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Case No: 86WT05411
CL 0904662

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Clifford's Inn, Fetter Lane
London, EC4A 1DQ

Date: 14 April 2011

Before :

Master Leonard, Costs Judge

Between :

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SIMON KING	**Claimant**
- and -	
THAMES WATER UTILITIES (1) **TRANSPORT FOR LONDON (2)**	**Defendants**

Mark Carlisle (instructed by **Stone Rowe Brewer**) for the **Claimant**
Simon Gibbs (instructed by **Kennedys and Morgan Cole**) for the **Defendants**

Hearing date: 22 March 2010

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MASTER LEONARD

Master Leonard, Costs Judge:

THE ISSUE:

1. The issue in this case is whether the Claimant's conditional fee agreement ("CFA") with his solicitors has been rendered unenforceable through any failure on their part to comply with Regulation 4(2)(e)(ii) of the Conditional Fee Agreements Regulations 2000.

2. On 12 December 2003, the Claimant was riding his motor scooter along The Embankment at a point near the junction of The Embankment and Westminster Bridge. A defect in the road caused him to be thrown from his scooter and injured. He sued the Defendants who, on 20 July 2007, accepted liability on a 50/50 basis. On 21 February 2008, the claim was settled in the global sum of £8,000, the Defendants to pay the Claimant's costs on the standard basis.

3. Following the accident the Claimant was referred to his solicitors, Stone Rowe Brewer, by the National Accident Helpline (NAH). On 8 January 2004, he signed a conditional fee agreement with Stone Rowe Brewer. At page 2 of the CFA, under the heading "Other Points" it read:-

> "...In all the circumstances, on the information currently available to us, we believe that the ***Benchmark 2*** contract of insurance is appropriate. Detailed reasons for this are set out in Schedule 2...we confirm that we do have an interest in recommending this particular insurance agreement."

4. Schedule 2 reads as follows. Under the heading "The Insurance Policy":

> "...In all the circumstances and on the information currently available to us, we believe that a ***Benchmark*** contract of insurance is appropriate to cover your opponent's charges and disbursements in case you lose.
>
> This is because Benchmark policy covers your opponent's costs and Stone Rowe Brewer's disbursements if you lose, providing cover of up to £100,000 and defers the premium to the conclusion of your claim.
>
> We are not, however, insurance brokers and cannot give advice on all products which may be available."

5. According to his witness statement dated 17 June 2010, on 15 December 2003 Mr Holt of Stone Rowe Brewer wrote to the Claimant asking him to bring to the initial interview copies of his family's motor, household contents and credit card insurance policy schedule so that he could personally inspect them. He subsequently did so and satisfied himself that there was no pre-existing legal expenses cover.

6. With his letter of 15 December 2003, Mr Holt enclosed a copy of Stone Rowe Brewer's standard client care guide. The version of that guide which he has identified as that sent to the Claimant was marked "revised December 2003". At paragraph 12,

under the heading National Accident Helpline/Asyst", the client guide read as follows:-

> "You may have been referred to this office by the National Accident Helpline or Asyst. If so, please note the following:
>
> If you were referred to this firm by the National Accident Helpline (NAH) then this firm has paid a fee to NAH for this service. The fee paid is variable depending on contribution to marketing and administration fees. On the basis of recent statistics, the average referral fee is to the order of £540. However, we confirm NAH does not have any influence or exercise any constraint on our professional judgment, in relation to advice that we will provide or in respect of our handling of your claim generally. However, we are obliged to provide you with the above information. If you do require any other details of the fee payable by us, then please let us know and we will endeavour to provide more specific information.
>
> 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 Allianz Cornhill Legal Protection. Further information relating to the benefits of an Allianz Cornhill policy is set out at 11 above and will be amplified in due course ..."

7. The guide goes on to confirm that if the client had been referred to Stone Rowe Brewer by "Asyst", Asyst would have required any ATE cover to be provided by Keystone Legal Benefits Ltd.

8. Paragraph 11 refers to the Allianz Cornhill Legal Protection Benchmark insurance policy (as well as the Keystone policy required by Asyst). It adds;

> "...it is our view that these policies are eminently suitable to your needs, bearing in mind that the premiums are competitive; the payment is postponed without interest to the conclusion of the case; that the premiums are waived should your claim prove unsuccessful...
>
> We would also draw to your attention to (sic) the fact that in recommending the Benchmark Policy this firm does have an interest in the same given that commission is payable to us as a result..."

9. On 7 January 2004 Mr Holt interviewed the Claimant. In the course of the interview Mr Holt gave verbal advice which is recorded in a "model script", signed by Mr Holt. The script is marked to confirm that Mr Holt had investigated and explained a number of matters, including "...an explanation as to why, and the reasons for, the recommendation of the case being funded in a particular way and what ATE is recommended, including whether the lawyer has an interest in recommending the ATE product (Reg 4(2)(e)(i) and (ii)?)" The precise nature of the interest disclosed is not specified.

THE LICENCE AGREEMENT

10. The Claimant had been referred by NAH to Stone Rowe Brewer pursuant to the terms of a licence agreement signed by NAH and Stone Rowe Brewer on 1 January 2002. Under the terms of that agreement, NAH as licensor licensed "Proprietary Marks" to Stone Rowe Brewer as licensee. Stone Rowe Brewer appointed NAH as its marketing agent in specified "territory" for the provision of personal injury referral services.

11. NAH's primary obligations were to screen personal injury and clinical negligence enquiries from persons residing in the "territory", undertake an initial investigation and (save for specified exceptions) to pass all screened and investigated cases from the "territory" to Stone Rowe Brewer. The "territory" comprised London SW11, SW12, SW15, SW16, SW17, SW18, SW19 and SW20.

12. Stone Rowe Brewer's primary obligations were to pay agreed fees and shared costs for NAH's services and to deal with enquiries to a specified standard, including the provision of management or supervision by members of the Law Society's Personal Injury Panel.

13. Paragraph 9 of the licence agreement gave both parties the right to terminate the agreement without cause by serving not less than four calendar months' notice in writing.

14. The agreement imposed no requirement to the effect that Stone Rowe Brewer recommend any particular insurance policy to a client referred by NAH. Nor did it provide for termination should such recommendation not be made.

THE REGULATIONS

15. Section 58(1) of the Courts and Legal Services Act 1990 provides that a CFA is not unenforceable if certain conditions are satisfied. As at 7 January 2004, those conditions included a requirement for the person providing advocacy or litigation services under the CFA to have provided to their lay client prescribed information before the agreement was made. Regulation 4 of the Conditional Fee Agreements Regulations 2000 (since revoked) specified the information to be given. If it was not given, the CFA would be unenforceable.

16. Regulation 4(2)(e)(ii) required Stone Rowe Brewer, before the CFA was made, to inform the Claimant both orally and in writing whether they had an interest in recommending a particular contract of ATE insurance.

17. The essence of the Defendants' case, if I understood it correctly, is this. Stone Rowe Brewer did inform their client that they had an interest in recommending the "Benchmark" ATE policy which was taken out by the Claimant on their recommendation. The specific interest referred to was that the firm had an interest in commission which would be payable to it as a result. Nonetheless, there was a breach of Regulation 4(2)(e)(ii) because the full extent and nature of their interest in recommending the policy was not disclosed.

18. What was lacking, says the Defendants, was a clear explanation of the indirect financial interest to Stone Rowe Brewer, in recommending the policy, of maintaining

a flow of work through membership of the NAH panel. If it was a requirement or expectation of NAH that the "Benchmark" policy be recommended, then it is reasonable to conclude that failure to comply with that requirement could create the danger of termination of the agreement under its general termination provisions and loss of the exclusive right to referrals from the area specified in the licence agreement.

19. Bearing in mind that Stone Rowe Brewer had the exclusive right to referrals (with some limited exceptions) to all enquiries made for the "territory" specified in the licence agreement, that amounted to a substantial interest to be disclosed to the client when recommending the policy.

20. It follows, says the Defendants, that non-disclosure was a material breach of regulation 4(2)(e)(ii). The CFA is unenforceable. The Claimant has no obligation to pay any sums due under the CFA and, by the operation of the indemnity principle, no right to recover them from the Defendants.

THE EVIDENCE

21. The Claimant's evidence is set out in two witness statements: from Mr Holt, as referred to above, and from Mr Campbell, Legal Director of National Accident Helpline Ltd, dated 22 June 2010.

22. Mr Holt confirms that as at December 2003, he was fully familiar with his obligations to advise the client in accordance with the Conditional Fee Agreement Regulations 2000. He says that his firm had developed appropriate assistance and documentation to ensure that appropriate advice was given in each case. At paragraph 6 of his statement he states:-

> "My standard practice would be to reiterate the points already made in the client care guide –
>
> (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.
>
> (b) I would explain that the Benchmark Policy was the preferred policy of 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 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; that the client was fully entitled to ask for such commission to be payable to them as they so chose, that if they did not do so, this firm would receive the commission as compensation for the time spent on undertaking the work done under delegated authority from Allianz Cornhill in risk assessment and policy inception."

23. At paragraph 7 of his statement, Mr Holt says:-

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

24. Mr Campbell explains that NAH provides "flag advertising" for a national network of over a hundred subscribing firms. NAH is an introducer-appointed representative of Allianz Legal Protection in relation to the Benchmark ATE Policy. That policy was developed by NAH jointly with Allianz Cornhill in 1999 and since then it has been offered to specialist personal injury solicitors, whether they subscribe to the NAH service or not.

25. Mr Campbell describes the Benchmark ATE insurance as

> "...probably the leading ATE insurance policy in use with Conditional Fee Agreements. Underwriting the policy, Allianz were judged General Insurer of the Year for 2004 and 2005, and awarded Legal Expenses Insurer of the Year in 2005".

26. At paragraph 7 of his statement, Mr Campbell says:-

> "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 more firms across the country who do not subscribe to NAH services."

27. At paragraph 8 of his statement Mr Campbell says:-

> "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 from multi-track work, where Benchmark may not be suitable in a particular case."

28. At paragraph 9 of this statement Mr Campbell says:-

> "NAH have made it clear to all solicitors using Benchmark insurance, whether NAH subscribing members are 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 client."

29. At paragraph 10 of this statement he says:-

> "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 any particular case."

CONCLUSIONS ON THE FACTS

30. 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. 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 Allianz 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 business (NAH and Asyst) each of whom specifically required Stone Rowe Brewer to recommend a particular policy from a particular insurer (Allianz Cornhill for NAH and Keystone Legal for Asyst). That is not consistent with a free choice of ATE policy by reference to the best fit for a particular client. It is consistent with the 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. He states that it has never been a requirement of the NAH licence agreement that Benchmark must be recommended "in all cases". 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. I am perfectly willing to accept that as 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 he 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 7 January 2004 is self-contradictory. If, as he says at paragraph 6 of his statement, his firm's standard practice was then to reiterate verbally the points already 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 Allianz Cornhill Legal Protection, not (as he says at paragraph 6 (b)) 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.

39. Accordingly my conclusion is that as at 7 January 2004 Stone Rowe Brewer were under an obligation to NAH to arrange that the Benchmark policy was used for the Claimant's ATE cover. 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 that 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.

40. Whether any specific contractual term provided for the termination of the relationship in such circumstances is beside the point: one has to look at the reality (see *Jones v Wrexham Borough Council,* [2008] 1 W.L.R. 1590 at paragraph 66).

WHETHER THERE HAS BEEN A BREACH OF THE REGULATION

41. It does not necessarily follow, from the factual conclusion I have reached, that there has been a breach of Regulation 4(2)(e)(ii). First it is necessary to consider whether the obligation to use the Benchmark policy gave rise to an interest within the meaning of the regulation, and if so what sort of explanation was required in relation to that interest.

42. The test I must apply is that identified in the judgement of the court in *Tankard –v- John Fredericks Plastics Ltd & Other Cases* [2008] EWCA Civ 1375. At paragraph 13):

> 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."

43. At paragraph 14:

> 14. "...regulation 4 is concerned with giving the client who is considering entering into a 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 interest".

44. At paragraphs 43 and 44:

> 43. 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)(ii) 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 consistently with his membership of... *(a)*... panel tells the client nothing about the nature of the benefit that accrues to the solicitor through continuing membership of the panel. The matter can be tested in this way. Suppose that 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 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..."

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 client's interests to do so. There was not (as there had been in *Garrett v Halton Borough Council* [2006] EWCA Civ 1017) any substantial dependence upon referrals from ALP such as to give rise to an interest 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.

46. In this case I do not doubt that NAH have cause to be proud of their policy, nor that the arrangements between NAH and Stone Rowe Brewer were intended to ensure the

provision of legal and insurance services to a high standard. It does not follow that NAH had no commercial interest in promoting the Benchmark policy, nor that Stone Rowe Brewer had no interest beyond that disclosed to their client.

CONCLUSIONS

47. 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 interest 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 a substantial area of southwest London.

48. In my view the reasonable person with knowledge of the relevant facts would have concluded that Stone Rowe Brewer's interest 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.

49. Accordingly Stone Rowe Brewer had an interest in recommending the Benchmark Policy which they did not disclose to the Claimant. In those circumstances, the Claimant had not had the opportunity to make the informed choice that the 2000 regulations, designed as they were for consumer protection, were intended to safeguard. That was a material breach of the 2000 regulations that the client could have relied on successfully against his solicitor.

50. It follows that their failure to do so constituted a material breach of Regulation 4(2)(e)(ii) of the Conditional Fee Agreements Regulations 2000 and that the CFA of 8 January 2004 is unenforceable.