Maurizio Samonini v London General Transport Services Ltd [2005] 19 January 2005

While members of the public continue to be blissfully unaware of the increasing prevalence of Before the Event insurance ("BTE") in policies that they have taken out for other purposes, such as motor or household insurance, lawyers are expected to be alert to BTE– and the penalty for overlooking it can be heavy, as the recent case of *Maurizio Samonini v London General Transport Services Ltd* [2005] 19 January 2005 demonstrates.

In *Samonini*, the CFA claimant, having prevailed at trial, appealed unsuccessfully against the disallowance of all of his costs. The original grounds were that there was insufficient evidence to show that the Claimant's legal representatives had made proper enquires into there was BTE prior to purchasing the After The Event insurance ("ATE") and entering into a CFA.

The claim in question was a straightforward rear-end collision valued at around £2,000. Relative to that, the ATE premium was a rather hefty £798. The cost of the satellite litigation in respect of the costs was thought to be in the region of £18,000.

The evidence was that the Accident Advice Helpline ("AAH"), which initially contracted with the Claimant to deal with his claim, inquired and were told the client had no BTE under his car insurance (subsequently confirmed in writing by his broker). The solicitors relied on that inquiry. There was no evidence that either party asked about his household insurance or asked to see his motor and household policies. Indeed, the transcript does not actually say whether such insurance was ever actually established to exist.

Regulation 4(2)(c) – the hurdles

In order to be enforceable, a CFA must satisfy the conditions set out in *Conditional Fee Agreements Regulations 2000*, including *Reg 4(2)(c)*, which requires that client be informed, prior to entry into the CFA "whether the legal representative considers that the client's risk of incurring liability for costs in respect of the proceedings to which agreement relates is insured against under an existing contract of insurance". To be able to give such information the legal representative needs to inquire whether the client has BTE.

Failure constitutes a breach of the regulations. The court will then consider what effect the breach should have. Following the Court of Appeal's decision in *Hollins v Russell [2003] 4 All ER* 590, the question costs judges should pose themselves is whether the breach has, on its own (or in conjunction with any other departure), had *a materially adverse effect* on either:

(i) the protection afforded to the client, or
(ii) upon the proper administration of justice

Breach of the Regulations

Regulation 4(2) (c) requires an inquiry but does not impose an absolute obligation to obtain copies of the client's motor and/or household policies. The grey area is how far a legal representative need pursue inquiries.

In the previous case of *Culshaw v Goodliffe (Lawtel - 24 November 2003),* following a failure to carry out an adequate enquiry into BTE it transpired that cover existed. The claimant had unequivocally (but incorrectly) confirmed that that she had no BTE. When her error was discovered, she failed to recover her costs. The court held that the existence of unused BTE was sufficient to justify an inquiry as to whether there was compliance with Regulation 4(2)(b) (though not all failures to use BTE will be unjustified, see Box 1). In *Samonini* there does not appear to have been any evidence that BTE existed. Instead, the court looked to the disproportionate size of the premium in relation to the amount at stake and the very straightforward nature of the accident as justifying looking behind the solicitors's signature to see whether there was a breach of the Regulations.

It is not clear whether the court would have regarded the solicitors' duty of inquiry as delegable to AAH and this question remains open. It was not decided because neither party's efforts were deemed adequate. This is hardly surprising since neither had taken the course advocated by the Court of Appeal in *Sawar v Alam* [2002] 1 WLR 125, where Lord Phillips observed:

"45. In our judgment, proper modern practice dictates that a solicitor should normally invite a client to bring to the first interview, any relevant motor insurance policy, any household insurance policy and any stand alone BTE insurance policy belonging to the client and/or any spouse, or partner living in the same household as the client[1]."

This admonition, although in the context of CPR 44.4 rather than the Regulations, will probably apply in cases under Regulation 4(2)(b). The position suggested in *Sawar* is not strict. Lord Phillips modified his comment at para 50, saying that, where ATE was available at a modest premium, a solicitor might be justified in not exploring alternative sources of insurance too widely. In *Culshaw* it was observed that the client's word that no BTE existed might be sufficient where the client was sophisticated in insurance, e.g., a lawyer or insurance professional. In *Samonini,* however, neither situation applied and the failure of solicitors to ask the client to produce any possible policies, could not, therefore, be justified.

Materially adverse effect

The court had no hesitation in concluding that entry into a CFA, a loan agreement, and an ATE, the premium for which was almost half the maximum damages to be expected was disproportionate and had a materially adverse effect on the client. This was not the sort of modest

[1] To which one might add "parents" if an adult is still living at home

premium envisaged in *Sawar.* Arguments that the Claimant would have funded the litigation in the same manner in any event, or that he elected (by reason of a term in his contract) to waive his right to draw on such insurance if it existed, were rejected. The court also noted the potential adverse effects listed in *Culshaw* (see box). If it was appropriate for the Claimant to undertake a policy with such a high premium the solicitor was under a duty to carry out careful investigation into alternative financing.

Proper Administration of Justice

The Court in *Samonini* had no hesitation in accepting the argument that if solicitors were permitted to skimp on the proper investigation of BTE then the administration of justice would be badly served since they would have no incentive to improve and the client would have been badly served.

The position for practitioners

Delineation is not precise. On the view stated in *Culshaw,* the duty is more than asking about legal expenses insurance but falls short of ""ferreting around for documents". Even then, simply asking may sometimes suffice. In *Hollins,* an elderly lady was still in hospital and with significant injuries, when a CFA was entered into. The Court of Appeal held that it had not been necessary, for the purposes of whether the CFA itself was *enforceable*, for the legal representative to wait till her home insurance policy had been located. It was sufficient that he had discussed it with her and formed a view (para 136). The Court expressly reserved its position, however, on whether the cost of the premium would be *reasonable* in those circumstances.

As a practical matter, it takes relatively little time to ascertain whether a motor or household policy includes BTE and many solicitors may feel that that an ounce of prevention is a worthy outlay of time. Grey areas still persist; would it be sufficient, for example, to seek written confirmation from the broker, or to ask the client to produce the policy but not to press the matter if he neglects to do so? What if the client denies (wrongly) that there is a household policy that may cover him (e.g. because it was purchased by a parent in whose household he lives)? We shall have to wait for answers to these questions.

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Box 1

1 when may court look into whether there was a breach

Court may look into whether here was a breach of the regulations if:

BTE insurance was available and not used, or

Size of the premium is disproportionate to the claim and/or nature of the accident

2 what steps are prudent

Inquiries should cover whether the insured, their spouse, partner, or head of their household has motor (if relevant) or household insurance or stand alone BTE.

If a possible policy exists it is not mandatory to view it but it is advisable as a matter of good practice (*Sawar*)

Failure obtain the insurances will rarely be excused but *may* not be regarded as a breach of the regulation in exceptional circumstances, e.g.:

- The ATE premium is very modest (*Sawar*)
- There is some other good reason why the client cannot be expected to produce the insurances (such as being seriously injured in hospital (*Hollins*)
- Claimant is sophisticated about insurance
- There is clear potential conflict of interest e.g. Passenger seeking to sue his own driver under driver's insurance

Box 2 - was the breach material - factors

Potential consequences of a breach must be viewed at the time the agreement was entered into, not after they materialized (or not).

Was there a risk that Claimant might be in worse position under CFA than under a BTE. For instance:

- Exposure to greater costs than he would pay under BTE
- Responsibility for barrister's fees/other disbursements even if carrying on, on advice, after a Part 36 payment.
- Difficulty in changing solicitors without charge.
- Exposure to paying charges to solicitor if he wishes to end the agreement.
- Exposure to a claim against his estate if he dies before trial or settlement
- Exposure to any shortfall between recoverable costs and the basic charges and disbursements under the CFA.

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