest in recommending this particular insurance agreement".

The relevant facts of the Scheme which emerged were that:

- The Scheme included a referral service of potential clients to the solicitors.

- The Scheme's operating manual required the solicitors to comply with all requirements in the manual.

- The manual required the solicitors to issue an Accident Line Protect insurance policy in all eligible CFA cases, whether or not the client had been referred by the Scheme.

- The solicitors could have their membership terminated if they breached any of the procedures in the operating manual.

The similarities with the facts in *Garrett* can be seen in that the solicitors had failed to notify the client of the financial interest they had in the recommending the particular ATE policy – their continued membership of the Scheme that might be lost if they did not use this policy. Nor had they informed the client that they were obliged to recommend the policy in all cases.

Master Rogers concluded that there had indeed been a breach of the Regulations due to the failure to make it clear to the client that there was an obligation on them to recommend the particular policy. However, to invalidate a CFA not only must there be a breach but that breach must be material. The test developed in *Hollins v Russell* [2003] EWCA Civ 718 was:

> "Has the particular departure from a regulation pursuant to section 58(3)(c) of the 1990 Act or a requirement in section 58, either on its own or in conjunction with any other such departure in this case, had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice?"

Here the Claimant argued that any interest which had not been declared was to be treated as de minimis. This assertion was supported by evidence that showed that, between 2000 and 2006, only 24 cases out of 26,217 new files opened by the firm were Accident Line referrals. Such referrals accounted for 0.3% of the firm's total income. It was argued that the facts in this case could be distinguished from those in *Garrett*, which proceeded on the basis that there was a major dependence by the solicitors on the referral scheme. For the same reason, Master Hurst's decision on the same issue, in *Andrews v Harrison Taylor Scaffolding* [2007] EWHC 90071 (Costs), could also be distinguished as the solicitors there were receiving 95% of their work from the referral scheme.

Master Rogers accepted the Claimant's submissions and held the breach to be immaterial for the following reasons:

- He concluded that it would not have made any difference if there had been proper disclosure as the Claimant was an established client of the firm and "would have no idea of how better or different types of policy could be obtained".

- He considered it "significant" that the client using the same solicitors in a previous personal injury claim had used the very same policy.

- He was satisfied that the case could be distinguished from *Garrett* and *Andrews* on the basis that any interest not declared was de minimis.

This judgment, although not binding, does raise a number of interesting issues and is clearly not immune to criticism. The conclusions in relation to the fact that the client had used this policy before and the relative proportion of Accident Line referrals to the firm obviously make the decision very case sensitive.

The fact that the Claimant may not have known of any better policies does not appear to be a justification for a solicitor departing from the requirements of the Regulations. The Court of Appeal held in *Garrett* that the fact that "clients rarely show any interest in [explanations about insurance] is not a good reason for not giving effect to the plain intention of Parliament". It would be surprising if the ignorance of the client about ATE insurance were a reason to give less rather than more information on the issue.

The decision that the interest was de minimis is the most problematic element. If a solicitor recommended a policy that paid them commission of £500, would that be de minimis on the basis that £500 represented only 0.01% of a large firm's income? It seems unlikely. It might represent a small element of a firm's overall income but would be reasonably significant in terms of the potential profit on the case itself. Why then should the value of referrals in this case have been so treated? The work may have only represented a small proportion of the overall income of the firm but the very fact that the firm was a member of the Scheme was presumably on the basis that they valued such work.

If the de minimis issue is to be interpreted in this way, how will that impact on other detailed assessments? Will paying parties demand details of the financial affairs of solicitors' firms in all similar cases to determine the relative value of any referrals? The Courts have tended to discourage "fishing expeditions" unless a genuine issue has been raised and have accepted the signature on the Bill of Costs as evidence of general compliance with the Regulations. However, how can a solicitor self-certify whether the value of any such interest should be treated as de minimis? If 0.3% is to be so treated, what about 2% or 5%? Is 5% of a large firm's income to be treated as more significant that 5% of a small high street practice or vice versa? Or, given the decision that there had been a breach of the Regulations, does the onus shift to the solicitors to show, by detailing their financial affairs, that the interest was not significant and therefore the breach was not material? What will such an exercise do to the costs of detailed assessment?

The purpose of the Regulations, as accepted by the Court in *Garrett*, 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". How can the de minimis conclusion in this case provide for such protection? Whether the value of membership of the Scheme to the solicitors was large or small, the client has not been provided with an explanation as to the true reason this policy was being recommended and therefore did not receive the protection that the Regulations were designed to provide. The client is only concerned with receiving proper advice in relation to their claim. If they do not receive that advice, because they are not told the true reason for the recommendation, it is hard to see how that is de minimis from the client's perspective.

As noted above, this decision is not binding and was case specific. However, the conclusion that there had been a breach of the Regulations, by failing to explain the obligation to recommend the policy, is equally likely to apply in all other Accident Line Protect Scheme matters. Whether other firms would be able to survive the de minimis test, or whether other judges would be as willing to apply it in the same manner, remains to be seen. Given this was a Law Society recommended scheme, the

courts may be reluctant to find that all CFAs run under the Scheme were unlawful. Nevertheless, this issue is likely to head to the higher courts.

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