Minutes of APIL South of England Regional Group Meeting
Farnborough 05/12/06

We had an excellent turn out on 5 December of 27.

The main topic was presented by District Judge James who very kindly came along to speak to us with regard to the recent cases of Myatt & Garrett, both of which can be potentially troublesome to Claimant PI practitioners.

District Judge James

District Judge James is a full time District Judge who sits at the Aldershot and Farnham County Court. He is also the Regional Costs Judge. He did helpfully tell us a little bit about the concept of Regional Costs Judges which is a fairly new phenomenon.

Regional Costs Judges will generally conduct the assessment hearing where:

a) The time estimate for assessment is greater than one day
b) Bills are over £50,000
c) Where there are complex arguments with regard to costs

Myatt & Garrett

Obviously the District Judge was recognises that these decisions have not been terribly well received by Claimant practitioners. He reminded us that they deal with Regulation 4 of the CFA Regulations 2000, which have subsequently been repealed, though not retrospectively. They apply to all CFAs pre 01/11/05.

He, like most others, had thought that the criteria for enforceability of CFAs had been dealt with in the case of Hollins v. Russell which is clearly not quite the case.

Lord Justice Dyson presided over these cases.

There were two issues to be dealt with:

i) Whether reasonable steps had been made to fund BTE cover
ii) The extent of the duty to declare an interest in an insurance product

Points from Lord Justice Dyson

a) Whether the test of materiality breach meant that the client had suffered actual prejudice, he made it quite clear that it was not necessary to prove this.

b) In terms of enforceability of the CFA, one would look at the circumstances pertaining at the time the CFA was entered into, meaning that if it transpired there was no BTE cover available in any event, that would not necessarily be relevant.

Dyson's reasoning when looking at Section 58(1) was that the scheme was designed to protect clients and require solicitors to comply.

He was clearly aware, when giving his judgement about the harsh consequences of the decisions but he was not overly concerned with this.

It is probably of small comfort to us that any breach regarded as "trivial" would not be regarded as a material but clearly the definition of trivial appears to be quite narrow.

In the Myatt case Master Wright who gave the first instance decision looked carefully at the questions that the solicitor had asked with regard to BTE cover. The CFA was declared invalid because the wrong questions were asked by the solicitors even though he made enquiries about BTE cover and it subsequently transpired that there was no BTE cover in any event.

In summary Lord Justice Dyson said one would have to take into account

a) The nature of the client. Would the client have the intelligence to understand the question being asked by the solicitors. E.g. would the client really understand what was meant by "have you got any cover to pursue this claim?"
b) The circumstances in which one is instructed. For example if one is instructed by an old lady who has a short life expectancy it may be unreasonable to go on a treasure hunt looking for BTE cover.
c) The nature of the claim i.e. in terms of value and complexity.
d) The costs of an ATE premium, implying that if the ATE premium is set at a relatively low level this may help the solicitor with regard to any challenge.
e) The method of referral to the instructed solicitor. The referrer may well have already carried out diligent checks.

Garrett Decision

This did deal with slightly different issues.

The solicitors were the members of a panel, and were effectively tied to an insurance product, and were referred cases by that panel. Clearly they had an interest which was declarable, but no financial interest.

It would appear that the solicitor did not declare an interest, as there was no interest as such in the product but nevertheless the CFA was held to be unenforceable because the declaration had not been made properly.

What we do about pre-1/11/05 CFAs

Potentially we may well have to check all of our files to see if we are properly covered and whether checks have been made. If we are non-compliant it is an option (although it must be emphasised that this is not given as advice by anyone at the meeting) to start all over again.

In those cases, be prepared for an attack at the end of the case. Cover oneselves with a witness statement.

Consider obtaining witness statement from client which should deal with the question of BTE cover.

The feeling of the meeting generally however was that we should attempt to avoid any "fishing expeditions".

What about good news?

A case of Lusani –v- Butt

Predictable costs regime. Indemnity principle does not apply. That may be of small comfort and is not of much comfort in bigger cases not caught by the regime.

Post 1/11/05 CFAs

These cases do not apply to post 1/11/05 CFAS.

However Section 58 does still apply.

Though the District Judge did feel that we may only get limited challenges to post 1/11/05 CFAs, we nevertheless must be on our guard with regard to potential new challenges which the defendants are bound to try.

Other costs matters

The District Judge did very helpful answer some other questions that were put to him about costs generally.

1. Costs draftsman's hourly rates – generally he will allow £90 per hour in his Court.
2. How long before a hearing date before a regional costs judge – obviously it depends but probably at least 3 months.
3. Arguments put by defendants with regard to fee earner grade - encouragingly the judge said that he does have some sympathy with claimants here. He does of course accept that even if a lower grade fee earner could have conducted the case, undoubtedly a higher grade fee earner would have completed the case rather more quickly. He did say however that he may take a harder view with regard to the rate applied to letters and telephone calls.
4. Amanda Stevens did put an interesting question with regard to the amount of time it often takes to amend statements out of necessity when dealing with for example brain injury clients who may still have capacity just about. This was a rather more difficult question to answer.

David Pinto

David did set out a stark warning that the new Code of Practice with regard to CFAs has not yet been published.

No doubt the defendant will look at new forms of attack.

By now he will have had a discussion with the Law Society on 13/12/06 and will let us know his findings out our next meeting.

The Stevenson case with regard to costs is due to go to the Court of Appeal on 15/1/07.

Guidelines will be issued as to how to deal with challenges and in particular Part 18 Requests.

Generally

The District Judge did say that as a general rule he feels that Claimants or at least the receiving party succeed at assessment hearings.

Talk by Amanda Stevens/EC Committee at APIL Area Meeting for South

Amanda Stevens came along to the meeting as usual and gave us some useful updates:

Claims Process

- Department of Constitutional Affairs are considering issuing a "super protocol" for the claims process – watch this space
- There are considerations with regard to increasing the fast track limit up to £25,000 and introducing predictive costs to all cases, not just PI cases.
- APIL will be responding to these
- They will also be hosting a meeting at the House of Commons

Rehabilitation

- Again, the Code of Practice and Directory is likely to be revised
- APIL again want examples over defendants attempting to introduce rehab agencies who may not be wholly independent, for example, AIG and Cunningham & Lyndsey/Corporee
- Rehab providers – there is obviously a need to have a common set of standards

Case Management Companies

- Regulations – good news is that Roger Bolt is on a committee assisting the Regulator in setting standards
- Boleat has made it quite clear that CMCs with which we deal must be fully regulated. He has made his intentions very clear with regard to any prosecutions to be brought.

Third Party Capture

- We desperately need examples of this to be given to APIL

Annual conference

- Celtic Manor, 19 and 20 April – early bird rate available

Coroner's Inquest

- None of us are really quite sure what will happen here regarding Coroner's Reform Bill which has no legislative timetable set yet.

Mesothelioma claims

- There will be a draft protocol issued for these claims
- DWP will be issuing a code with regard to tracing of employers liability insurers