IN THE WANDSWORTH COUNTY COURT 6WT05411.

Wandsworth County Court,
76-78 Upper Richmond Road,
Putney,
London SW15 2SU.

Thursday, 15th December 2011.

Before:

HIS HONOUR JUDGE MITCHELL

SIMON KING Appellant

- v -

THAMES WATER UTILITIES
TRANSPORT FOR LONDON Respondents

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MR BUTLER (*instructed by solicitors)* appeared on behalf of the Appellant.
MR GIBBS *(instructed by Gibbs Wyatt Stone)* appeared on behalf of the Respondents.

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JUDGMENT
*(Approved)*



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Thursday, 15th December 2011.

JUDGMENT:

JUDGE MITCHELL:

01 This is an appeal from a Costs Judge Master Leonard, who had a hearing in connection with this matter on 22nd March 2011, who then produced his judgment by 8th April 2011 and presumably sent it off that day and it was formally handed down on 14th April 2011. What was at issue was whether or not the Conditional Fee Agreement that had been entered into between the Claimant and his solicitors was consistent with the relevant Regulations, and he found that it was not. He did however give permission to appeal according to the Form N460 and he said:

> *'On a finding that the Claimant's CFA is unenforceable due to a breach of the Conditional Fee Agreement Regulations 2000 the Claimant has a real prospect of establishing that the breach was not material.'*

That was not the correct basis on the appeal, which was that on the facts before the Costs Master he should have found the opposite, namely, there had been compliance, and the costs were recoverable. The issue really is whether there has been a breach of Regulation 4(E)(2) of the Conditional Fee Agreement Regulations 2000.

02 These appeals used to be fairly prevalent but they have ceased to be so since the Regulations themselves were repealed, so we are dealing with a considerable period of time ago. The Regulations are these – these are the relevant ones – it is 4(E)(1) and (2) and also Regulation 5. Regulation 4(E) says this:

> *'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 (1) his reasons for doing so and (2) whether he has an interest in so doing'*

and para. 5(5) provides this:

> *'Information required to be given under para. 1 about the matters in paras. 2(A)-(D) must be given orally whether or not it is also given in writing but information required to be given about the matters in para. 2(E) and the explanation required by para. 3 must be given both orally and in writing.'*

That is an important aspect of this case in our judgment.

03 At any rate, Mr Butler's position on behalf of the Appellant is that the findings of fact by Master Leonard were in turn so unreasonable that no reasonable tribunal could have come to those conclusions on the evidence put before him. He relies very heavily not only on the evidence of Mr Holt, the solicitor who conducted the case, but also Mr Campbell, a solicitor who is also a director of the National Accident Helpline, which are



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responsible ultimately for obtaining insurance. Mr Butler's contention is that if you take their uncontradicted evidence there is no breach at all because it has never been in dispute that there is freedom to use another policy and there is no dispute that they are not bound to use the particular policy. He goes further and says that that was conceded by Mr Gibbs, his opponent, at the hearing – I am not going to refer specifically to the passages to which he referred – and also that the solicitor had declared an interest to the client. I am going to cite the paragraphs of both solicitors' statements which have been most heavily relied upon. Mr Holt said this at para. 6:

> *'My standard practice would be to reiterate the points already made in the Client Care Guide'* (to which I shall in fact refer in a moment): *'A. I would explain this firm's panel membership of National Accident Helpline and that this firm would pay a referral fee for the introduction of the client. I would explain that the Benchmark policy was the preferred policy for NAH but that I was not at all constrained in my choice of policy. The Benchmark policy was however in my opinion appropriate in this case in view of the level of cover provided, the level of premium and the fact that the payment of the premium was deferred. C. I would explain that a commission was payable as a result of using the policy and that such commission would be in the region of £56, and that the client was fully entitled to ask for such commission to be payable to them if they so chose but that if they did not do so this firm would receive the commission as compensation for the time spent in undertaking the work done under delegated authority from Alliance Cornhill in risk assessment and policy inception.'*

Paragraph 7:

> *'Although I cannot profess to have any specific recollection in this case there is no reason to believe that I would have diverted from my standard practice.'*

04 Mr Campbell, a director of NAH and solicitor, also says this. I should add that in fact the solicitor in fairness to him, Mr Holt, was referring to a considerable time earlier in his statement. It is not surprising he could not remember exactly what was said, because the accident had occurred on 12th December 2003 and the claim was settled on 21st February 2008, so it was obviously at some considerable time ago when any conversations or whatever he might have had had taken place. Mr Campbell said this, and paras. 6-10 of his statement have been quoted I think by both counsel – certainly some of them have:

> *'Benchmark ATE insurance is probably the leading ATE insurance in use with Conditional Fee Agreements. Underwriting the policy Alliance were adjudged General Insurer of the Year for 2004 and 2005 and awarded Legal Expenses Insurer in 2005.*
>
> *7. Benchmark is the NAH preferred policy for cases generated for subscribing firms by NAH Services. NAH has a good reputation to uphold. Because of the integrity and security of the underwriting and the suitable appropriate and proportionate features for client costs cover Benchmark is also the preferred choice for many firms across the country who do not subscribe to NAH Services.*



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*8. It is not and never has been a requirement under the NAH licence agreement between NAH and subscribing firms that Benchmark must be recommended on all cases. Firms have a duty under the licence agreement and under the Solicitors' Code of Conduct to act in the best interests of their clients in relation to insurance and funding. Many firms on the panel currently use alternative policies, particularly for multi-track work where Benchmark may not be suitable in a particular case.*

*9. NAH have made it clear to all solicitors using Benchmark insurance whether NAH subscribing members or not that in each case when considering funding and insurance they must always use their professional judgment and act in the best interests of the clients.'*

05 Mr Gibbs at this point raised a question in relation to that first sentence of para. 9 when was it made clear, because his submissions are it really is not terribly clear at all, and para. 10:

*'A firm will not be ejected from the NAH scheme for failing to recommend Benchmark, for using an alternative ATE policy or for using any other suitable funding in a particular case.'*

06 It is quite clear to us that what really troubled the Master in the Costs Office was in fact the conflict – and it *is* a conflict – between those oral statements and in fact the material that was provided by Mr Holt to clients in the context of the leaflet which is headed *'Getting the best from us – a guide for our clients.'* What is said there is under para. 12:

*'Further, it is a requirement of NAH that should it be necessary to offer you After The Event insurance cover that the policy is provided by Alliance Cornhill Legal Protection. Further information relating to the benefits of an Alliance Cornhill policy is set out at 11 above and will be amplified in due course.'*

Then Mr Gibbs relies further on the paragraph that follows:

*'If on the other hand you were referred to this office by Asyst, it is a requirement of Asyst that should it be necessary to offer you After The Event insurance that the policy is provided by Keystone Legal Benefits Ltd and further information about them is set out above.'*

07 So it seems to us that the Master was having to wrestle with what appeared to be a conflict on the uncontradicted evidence which he had put before him. The question for us is how he went about his task, and what he did was at p. 56 having set out some of the matters to which I have referred and other matters as well he set out his conclusions on the facts. Again these passages have been quoted at some length during the course of this hearing. What he said was this:

*'If it is the aim of the evidence of Mr Holt and Mr Campbell to demonstrate that as at January 2004 NAH has never required Stone Rowe Brewer to recommend the Benchmark policy to clients referred by them then that aim has not been achieved.'*



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So in other words he was not satisfied on the evidence that they had to demonstrate the requirements, and he said:

> *'I say that for the following reasons. 31. Stone Rowe Brewer's standard Client Care Guide as revised in December 2003 and sent to the Claimant plainly stated that it was a requirement of NAH that should ATE cover be offered to a client referred by NAH that ATE policy was to be provided by Alliance Cornhill Legal Protection. The policy referred to, as is evident from the face of the document, was the Benchmark policy.*
>
> *32. It seems to me to be inherently unlikely that such a statement would ever have been included in a standard Client Care Guide unless it was or had at some point been true. It also seems to me that if such was no longer the case in January 2004 the (very recently revised) Client Care Guide sent out to the Claimant would not have said that it was.*
>
> *33. This conclusion is reinforced by the fact that the document identifies two different referrers of prisoners(?) NAH and Asyst, each of whom specifically required Stone Rowe Brewer to recommend a particular policy from a particular insurer (Alliance Cornhill for NAH and Keystone Legal for Asyst). This is not consistent with a free choice of ATE policy by reference to the best fit for a particular client. It is consistent with a practice of using whichever policy the particular organisation referring business requires.*
>
> *34. Mr Campbell's statement offers no solid evidence that might lead to a different conclusion. Mr Butler asked in forcible terms that we reject that. We cannot accede to that submission.'*

08 The Master went on to say:

> *'He states that it has never been a requirement of the NAH licence that the Benchmark must be recommended "in all cases."'*

That is a proposition with which Mr Butler does not take issue. The Master goes on to say:

> *'It does not follow that such a requirement was never imposed other than in the licence agreement nor that solicitors never at least expected routinely to use the Benchmark policy unless for example it were to be manifestly unsuitable for a particular case.*
>
> *35. Otherwise his evidence relates to the present day.'*

How can he reach that conclusion, says Mr Butler? It may be that he is not entitled specifically to reach that conclusion but he was voicing throughout the judgment the concern that he had before him in fact evidence which was not particularly specific to the particular time. He went on to say:



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*'I am perfectly willing to accept that at the date of his statement a firm would not be ejected from the NAH scheme for failing to recommend Benchmark but I need to know the position as at January 2004. Nor does it assist me to know that NAH has made it clear to all solicitors that when considering funding and insurance they must always use their professional judgment because it does not say when NAH did so.*

*36. Mr Holt's evidence does little more to assist the Claimant's case. He does not say that there has never been an obligation on Stone Rowe Brewer to recommend the Benchmark policy; the exhibits to his statement indicate not only that there was once such an obligation but that it existed in January 2004 when the CFA was signed.*

*37. Regrettably, Mr Holt's evidence as to his firm's practice as at 7th January 2004 is self-contradictory.'*

That is with respect a statement with which this court entirely agrees, and the Master goes on to say:

*'If, as he says at para. 6 of his statement, his firm's standard practice was then to reiterate verbally the points made in the firm's Client Care Guide, that will have entailed repeating its confirmation that it was a requirement of NAH that any ATE policy should be provided by Alliance Cornhill Legal Protection not (as he says at para. 6b) saying that he was not at all constrained in policy choice.*

*38. Given that Mr Holt is attempting to recollect his standard practice more than six years before the signature of his witness statement, it is entirely understandable that he has no specific recollection of this particular case. Given that he does not explain the discrepancy between his recollection of his firm's standard procedure and the Client Care Guide that his firm was using at the relevant time, I am driven to the conclusion that he is recalling a standard procedure that evolved after the date of the signature of this Claimant's CFA. Accordingly, my conclusion is that as at 7th January 2004 Stone Rowe Brewer were under an obligation to NAH to arrange the Benchmark policy that was used for the Claimant's ATE cover.'*

Mr Butler takes issue with that, but in our judgment we would entirely approve:

*'Given that NAH (according to Stone Rowe Brewer's Client Care Guide) imposed a requirement to that effect, it follows that failure to comply with the requirement could risk the commercial relationship between Stone Rowe Brewer and NAH and lead to the loss of exclusive referrals from the specified territory set out in the licence agreement.'*

Mr Butler submits about that that simply cannot be correct, but in our judgment it is correct. Mr Butler, whilst submitting with some force in relation to a number of the points that he advanced upon us, did in fact to some extent have to swerve around – if that is not an inelegant phrase – the fact that on the Client Care letter it was extremely specific.



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09 We have also been referred to *Garrett* and *Tankard*, and the Master referred to them in this way. At para. 42 he acknowledged the test he must apply is that identified in the judgment of the court in *Tankard v John Fredericks Plastics and another* [2008] EWCA Civ 1375 and at para. 13:

> *'For the purposes of Regulation 4 a solicitor has an interest if a reasonable person with knowledge of the relevant facts would think that the existence of the interest might affect the advice given by the solicitor to his client.*
>
> *14. Regulation 4 is concerned with giving the client who is considering entering into CFA sufficient information and advice to enable him to take a properly informed and considered decision. He can only do so if he is given information and advice which are not in any way affected by the solicitor's self-interest. The purpose of the Regulation is to ensure that the solicitor acts and gives advice independently of his own interests.'*

At paras. 43 and 44:

> *'In approaching this issue, we bear in mind that the purpose of the Regulations is consumer protection. This means that in general terms they must be construed in a way which will promote rather than detract from such protection. It means in particular that Regulation 4(2)(E)(2) must be construed in a way which will ensure that the solicitor discloses to the client the true nature of his interest in recommending the insurance so that the client can make the necessary informed decision. This entails explaining to the client the nature of the benefits to the solicitor with sufficient clarity for the client to understand what they are and to be able to assess their significance.*
>
> *44. A solicitor who informs his client that he is recommending a policy because that is the only policy which he can recommend consistent with his membership of a panel tells the client nothing about the nature of the benefit that accrues to the solicitor through the continuing membership of the panel. The matter can be tested in this way. Suppose a large number of referrals accrue to the solicitor by reason of his membership of the panel merely to inform the client that the solicitor is recommending the insurance because if he does not he will be unable to take the case on or under a CFA and remain on the panel tells the client nothing about the real benefit derived by the solicitor from his membership of the panel.'*

10 Then the Master goes on to say at para. 45:

> *'In Tankard the solicitors were members of the Accident Line Protect ALP scheme. The Court of Appeal found that the overriding consideration for both solicitor and insurer was the quality of the Accident Line ATE policy. That was why the solicitor subscribed to the scheme and recommended the policy to their clients. They kept the scheme under review and only renewed their membership of it if they regarded it as in their clients' interests to do so. They were not, as there had been in Garrett v Holton Borough Council [2006] EWCA Civ 1017 any substantial dependence upon referrals from ALP such as to give rise to an interest*



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*by the definition adopted by the court. In the absence of such dependence or other particular facts there was no conflict of interest by reference to the test set by the court.'*

11 Mr Butler had submitted with some force that the factual situations in *Garrett* and *Tankard* were very different in that in *Tankard* he submitted, as here, the position was that it was the insurance that the solicitors were interested in, not the business that was referred, and that was the situation in *Garrett*, and he submits these are very different factual situations. We would respectfully agree that that is the case and having set out both his conclusions on the facts and his thoughts his final conclusions were these, and I quote from paras. 47 and 48:

*'In this case the client was informed directly that his solicitor had an interest (receipt of commission) in recommending his ATE policy. It does however appear on the facts that Stone Rowe Brewer had a further interest in the benefit of substantial referrals of work from NAH. It was in their interests to comply with NAH's requirement that clients used that policy should they need ATE insurance because doing so helped to secure exclusive referrals of business from the substantial area of South West London.'*

In that regard Mr Gibbs drew our attention to the fact that this firm were operating in most of the SW territory from SW11 to SW20, not quite every single area but a substantial area nonetheless. Para. 48:

*'In my view, the reasonable person with knowledge of the relevant facts would have concluded that Stone Rowe Brewer's interests in maintaining exclusive referrals from NAH from potential clients residing in the territory might affect the advice given by them to the Claimant in relation to his choice of ATE policy.'*

12 It seems to us that in the circumstances those were the only conclusions that the Master could properly come to. He was well aware when he gave his judgment and voiced his concerns about a lack of detailed evidence that in fact these cases of *Tankard* and *Garrett* in particular had caused mayhem (that may not be too strong a word) and indeed as a result of those decisions eventually the decision was taken to revoke the Regulations. Fundamentally, what – particularly my colleague takes this point – fundamentally was he right in was he obliged to use the policy? According to the statement, that was not the case; there was a clear conflict of evidence which was not in dispute, which he resolved in the way in which he did and which in fact – and his conclusions are not conclusions we would seek to disturb. In particular, as I say, my colleague is particularly anxious to make the point – and it is right, I agree with him entirely – that in fact he was obliged under 4(E)(2) to give advice both in writing and orally, and to some extent of itself may simply be sufficient to indicate that this appeal must fail. But we have dealt with all the points, I hope, which were both dealt with before the Master and raised before us on this appeal, and so the appeal must be dismissed.

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