Claim No: PE1 04264

IN THE PETERBOROUGH COUNTY COURT

BETWEEN:

GEORGE ENGLISH

Claimant

And

WAYNE CLIPSON

Defendant

CLAIMANT'S SKELETON ARGUMENT

GROUND 1:

The District Judge was wrong to conclude that the obligations of regulation 4 CFAR 2000 could not be discharged by use of a representative of Accident Investigations Limited (AIL) to act as the Legal Representative's agent for the purposes of informing the client about the matters stipulated in that regulation .

1. The CFA Regulations 2000 define the term *legal representative* as meaning *the person providing the advocacy or litigation services to which the conditional fee agreement relates.*

2. The District Judge was wrong when he determined (page 13 of the Judgment) that in his opinion: *it is the authorised litigator who is granted a right to conduct litigation by his professional body in accordance with the Act who provides litigation services and is thus the legal representative.*

3. C submits that this cannot be the complete definition for all persons who may fall within the category of *legal representative* as it is used in the CFAR 2000.

4. The District Judge reached his definition by attempting to work backwards from the definition of *legal representative* given in CFAR 2000 to the Courts & Legal Services Act 1990 (as amended).

5. However, as the District Judge himself acknowledged, litigation may be conducted by a managing clerk or paralegal (Judgment page 14), neither of whom can be said to have *a right to conduct litigation granted by an authorised body in accordance with the provisions of this Act (Court & Legal Services Act 1990).*

6. If it is possible for either a managing clerk or paralegal to give the advice / information required by regulation 4 CFAR 2000 then there is no logical reason why some appropriately instructed agent, but one not directly employed by the solicitor's firm nor coming within their training programme or under direct supervision, cannot also be a suitable person to give the advice / information required.

7. The District Judge was apparently influenced by the passage in Bowstead & Reynolds on Agency (16th edition) at para 2-016. This strengthened his view that *the duties of the legal representative are simply non-delegable beyond, in the case of the panel solicitor, members of his firm* (page 17).

8. This must be wrong. There is no statutory or other support for the contention that a Panel Solicitor could not instruct solicitor agents local to the geographically distant Claimant's home to perform the functions of regulation 4 CFAR 2000, as the District Judge's findings would require.

9. The District Judge reached his conclusion that *the duties of the legal representative are simply non-delegable beyond, in the case of the panel solicitor, members of his firm* without (as he conceded) reference to, or submissions concerning, the various authorities referred to in Bowstead in support of the general proposition given at para 2-016 and quoted at page 17 of the Judgment.

10. Had he had full access to those authorities he would have seen that they include, *inter alia*, the following:

R v Kent JJ (1873) L.R. 306

No doubt at common law, where a person authorises another to sign for him, the signature of the person so signing is the signature of the person authorizing it; nevertheless there may be cases in which a statute may require personal signature…I see nothing in this statute that makes a personal signature necessary, and the rule therefore must remain absolute (per Blackburn J.)

We ought not to restrict the common law rule, qui facit per alium facit per se [He who acts through another is deemed to act in person] unless the statute makes a personal signature indispensable. (per Quain J.)

In re Whitley Partners Ltd (1886) 32 Ch.D. 337

In every case where an Act requires a signature it is a pure question of construction on the terms of the particular Act whether its words are satisfied by signature by an agent. (per Bowen LJ)

Jackson & Co. v Napper (1886) 35 Ch.D.162

And I understand the law to be that, in order to make out that a right conferred by statute is to be exercised personally, and not by an agent, you must find something in the Act, either by way of express enactment or necessary implication, which limits the common law right of any person who is sui juris to appoint an agent to act on his behalf. Of course the Legislature may do so, but prima facie, when there is nothing said about it a person has the same right of appointing an agent for the purpose of exercising a statutory right as for any other person. (per Stirling J. @ 172)

Bevan v Webb [1901] 2 Ch.59

I agree that when the right which is to be exercised is conferred by some written instrument as, for example, either by a statute incorporated in a partnership contract or by the articles of partnership, it may be that, upon the true construction of the instrument, it is found that the intention of the parties was that the right of inspection should be a personal right; but, unless you can find something of that nature in the instrument itself, you are not entitled to say that, because an agent is not expressly mentioned, the exercise of the right by an agent is excluded. (per Stirling LJ @ 78)

11. Section 58 Courts & Legal Services Act 1990 (as amended) stipulates that a CFA Agreement which does not comply with the relevant statutory provisions is unenforceable. Given this all or nothing situation, the Courts should approach the question of construction of the Regulations with particular care as an over restrictive construction would lead to a windfall benefit for the paying party and losses for the Receiving Party out of all proportion to the shortcomings in compliance; especially if, as here, no prejudice to either party is revealed.

12. Moreover, when considering whether such statutory duties could be delegated, the District Judge was wrong in failing to take account of the obvious analogies that can be drawn with statutory duties that arise under Health and Safety Regulations. Many obligations upon an employer are exercised through an agent but, nonetheless, are duties which remain with the employer who remains liable for any acts or omissions committed by the agent exercising a particular function on his behalf. In such circumstances the non delegable duty has been described as *"a duty not merely to take care, but a duty to provide that care is taken"* (per Langton J: The Pass of Ballater

[1942]P.112 @ 117). So long as such duty remains throughout with the *legal representative* is not the statutory purpose of the Regulations achieved?

13. In his judgment, the District Judge also failed to deal at all with the case of Smith Graham v Lord Chancellor [1999] 2 Costs LR 1 despite it being cited to him in argument. This case demonstrates that agents (who need not necessarily be employed by the legal representative) can undertake fee earning work which can be recovered as such and not merely as a disbursement.

14. In the absence of an express stipulation in (or necessary inference arising from) CFAR 2000 that it is only a person with the right to conduct litigation granted by an authorised body in accordance with the provisions of the Courts & Legal Services Act 1990 who may give the advice / information required by regulation 4, the District Judge was wrong to reach this conclusion.

15. In support of the proposition that the legal representative's obligations under Regulation 4 are exercised through the AIL representative, C relies on the following:

(a) the client care letter makes it clear that the solicitor is the principal and the AIL representative is the solicitors' agent;

(b) the Fact Find & Oral Advice Sheet signed by the client expressly states that the solicitors *authorise* AIL to provide oral advice to the client;

(c) the solicitor knew that the AIL representative would provide information and advice as required by regulation 4 and relied upon the AIL representative so to act. It is not necessary that AIL be contractually bound to provide the information to the client. What is necessary is that, in fact, it is done;

(d) the solicitor would have a liability for the negligent acts or omissions of the AIL representative;

(e) the procedure adopted in this case was one effectively endorsed, or at least not rejected, in the exchange of correspondence between TAG and the Lord Chancellor's Department.

16. Either the duty is delegable by the legal representative or it is not. If the duty is delegable then the only issue is one of fact: was the duty performed?

17. The duty is to *inform* the client about certain specified matters. It is difficult in the extreme for the Court, in the context of a Detailed Assessment, to be able properly to evaluate the quality / sufficiency of the information provided. The Court should have proceeded in accordance with, and by analogy with, Bailey v IBC Vehicles [1998] 3 All ER 570 @ 575. A sensible cost-conscious proportionate civil justice system must operate on a basis of trust where the signature on the bill is no empty formality. *The court can (and should unless there is evidence to the contrary) assume that his signature to the bill of costs shows that the indemnity principle has not been offended. [per Henry LJ @ 575 h]*

18. Instead, the District Judge proceeded in error by, first, making unsupported inferences about the quality of the advice which could be given by the AIL representative and then, second, confusing that issue about which he had speculated with consideration about whether the representative could give such information in the first place.

19. The evidence in this case came from the documents signed by the Claimant confirming the nature of the advice / information received. The District Judge was wrong to conclude, as he appears to have done, that necessarily the advice given by the AIL representative would have been insufficient.

20. The Court should be slow to stimulate / encourage / allow satellite litigation involving speculation about the quality of the compliance with Regulation 4 when such speculation, in reality, fuels attempts by the Paying Party to put Claimants to proof that the indemnity principle has not been breached.

JAMES LAUGHLAND