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- The Defendant Costs Specialists

Costs Law Update – Defective CFAs

The, now revoked, Conditional Fee Agreement Regulations 2000 continue to cause problems for claimant solicitors as two cases where Gibbs Wyatt Stone appeared for the defendants show.

Suinner v FBN Bank (UK) Limited

In the case of *Suinner v FBN Bank (UK) Ltd* [SCCO] 22/2/07 the Claimant instructed Sherringtons solicitors to act for him in relation to an EL matter under a Conditional Fee Agreement (CFA). The CFA recommended that the Claimant take out an after-the-event (ATE) insurance policy with Costsupport. The CFA stated that: "This is because" but was then blank where the reasons for the recommendation should have appeared. This prima facie amounted to a breach of Regulation 4(2)(e)(i) which requires 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 -
>
> (i) his reasons for doing so, and
> (ii) whether he has an interest in doing so."

Whether the breach was material became obvious from the nature of the ATE policy that had been recommended. The policy premium was calculated as being a percentage (20%) of the damages recovered. This is an unusual method of calculation and had been the subject of previous judicial consideration by the Senior Costs Judge, Master Hurst, in *Pirie v Ayling* [2003] EWHC 9006 (Costs). He concluded that although such a method was lawful, it was inherently flawed and substantially reduced the amount claimed. What was significant about this decision, which was made prior to Mr Suinner instructing Sherringtons in his claim, was that the Claimant's solicitors in *Pirie* were also Sherringtons. (Coincidentally, Simon Gibbs who appeared for the Defendant here also acted for the Defendant in that case.) Therefore at the time that they were recommending that Mr Suinner obtained a policy with Costsupport they were already aware that the premium calculation was inherently flawed and was unlikely to be recovered in full at detailed assessment.

Mr Suinner's claim was pitched at one stage as being in the region of £150,000. If damages had been recovered at that level the premium would have been £30,000. A premium that high would have been grossly excessive for an EL claim of this nature and well in excess of equivalent policies available at the time. Further, the Costsupport policy only provided an indemnity of £10,000. If the matter had proceeded to trial the cover would have proved entirely insufficient. Indeed, that is

precisely what happened when the Claimant lost at trial on the Defendant's Part 36 offer. The Defendant's costs for the relevant post-Part 36 period were claimed in excess of £18,000.

It was argued for the Defendant that the failure to give any reasons for recommending the Costsupport policy was particularly serious in light of the policy that was being recommended. The failure to explain that it would be highly unlikely that the premium would be recovered at much more than a fraction of its full amount, meaning that the Claimant would be liable for the shortfall, and the failure to explain that the level of indemnity was likely to prove insufficient meant that the Claimant was unable to make an informed decision as to the suitability of the policy at the time of entering into the agreement. Reliance was placed on the following passage from *Garrett v Halton Borough Council* [2006] EWCA Civ 1017:

> "101. At para 90 of *Hollins v Russell,* the court recorded the submission 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 Ms Garrett that they were on the Ainsworth panel, the Websters representative did not disclose the real financial interest they had in recommending the NIG policy."

As such, it was clear that not only had there been a breach of the Regulations but that such a breach was material. The Court accepted these submissions and all the Claimant's costs incurred under the CFA were disallowed (having been claimed at over £10,000).

Brady v Rec-Tech Leisure Ltd

In the case of *Brady v Rec-Tech Leisure Ltd* (Tunbridge Wells County Court, 24/4/07), the Claimant, through her litigation friend, instructed Branton Edwards solicitors (now Branton Bridge) to act under a CFA. The case had been referred to Branton Edwards through Result Management Ltd (Result), a claims management company. The CFA recommended that the Claimant obtain an ATE policy with NIG or IOMA. The CFA stated that Branton Edwards had no interest in recommending the policy. In fact, the policy that was being recommended was issued by Result with the insurers being either NIG or IOMA. In a covering letter sent to the Claimant's litigation friend the following information was provided:

> "Result
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> 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 you case."

During the detailed assessment proceedings it emerged that the two partners, at the relevant time, each owned 50% of Result and that for each policy issued Result received a commission of £300 out of a premium of £900. Branton Edwards was the only firm who received referrals from Result. There were no other "panel" members.

It was argued for the Defendant that in truth the solicitors did have a financial interest by virtue of the commission payments received by Result, which in turn was owned by the partners, and by virtue of the fact that the firm had a financial interest in the success of Result to ensure the continued stream of referrals. It was further argued that the information given to the Claimant's litigation friend failed to properly advise of these interests as required by Regulation 4(2)(e)(ii) (see above). The litigation friend was not properly informed of the relationship between NIG/IOMA and Result or of what that interest actually was – the payment of a £300 commission. As such, she was unable to make an informed decision as per paragraph 101 of *Garrett* (see above).

District Judge Lethem, sitting as Regional Costs Judge, accepted the Defendant's submissions and ruled the CFA to be invalid resulting in a saving to the Defendant of approximately £20,000. Of wider significance, he accepted the Defendant's arguments over those of the Claimant in that the Regulations required a claimant to be informed as to what the actual interest was. It was not sufficient to simply inform a claimant whether or not there was an interest. This was the effect of reading Regulation 4(2)(e)(ii) together with 4(2)(e)(i). The requirement to explain why a policy is being recommended (Regulation 4(2)(e)(i)) must therefore include the details of what that interest is under Regulation 4(2)(ii). DJ Lethem accepted that this was the effect of the Court of Appeal's decision at paragraph 101 of *Garrett* with the reference to the failure by the solicitors there to "disclose the real financial interest".

It seems probable that the defective wording used in this case was also used in other CFA cases run by this firm during this period.

These two cases show that successful challenges continue to be available for claims where the old CFA Regulations apply. Although the volume of these claims is reducing over time, the outstanding cases are by their nature likely to be those where the level of costs is relatively high. Such claims are those where a careful consideration of the merits of a technical challenge is most justified. Gibbs Wyatt Stone remains committed to providing its clients with the best possible advice and advocacy in this area of the law.

Contact

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