- The Defendant Costs Specialists

Costs Law Update – Garrett v Halton Borough Council Myatt v National Coal Board

Judgment has been handed down by the Court of Appeal in the long awaited cases of *Garrett v Halton Borough Council* and *Myatt v National Coal Board* [2006] EWCA Civ 1017. These cases will have a crucial impact on pre-November 2005 CFAs.

Both cases revolved around interpreting the Court of Appeal's earlier decision in *Hollins v Russell* [2003] EWCA 718 and the "materiality" test laid down in that case to determine whether a breach of the *Conditional Fee Agreement Regulations 2000* rendered a CFA invalid:

> "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?"

The Court was required to determine whether the test of "materiality" quoted above requires a court to consider whether the client has suffered actual prejudice as a result of an alleged failure to satisfy the rules. A related question was whether the enforceability of a CFA was to be judged by reference to the circumstances existing at the time when it is entered into, or by reference to the circumstances known to exist at the time when the question arises for decision.

The Court concluded that the "focus on the adverse effect was on the *protection* afforded to the client, not whether, as a matter of fact, the client had actually suffered any prejudice". The scheme was "designed to protect clients and to encourage solicitors to comply with detailed statutory requirements which are clearly intended to achieve that purpose". The "focus of the scheme was on whether the CFA satisfied the applicable conditions, not on the actual consequences of a breach of one of the requirements of the scheme". Therefore, whether a client has actually suffered prejudice is irrelevant as to whether there has been a material breach of the rules. The time for determining whether there has been a breach is at the date of the CFA and not some later point.

The effect of this conclusion is that where the Court is considering whether there has been a breach of the requirement to consider the availability of alternative funding (Regulation 4(2)(c)) it is irrelevant that the client in fact had no relevant BTE cover. This conclusion matched that of the Senior Costs Judge Master Hurst in *Samonini v London General Transport Services Ltd* [2005] EWHC 90001 (Costs).

Therefore, in the *Myatt* case, the Court upheld the decision of the lower court that the CFAs were invalid. The Court agreed that the solicitors had failed to advise the claimants as to whether they already had relevant BTE cover. Although they had

asked the clients whether they held BTE cover that would cover their risks in respect of the claims, they were not the kind of litigants who could be expected to be able to properly answer this question themselves. There was thus a breach even though none of the claimants did in fact have BTE cover.

The Court gave some wider guidance as to what would represent proper enquiries to comply with Regulation 4(2)(c). The Court rejected the view that the guidance previously given by the Court of Appeal in *Sarwar v Alam* [2001] EWCA Civ 1401 should be slavishly followed. In their judgment "the statement at para 45 that a solicitor should normally invite a client to bring to the first interview any relevant policy should be treated with considerable caution. It has no application in high volume low value litigation conducted by solicitors on referral by claims management companies." There was no rigid code that applied in all cases. The relevant issues included:

- What is reasonably required of a solicitor depends on all the circumstances of the case.
- The more evidently intelligent and knowledgeable about insurance matters the client is the more the solicitor can rely on the answers the client gives as to whether suitable BTE exists.
- The circumstances in which the solicitor is instructed may be relevant to the nature of the enquiries that it is reasonable to expect the solicitor to undertake in order to establish the BTE position. Where the client, for example, is seriously ill in hospital, the enquiries required will be far less onerous.
- The nature of the claim may be relevant. If the claim is one in respect of which it is unlikely that standard insurance policies would provide legal expenses cover, this may be a further reason why it may be reasonable for the solicitor to take fewer steps to ascertain the position than might otherwise be the case.
- The cost of the ATE premium may be a relevant factor. The availability of ATE cover at a modest premium will inevitably restrict the extent to which it will be reasonable for a solicitor's time to be used in investigating alternative sources of insurance.
- If the claim has been referred to solicitors who are on a panel, it may be relevant that the referring body has already investigated the question of the availability of BTE. Whether it is reasonable to rely on any conclusion already reached will be a matter on which the panel solicitor must exercise his own judgment.
- A solicitor is not required in every case to ask the client who says that he has a home, credit card or motor insurance or is a member of a trade union to send him the policy or trade union membership document.

Although the judgment then went on to discourage defendants from embarking on fishing expeditions in the hope that if they ask enough questions they will be able to show a breach, the vagueness of this guidance is likely to see technical challenges relating to Regulation 4(2)(c) increasing rather than decreasing, but with increasing inconsistency between decisions.

The case of *Garrett v Halton Borough Council* concerned a case that was referred to the Claimant's solicitors by a claims management company called Ashley Ainsworth. The judge on assessment disallowed the entirety of the solicitors' costs on the grounds that he considered that they had acted in breach of Regulation 4(2)(e)(ii) of the Regulations: in recommending the ATE insurance that they recommended, they had

failed to inform the client whether they had an interest in doing so. This was on the basis that although the solicitors had told their client that they were on the panel of Ashley Ainsworth they had failed to inform the client that they thereby had an indirect financial interest in recommending the policy because if they did not they would have their panel membership withdrawn.

The Court of Appeal upheld this decision on the grounds that there was a close relationship between the solicitors and Ashley Ainsworth because the solicitors were dependent on them for referrals of cases. The profit generated by cases was likely to be of greater significance to the solicitors than commissions paid on insurance premiums paid for ATEs in connection with CFAs. The indirect financial interest in maintaining a flow of work through membership of a panel of solicitors was therefore greater than the direct financial interest in commissions paid for insurance premiums. The solicitors had therefore not disclosed to the clients 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 ATE policy. The client did not know that the solicitors were recommending the policy because this was dictated by their financial interest. Again, this breach was held to be material and the CFA invalid.

This decision is likely to have a significant impact on a large number of other cases as the wording used in relation to the interest in recommending the insurance is similar or the same to that used in a large number of other claims management schemes.

These two decisions, following the Court of Appeal's earlier decision in *Jones v Caradon Catnic Ltd* [2005] EWCA Civ 1821 leaves wide open the doors to technical costs challenges by defendants. The scope for significant savings on pre-November 2005 CFAs remains.

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