

Queen Elizabeth II Law Courts  
Red Cross Street  
Liverpool

Tuesday, 5<sup>th</sup> April 2005

Before:

HIS HONOUR JUDGE STEWART, QC

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Between:

DEBORAH GARRETT

Claimant

-and-

HALTON BOROUGH COUNCIL

Defendant

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MR BACON appeared on behalf of the Claimant/Appellant

MR WILLIAMS appeared on behalf of the Defendant/ Respondent

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Judgment (1)  
(As Approved)

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Transcribed by Harry Counsell & Co  
Official Court Reporters  
Cliffords Inn, Fetter Lane,  
London EC4A 1LD  
Tel: 020 7269 0370

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DRAFT JUDGMENT

HIS HONOUR JUDGE STEWART:

- 1 This is the appeal of Garrett v Halton Borough Council, which is an appeal by the claimant against a decision of Deputy District Judge Storry. Deputy District Judge Storry was dealing on the 28<sup>th</sup> October 2004 with a detailed assessment of the claimant's costs. He disallowed the entirety of the post-CFA costs, save for allowing the insurance premium. At this stage I have already indicated, before I heard from Mr Williams for the defendant respondent, that I intend to refuse permission on all matters, save one. In respect of that one further issue, I have heard in detail from Mr Bcaon, but I have not yet heard from Mr Williams and therefore I have indicated that I have not decided yet whether or not to grant permission to appeal, and if so what the outcome of that appeal would be.
- 2 The background to the claim is that the claimant suffered an accident on the 24<sup>th</sup> February 2003. The claim was actually settled. The claimant had been to solicitors and was represented by solicitors called Websters and they conducted the claim on a conditional fee agreement basis, the conditional fee agreement having been entered into with the claimant on 19<sup>th</sup> June 2003. The defendants agreed to pay the claimant's costs as part of the settlement.
- 3 When the matter came before Deputy District Judge Storry, the basis upon which he disallowed the costs to which I have referred was because of breach of regulation 4(2)(e)(i) of the Conditional Fee Agreement Regulations, which, so far as material, in conjunction with Regulation 4(1), reads as follows,

“Before a conditional fee agreement is made, the legal representative must (a) inform the client about the following matters; and (b) if the client requires any further explanation, advice or other information about any of those matters, provide such further explanation, advice or other information about them as the client may reasonably require.

(2) Those matters are: (e) whether the legal representative... considers that a contract of insurance is appropriate, or recommends a particular such contract. (i)... (ii) whether he has an interest in doing so.”
- 4 The position here is unusual in this sense. In the points of dispute, the defendant solicitors specifically set out the following, under the heading, “Interest in recommending insurance policy”

“The claimant solicitors advised the claimant that they had no interest in recommending the policy, whilst at the same time advising that the claimant solicitor was on the Ashley Ainsworth Panel. The defendant submits that panel membership in these circumstances amounts to an interest which should be declared. The defendant suspects that it is a condition of membership of the Ashley Ainsworth that the Ashley Ainsworth policy be used and that failure to comply would lead to termination of the panel membership. The defendant requests sight of all documentation relating to the claimant

solicitor membership of the Ashley Ainsworth Panel and also to the sight of the claimant solicitor's attendance note of 9<sup>th</sup> June 2003, when the question of insurance was initially discussed between the claimant and the claimant's solicitors."

- 5 The brief factual background is that on the 19<sup>th</sup> June 2003 there was a telephone note, which amongst other things stated this, "RJW" that is the claimant's solicitor, "also explained that Websters had no interest in the premium and it is between the client and AA, although we are on the AA Panel." Prior to that, on the 9<sup>th</sup> June, a letter had been sent, together with a draft CFA by Websters to the claimant, and the claimant had been advised to purchase a policy of ATE legal expense insurance from Ainsworths and a Certificate of Insurance was issued on the 10<sup>th</sup> June, although the insurance was not effective as at that date because it was necessary that a CFA was in place first before the policy was actually incepted.
- 6 The grounds of appeal which were put forward and upon which I have refused permission really amounted to three: 1. Was there a declarable interest under Regulation 4(2)(e)(ii), and if so what was it? 2. If so, in other words if there was a declarable interest, did Websters comply with the regulations in declaring the interest? 3. What is the effect of the fact that the Certificate of Insurance and the policy was dated 10<sup>th</sup> June 2003, i.e. prior to the date of the CFA itself, which was 19<sup>th</sup> June 2003?
- 7 I am not going to give very detailed reasons for refusing permission to appeal because these have been dealt with in argument and it is a refusal of permission to appeal, but very shortly the answers I give to those questions in refusing permission to appeal are as follows. Yes, there was a declarable interest because the allegation was made upon reasonable circumstantial evidence that if the claimant solicitors did not recommend the Ashley Ainsworth policy, which was with NIG, then that would lead to termination of the panel membership. That allegation has never been responded to. Allegations which have not been really the substance of the defendant's complaint had been responded to. The Aunt Sallies which have been knocked down are, one, that the claimant solicitors did not have a financial incentive, a direct financial incentive in recommending the NIG policy via Ashley Ainsworth, and secondly (and this is dealt with in more detail in a statement of Ian Austin Jones, which I have looked at but which was not before the District Judge) that the claimant's solicitors had actually told the claimant that they were on the AA Panel. But the crunch averment in the points of dispute was that failure to comply with recommending the NIG policy would lead to termination of panel membership, and I accept that from the lack of response to that direct matter that it is a proper inference that in fact it would have done so, in the sense that had the claimant solicitors, Websters, recommended to some clients to go elsewhere for their ATE insurance, then they would have been taken off the panel, or, as the Deputy District Judge put it slightly differently, "I am not satisfied that the claimant has established that the claimant solicitors have no interest in recommending this policy." Although not a direct financial interest, it would be a perfectly understandable indirect financial incentive, if by not recommending a particular policy, a solicitor was taken off a panel of solicitors where there was a not insubstantial amount of work fed through to them because they were members of that panel.
- 8 So the answer to the first question is there was ample evidence for the court to draw the inference that there was a declarable interest, that declarable interest being that failure to recommend the NIG policy would lead to termination of the Ashley Ainsworth Panel membership.

- 9 Did Websters comply with the regulation is the second point on which I have refused permission to appeal. What was argued there was that technically they did comply, in the sense that, when looking at the regulations, they informed the client under Regulation 4(1) about the matter, namely that they did not have an interest, because they have got to inform the clients whether they have an interest in recommending a particular contract of insurance and it is said they did inform the client that they did not have an interest, albeit that on the District Judge's ruling, which I have upheld, that that was wrong. It was accepted in argument that if solicitors acted fraudulently, which I emphasise is not the case here, and dishonestly told a client that they did not have an interest when they did, that they could not possibly be within the regulations. I am not going to rule specifically upon difficult cases where it might be a matter of very fine judgment, but it seems to me that as soon as one stands back from the position here and looks at it in any way objectively, then no solicitor standing back and looking at the matter could possibly come to any conclusion other than that they did have an interest in recommending this particular policy on the factual basis upon which I have operated earlier in this judgment. That being the case, it seems to me that there is no real prospects of success in arguing that they did actually comply with Regulation 4(2)(e)(ii).
- 10 As regards the fact that the policy was dated 10<sup>th</sup> June 2003 and that the CFA was not entered into until the 19<sup>th</sup> June 2003, there are a number of arguments why that is a point which does not have real prospects of success. The two of them which can be simply stated are these. Firstly, that the claimant had advice from the solicitors, Websters, on 9<sup>th</sup> June 2003, and secondly that the policy did not actually come into force unless and until this particular CFA recommending it was entered into and signed up by the claimant. So for those reasons the application for permission to appeal on those bases which I have already dealt with is refused, there being no real prospect of success.
- 11 I have dealt with them in a little more detail than I might otherwise do so because the next issue which I will have to determine, after I have heard from Mr Williams, is whether, having regard to the authority of *Hollins v Russell*, [2003] 1 W.L.R. 2487, the District Judge was right or wrong to then disallow, because of the breach which he found, and which I have upheld, of Regulation 4(2)(e)(ii), all of the claimant's costs, save for the insurance premium (which in principle was not disputed, although it was slightly reduced on assessment). I shall return later, having heard from counsel, to give my judgment on this point.

IN THE LIVERPOOL COUNTY COURT

Claim No. 4CL50785

Queen Elizabeth II Law Courts  
Red Cross Street  
Liverpool

Tuesday, 5<sup>th</sup> April 2005

Before:

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Between:

DEBORAH GARRETT

Claimant

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HALTON BOROUGH COUNCIL

Defendant

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MR BACON appeared on behalf of the Claimant/Appellant

MR WILLIAMS appeared on behalf of the Defendant/ Respondent

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Judgment (2)  
(As Approved)

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DRAFT JUDGMENT

HIS HONOUR JUDGE STEWART:

- 1 I now turn to the final point of the appeal, one which has caused me some difficulty, and although I have heard full argument, I nevertheless must separate the two questions in my mind. In other words, should there be permission to appeal, in the sense that there are real prospects of success, and if so, does the appeal succeed or fail? Having heard the arguments and accepting the concerns it has given me, although I have now come to a clear conclusion in my own mind, it would be disingenuous of me to say that there was not, a real prospect of success and therefore I am going to grant permission to appeal in relation to the question as to whether, in line with the tests set out in paragraphs 106 and 107 of *Hollins v Russell* the failure to comply with Regulation 4(2)(e)(ii) of the Conditional Fee Regulations, was rightly held to be fatal to the recovery of any solicitor's costs in this case.
- 2 Having granted permission to appeal, I now turn to consider the issue in some detail. First, Mr Williams said that the point was not taken below and therefore could not be taken here. Mr Bacon, for the claimant, relied upon page 43 of the bundle, page 16 of the transcript, lines 27 to 38, where Mr Phillips, then acting for the claimant, said that it would be disproportionate to have the solicitor's costs disallowed. It is right to say that the issue upon which I have given permission to appeal was put before the court by Mr Patel, then acting on behalf of the defendant, at bundle page 42, transcript page 15, lines 5 to 10, where there is a brief reference to whether the breach was material in *Hollins v Russell* terms. However, the argument was not developed by Mr Patel because the Deputy District Judge essentially told him he did not need to develop it at that stage and it was not really picked up by Mr Phillips. Therefore Mr Williams says that because of the case of *Tanfern*, with which one is, of course, familiar, and also a couple of other authorities to which he referred me to (although they were authorities after a trial where points had or had not been taken and were sought to be taken for the first time on appeal) I should not consider this issue and allow it to be argued in this court.
- 3 This point is somewhat different. The issue was before the Deputy District Judge. He had to determine, in order to deprive the claimants of their costs, not only that there was a breach of Regulation 4(2)(e)(ii), but also that that breach was one which was such that the test at paragraphs 106 and 107 of *Hollins v Russell* was satisfied. I will come to the test later. Therefore the issue was before the court. It may not have been properly or even hardly at all argued by Mr Phillips on behalf of the claimant, but it seems to me that if the claimant was to be successful in the appeal on that basis that is a matter which will properly be addressed in relation to costs, rather than a matter upon which the court should refrain from ruling. So I am going to deal with the issue and indeed, as I have said before, I have already given permission to appeal because there are real prospects of success.
- 4 The argument that has been put before me substantially, although perhaps not totally, focuses on, or what was meant by the Court of Appeal in paragraphs 106 and 107 of *Hollins v Russell* and also to some extent requires consideration as to when things are to be judged. In other words, are matters to be judged at the time the client enters into the CFA, or are they to be determined in relation to how things "come out in the wash"? And

both of those matters are the nub of the dispute between the parties on this point in the appeal.

5 I have to remind myself of the background to the case. In Section 58(3) of the Access to Courts and Legal Services Act 1999, Parliament provided this, "The following conditions are applicable to every conditional fee agreement," (c) "It must comply with such requirements (if any) as may be prescribed by the Lord Chancellor." Then Section 58A(3) provides, "The requirements which the Lord Chancellor may prescribe under Section 58(3)(c)-(a) include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made; and (b) may be different for different descriptions of conditional fee agreements..."

6 I have been taken to numerous paragraphs in **Hollins v Russell**. I do not intend to go through all of them, but I have borne them very much in mind. One of the background documents which the court took into account is referred to at paragraph 29 and there the Court of Appeal say this,

"It [and that is the Government] also decided to 'draw on the example of the Solicitors' Client Care Code' to require the legal representative to provide explanations of the different possibilities open to the client on the insurance front. This part of the paper concludes at paragraph 83. If the legal representative recommends a particular product but also has an interest in doing so, for example because he or she will receive a commission or is a member of the insurer's panel of solicitors, then this must also be disclosed to the client."

At paragraph 34 Regulation 4 is set out in detail. At paragraph 35 the court said this,

"It will be noted that Regulation 4(2)(e)(ii) gives effect to the Government's identification of the need for a legal representative to disclose any interest he may have when he recommends a particular insurance product."

At paragraph 53:

"We must take it to be the policy of Parliament that the paying party should be protected by the indemnity principle in relation to the CFA entered into by the receiving party, in other words, that he should be entitled to object to paying costs which he has been ordered to pay if they are made payable by a conditional fee agreement which is not rendered enforceable by Section 58(1)."

Paragraph 71,

"We consider that this is appropriate where receiving parties may claim more than they otherwise would be entitled to in circumstances in which the whole claim may turn out to be unenforceable. Non-compliance may be sufficient to remove the paying party's liability. The court is entitled and bound to have regard to the interests of paying parties and those to whom they pass on the costs... as well as those receiving parties. If these appeals are a fair measure of CFAs in general use, it is apparent that mistakes in complying with regulations are not uncommon."

At Paragraph 94, the court said this,

“However this subsection contains not one purpose but two, increasing access to justice and maintaining a proper and efficient system of justice. These two objectives have to be balanced. It cannot be the case that Parliament was entirely unconcerned with the interests of the other party to the litigation. The replacement Section 58, together with Section 58A, was enacted at the same time as paying parties were made liable for both the success fee and the ATE insurance premium. These are significant additional liabilities.”

The court then, at paragraph 105 to 107, said the following,

“We have already considered (in paragraph 1 to 40 above) the historical context of this legislation, its declared statutory objective, the extensions to the CFA regime in April 2000 and the purposes of the regime in Section 58 and the new regulations. In approaching the meaning of the words ‘satisfies the conditions’ we can be confident that Parliament would not have meant to render unenforceable a CFA which adequately meets the requirements which were designed to safeguard the administration of justice, protect the client and acknowledge the legitimate interests of the other party to the litigation. The other party to the litigation has no legitimate interest in seeking to avoid his proper obligations by seizing on an apparent breach of the requirements, which is immaterial in the context of the other two purposes of the statutory Regulation 106. The question whether something is ‘satisfied’ inevitably raises questions of degree, what is enough to satisfy?”

And then the court discusses that and towards the end of paragraph 106, continues,

“But in general conditions are sufficiently met when there has been substantial compliance with, or in other words no material departure from, what is required.

107. The key question therefore is whether the conditions applicable to the CFA by virtue of Section 58 of the 1990 Act have been sufficiently complied with in the light of their purposes. Cost judges should accordingly ask themselves the following question, ‘Has the particular departure from a regulation pursuant to Section 58(3)(c) of the 1990 Act, or a requirement in Section 58, either on its own or in conjunction with any other such departure in this case, had a materially adverse effect, either upon the protection afforded to the client or upon the proper administration of justice’.

If the answer is ‘yes’ the conditions have not been satisfied. If the answer is ‘no’ then the departure is immaterial and (assuming that there is no other reason to conclude otherwise) the conditions have been satisfied.”

- 7 I will come back to **Hollins v Russell** in a moment and the helpful guidance given by the Court of Appeal. Albeit that it is a carefully written judgment of the Court of Appeal, its words cannot be construed as a Statute; counsel made that submission in the course of argument. But I do need to focus carefully on the last words, particularly at paragraph 106 and paragraph 107. This is because Mr Williams’ submission, as I understand it, is that one does not look at the actual consequences of the breach to the client in terms of, in this particular case was the insurance policy a good one or a bad one, did it, the insurance policy, afford protection to the client which was as good as, or worse than, or better than other policies in the market. His submission is that if there has been a material departure

from the regulations, then the protection afforded to the client by the regulations has been materially adversely affected. Mr Bacon's submission is that I have to look and consider whether the breach is such that the product provided to the client was one where the protection afforded to the client under that product has been in fact materially adversely affected. In other words, notwithstanding the breach, is the insurance policy better than, worse than, or about the same as the policy which the client would have got absent the breach.

- 7 I prefer the argument of Mr Williams and I say that for various reasons. First, the language of the Court of Appeal in the last sentence of paragraph 106 and paragraph 107. It seems to me clear that the court is there stating that a material departure from what is required, or a lack of substantial compliance with what is required by the condition, is sufficient to amount to a breach which results in a non-recovery of costs. The reason I say that is because the court sets out the test in paragraph 106 and then from that test of substantial compliance with or no material departure from what is required, uses words such as "therefore" and "accordingly" in the early paragraphs of 107 to set out the question which the courts, the lower courts, must ask themselves when dealing with this issue. In other words, the question set out in paragraph 107 is a helpful test which is meant to mirror the test in the final sentence at paragraph 106. That is the first point.
- 8 The second point is this. If one considers the words "The protection afforded to the client" in the paragraph 107 question, then it seems to me clear that the protection which is being contemplated is the protection which the client gets by virtue of the regulations. There may, of course, be (to use Mr Williams' words) petty fogging breaches which are clearly to be swiftly disregarded by courts, and examples of those breaches are given in **Hollins v Russell** itself. But where the breach is something which is a material departure from what is required, then the protection which Parliament meant to give to the client has been materially adversely affected.
- 9 Next, one can perhaps test it this way. Later, in paragraph 222 of the **Hollins v Russell** case, the court said,

"Thus the judge conducting the assessment should first consider the position as between solicitor and client... if the court considers that as between solicitor and client, the client would have just cause for complaint because some requirement introduced for his protection was not satisfied... then the CFA will be unenforceable and the indemnity principle will operate in favour of the paying party."

So there the court is making it clear that when they are considering protection, they are considering it in the context of the protection afforded by the regulations, not whether the protection afforded by, for example, the policy of insurance here is better than, worse than, or roughly the same as a policy which would have been entered into absent breach of the regulations.

- 10 Next, if a solicitor, (i) should disclose to his client that he has a financial interest and does not, and (ii) the client then enters into an insurance policy which the solicitor has recommended, and in which the solicitor does have a financial interest, and (iii) if it be the case that the client subsequently finds out and does not want to pay (I am looking at the test under paragraph 222) would the client really have to show that the policy he got was worse than the policy he would have got absent the breach? Or would he not be entitled to say

“Parliament enacted this regulation under delegated legislation so that I would know whether or not my solicitor had an interest, my solicitor erroneously told me he did not when he did, and why should I have the trouble of trying to prove that I would be better off, worse off, absent that breach? The protection afforded to me under Regulation 4(2)(e)(ii) has been materially adversely affected.”

- 11 Mr Williams’ construction of the relevant section in paragraphs 106 and 107 of **Hollins v Russell** seems to me, with due respect, to be a much more consistent construction than the one contended for by Mr Bacon, with that which was said by their Lordships House in **London & Clydeside Estates Limited v Aberdeen District Council** in [1981] W.L.R. 182, particularly Lord Hailsham at 188H to 189F. It is true that at paragraph 109 of **Hollins v Russell** the court said this,

“We would however draw from *ex parte Jeyanthan* [2001] W.L.R. 354 and **Factortame (No 8) Case** [2003] Q.B. 381, the principle that sufficiency or materiality will depend upon the circumstance of each case. This is not to encourage paying parties to trawl through the facts of each case in order to try to discover a material breach, quite the reverse. At the stage when the agreement has been made, acted upon, and success for the client has been achieved, it is most unlikely that any minor shortcoming which the paying party might discover in the agreement or the procedures leading up to its making will amount to a material breach of the requirements or mean that the applicable conditions have not been sufficiently met.”

Of course, I accept that, and Mr Bacon relied upon it for suggesting that if, to use my expression, things had come out all right in the wash, then that was the time to judge whether the breach was material. I do not accept that, because otherwise the court might as well have said at the stage when the agreement has been made, acted upon, and success for the client has been achieved, then there will not be a material breach of the requirements. The focus in this paragraph that I should have is on the words “minor shortcoming”. I cannot regard a solicitor telling the client that they have no financial interest in a product when in fact they do have a substantial, albeit indirect financial interest in a product, as being a minor shortcoming and the word “minor” in paragraph 109 picks up the words “substantial compliance with” or “no material departure from” in paragraphs 106. One is at the far end of the spectrum from the other and I have no hesitation in finding that the circumstance of this case were a material departure from what was required by the regulations, rather than a minor shortcoming.

- 12 I should emphasise that there is no suggestion that the solicitors here were guilty of any moral turpitude. They, it seems to me, totally misconstrued the position under 4(2)(e)(ii), but that is not a matter which would have concerned their client in terms of the consumer protection of 4(2)(e)(ii) and therefore does not concern me in this particular case. It may be that if there had been, which there was not, moral turpitude then that might also have figured in relation to the second part of the test, which is in relation to the proper administration of justice under the paragraph 107 question.
- 13 Similarly, at paragraph 226 of **Hollins v Russell**, the court said this,

“In future district judges and costs judges must be equally astute to prevent satellite litigation about costs from being protracted by allegations about breaches of the 2000 Regulations where the breaches do not matter. They should remember that the law

does not care about very little things and they should only declare a CFA unenforceable if the breach does matter and if the client could have relied on it successfully against his solicitor.”

- 14 It seems to me that this breach was one which was not a very little thing, that the breach did matter and the client could have relied on it successfully against his solicitor in order properly to give effect to the will of Parliament, as expressed in the Courts and Legal Services Act 1999, Section 58, and Regulation 4(2)(e)(ii) of the relevant regulations.
- 15 I should finally mention this. It was argued by Mr Bacon that in the telephone note of 19<sup>th</sup> June 2003, it was helpful to his client/solicitor that the solicitor, RJW, “Also explained that Websters had no interest in the premium and it is between the client and AA, although we are on the AA Panel.” He said that in effect the client was being told that the solicitors were on the AA Panel and therefore it might be inferred that their breach was less material. I have said that I do not suggest that the solicitors were anything other than bona fide in this case but that extract could be read by some clients, not as being helpful to the claimant’s argument. Some clients might say, “Well he said he was on the AA Panel, but even despite that they had no interest in the premium” in other words reinforcing the point. It is capable of all sorts of construction, but it seems to me it does not take the argument any further one way or the other.
- 16 So for those reasons the appeal must be dismissed.

MR WILLIAMS: Your Honour, can I just make one very small correction, (Inaudible) because it may be my authority bundle that may have had led your Honour into a slip, I think on two occasions in the judgment. It is either Section 27 of the Access to Justice Act 1999, or Section 58 of the Courts and Legal Services Act 1990, because the latest actually substitutes the new section and I rather lazily perhaps put in the Section 27 rather than the Section 58.

JUDGE STEWART: Well I will try to recall that, if I have to, and amend the transcript.

MR BACON: It is a point I was going to make too.

JUDGE STEWART: Thank you.