

The Court of Appeal today handed down judgment in the conjoined appeals in Garrett v Halton Borough Council and Myatt & Ors v National Coal Board [2006] EWCA Civ 1017

Both appeals were dismissed, meaning success for the insurers. The upshot of the judgment is that technical challenges to CFAs live on (at least to those entered into prior to 1 November 2005).

The issues decided by the Court were:

Regulation 4(2)(c) (the requirement to investigate BTE insurance)

The Court held that a solicitor is required to undertake reasonable investigations into the possibility that the client has BTE insurance. Their Lordships identified three levels at which the question might be asked (especially where the solicitor never meets the client, which the Court acknowledged was often the case):

- a) The client is asked whether he or she has any credit cards or home or motor insurance at all and, if so, to send the policies to the solicitor
- b) The client is asked whether he or she has any BTE insurance at all and, if the answer is “yes” or “I don’t know”, the solicitor should ask to see the policy
- c) The client is asked whether he or she has BTE insurance which would cover them for the particular claim being contemplated

The Court’s view was that (c) would rarely be appropriate but that in many cases (b) would suffice. Beyond that, the Court declined to lay down any rigid guidelines. However, their Lordships did provide a non-exhaustive list of relevant factors to be taken into account:

- The nature of the client. The less likely the client is to understand his or her own policies, the more general the enquiries the solicitor must make.
- The circumstances in which the solicitor is instructed. For example, where the client is seriously ill in hospital, less extensive enquiries may be required
- The nature of the claim. If it is unlikely that standard BTE policies would cover the claim, then it may be reasonable to conduct less extensive investigations
- The cost of the proposed ATE premium
- Whether the referrer of the claim to the solicitor has already investigated BTE insurance

Regulation 4(2)(e)(ii) (the requirement to declare an interest in ATE insurance)

The Court rejected the appellants’ submission that Regulation 4(2)(e)(ii) requires only a direct financial interest, such as a commission, to be declared. If the solicitor is

obliged to recommend a particular insurance product because he or she is a member of a panel, then that must also be declared. It is not enough simply to tell the client that the firm is on the panel, because that does not make clear the solicitor's financial interest in recommending the insurance.

Their Lordships went on to note that, since 14 January 2005, this level of disclosure has in any event been required by the Solicitors' Financial Services (Conduct of Business) Rules 2001, and that solicitors who have complied with these Rules are unlikely to fall foul of Regulation 4(2)(e)(ii) in respect of CFAs signed after that date.

Materiality

The Court rejected the appellants' argument that materiality required *actual* rather than *potential* prejudice to the client. The provisions of s. 58(1) and (3) Courts and Legal Services Act 1990 were described as "clear and uncompromising". Their Lordships also acknowledged that the regime sometimes produced results which were "harsh or surprising", but that was what Parliament intended.

Materiality is therefore to be determined at the date of the CFA in the light of advice and information given by the solicitor and the relevant circumstances at the time, but not what happened subsequently. However, the circumstances at the time do not include – in a Reg. 4(2)(c) case – whether the client in fact had BTE insurance. Thus, in Myatt, the absence of BTE insurance did not render the breaches in failing to consider it any less material.

Furthermore, whilst their Lordships emphasised that Hollins was still good law, they suggested that its application might be limited to *de minimis* breaches of the CFA Regulations.

Conclusion

The Court's decision on the interpretation of Regulation 4(2)(c) is only going to lead to more satellite litigation. Their Lordships' attempt to walk a tightrope between client protection and not over-burdening solicitors doing high volume, low value work from claims management companies has resulted in a complete absence of the certainty which solicitors and insurers were hoping this decision would bring.

On the other hand, the decision on materiality, following the Court's recent decision in Jones v Caradon Catnic [2005] EWCA Civ 1821, suggests a toughening of the Court of Appeal's stance since Hollins.

The effect of these cases, therefore, is that challenges to CFAs can and do succeed. With many thousands of pre-November 2005 CFAs still in being, CFA litigation will be with us for the foreseeable future.

Jamie Carpenter on behalf of the Hailsham Chambers Costs Group