JUDGMENT : Master Hurset, Senior Costs Judge, Macclesfield County Court. 25th November 2005.

BACKGROUND

2. These proceedings arise out of a road traffic accident on 18 January 2001 when the Claimant and the Defendant were involved in a head on collision in Old Lane, Abersycon, Pontypool, Gwent. Paul Richards, the Claimant, commenced proceedings on 12 December 2003 claiming damages for personal injury and loss limited to £15,000. The Claimant did not instruct his solicitors until February 2002, but, following a letter of claim, the Defendant offered to settle liability on a 50/50 basis. This offer on liability was accepted on behalf of the Claimant on 21 January 2003. Once a medical report had been obtained and disclosed (at the end of December 2003), the Defendant made a Part 36 offer on a 50/50 basis of £1,600 which the Claimant accepted. The claim was settled by a consent order dated 27 January 2004 which included the provision: *"The Defendant to pay the Claimant's reasonable costs of this action, such costs to be referred to a detailed assessment in default of agreement."*

3. The Claimant had brought these proceedings under The Accident Group Scheme (TAG) and the parties having been unable to reach agreement on the issue of costs, District Judge Wallis, sitting at Macclesfield County Court, made an order on 24 May 2005 ordering that:

"1. The detailed assessment be transferred to the Supreme Court Costs Office.

2. The case involves matters involving TAG scheme and BTE, the case be referred to Senior Costs Judge Hurst for directions.

3. Costs in the detailed assessment."

THE ISSUES

4. The Defendant, in his Points of Dispute dated 17 June 2004, raised an issue as to whether there has been a breach of Regulation 4 of the Conditional Fee Agreements Regulations 2000, in that the advice given to the Claimant was not of sufficient quality to comply with that Regulation, and was not provided by the Claimant's solicitors in any event. The Defendant argued that if there had been a material departure from the requirements of Regulation 4 the CFA would be unenforceable and that therefore nothing should be payable by the Defendant because of the operation of the indemnity principle.

5. Given that this claim was brought under the TAG scheme, part of the claim for costs is in respect of the TAG premium, £997.50 including IPT. If the Defendant is successful on the first issue, the ATE premium would, in principle, remain payable. The Defendant raises a second issue in respect of that, stating that it was not necessary to insure using an after the event (ATE) insurance policy since the Claimant already had the benefit of legal expenses insurance under a DAS policy, and, in fact, had already claimed under that policy in respect of the damage to his vehicle. The Defendant argued on that basis that nothing is payable in respect of the TAG premium.

6. In response to this the Claimant contended that compliance and supervision issues have previously been considered by me, and, in the interests of the proper administration of justice, it would be inappropriate to re-open those issues; there had been no breach of Regulation 4, and even if there had been such a breach, that breach did not materially, adversely affect the Claimant or the proper administration of justice. With regard to BTE insurance, Mr Marven for the Claimant argues that the case does not concern a claimant who had LEI but did not realise it, and where an enquiry by his solicitor would have revealed its existence; he states: *"This is a claimant who knew he had LEI and had used it but chose not to tell his solicitors about it. The issue here is not (or should not be) about whether or not D should pay C's costs. D's challenge is technical in nature in that it seeks to undermine C's liability to pay [his solicitors] costs and in so doing avoid liability to pay because of the indemnity principle."*

THE TAG SCHEME

7. The TAG scheme was examined by me in some detail when dealing with the issue of delegation to TAG representatives of the solicitor's duties under the Regulations (judgment 27 November 2002), and also dealing with premium issues (judgment dated 15 May 2003), and also swing premium (judgment 30 July 2003). My decision in respect of the delegation issue was upheld by the Court of Appeal in **Hollins v Russell & Other Appeals** [2003] EWCA Civ 718, and in respect of the premium issues in **Sharratt v London Central Bus Co Ltd (No.2)** [2004] EWCA Civ 575.

8. My judgment of 27 November 2002 set out, at paragraphs 11 to 16, the statutory framework governing CFAs, and, to the extent that it has already been set out, I do not propose to repeat it here.

9. The Statutory Objective of the Courts and Legal Services Act 1990 is set out at Section 17(1): *"The general objective of this part is the development of legal services in England and Wales (and in particular the development of advocacy, litigation, conveyancing and probate services) by making provision for new or better ways of providing such services and a wide choice of persons providing them, while maintaining the proper and efficient administration of justice."*

   Sections 58 and 58A of the 1990 Act were inserted into Part 2 of that Act by the Access to Justice Act 1999 and are thus covered by the Statutory Objective.

10. In my judgment of 15 May 2003 the TAG contractual framework is fully set out at paragraphs 16 to 80. In this case that framework is essentially unchanged, although the wording of some documents has been altered.

11. The decision of the Court of Appeal in **Hollins v Russell** [2003] EWCA Civ 718 is of seminal importance in dealing with questions relating to CFAs. It is helpful to set out the conclusions of the court on that occasion:

> *"221 When we turn to matters of law, we have explained that a CFA will only be unenforceable if in the circumstances of the particular case the conditions applicable to it by virtue of Section 58 have not been sufficiently complied with in the light of their statutory purposes (… paras 105 to 110 …) Costs Judges should ask themselves the following question:*
>
> *"Has the particular departure from a Regulation or requirement in Section 58, either on its own or in conjunction with any other departure in this case, had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice?"*
>
> *222. 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, or that the CFA otherwise offends public policy (for example, through a breach of Section 58(3)(b), a provision with which we are not concerned on these appeals), then the CFA will be unenforceable, and the indemnity principle will operate in favour of the paying party.*
>
> *223. Even then, however, the client should be able to recover the disbursements which she has already financed, whether personally or through a loan, and any ATE premium (… paras 113 – 116 ...).*
>
> *224. The court should be watchful when it considers allegations that there have been breaches of the Regulations. The Parliamentary purpose is to enhance access to justice, not to impede it, and to create better ways of delivering litigation services, not worse ones. These purposes will be thwarted if those who render good service to their clients under CFAs are at risk of going unremunerated at the culmination of the bitter trench warfare which has been such an unhappy feature of the recent litigation scene. …*
>
> *226 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 CFA Regulations where the breaches do not matter. They should remember that the law does not care about very little things, and that 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."*

12. The judgments to which I have referred dealt with **The Accident Group Test Cases** of which there were 19. I was due to hear a further series of issues relating to compliance with the Regulations. There were 13 questions for the court to consider. In the event, however, these issues were compromised following mediation. The order made, following that successful mediation, is dated 16 February 2004 (amended 15 March 2004) and provides, so far as relevant:

> *"1. Where the Claimant's solicitor, acting in a matter on behalf of a client of The Accident Group (TAG) –*
>
> *"a) alone or in addition to the TAG representative, gave the Claimant the advice required under Regulation 4 Conditional Fee Agreement Regulations 2000 (CFAR) before the Claimant signed the CFA; or*

b) alone or in addition to the TAG representative, gave the Claimant the advice required under Regulation 4 Conditional Fee Agreement Regulations 2000 (CFAR) after the Claimant signed the Conditional Fee Agreement (CFA), but within 14 days of the date shown on the Insurance Certificate issued to the Claimant;

the Defendant will reimburse the Claimant's solicitors' costs, disbursements and Counsel's fees of the claim and of the detailed assessment process on the standard basis, to be assessed if not agreed.

Where the Claimant's solicitors seeks to rely on a) or b) above they must in each instance provide to the Defendants a copy of the Insurance Certificate together with a dated copy of the panel solicitors' relevant attendance note (redacted if necessary) recording the Regulation 4 advice provided by them to the Claimant, in default of which the Claimant's costs shall be dealt with in accordance with paragraph 2 below.

2. Where the advice required under Regulation 4 CFAR was not given by the Claimant's panel solicitors as in paragraph (1) above, the Defendant will reimburse the panel solicitor's profit costs, disbursements and Counsel's fees on the standard basis to be assessed if not agreed, SUBJECT AS FOLLOWS:-

the Claimant's agreed/assessed profit costs will be reduced by 25%.

3. Where (2) above applies the Claimant's solicitors will not seek to recover the shortfall in their costs from the Claimant himself.

4. Where (2) above applies, and Detailed Assessment proceedings have been commenced before 4 pm on 6th February 2004:

a) the Claimant will be entitled to 75% of the profit costs element of the work done (and 100% of disbursements and Counsel's fees) in those Detailed Assessment proceedings up to 4pm on 6th February 2004, to be assessed if not agreed;

b) the Detailed Assessment proceedings shall be stayed until 4pm on 26th April 2004 in order that the parties can attempt settlement;

c) where the Detailed Assessment proceedings are not settled before 4pm on 25th April 2004, the costs of the Detailed Assessment proceedings after 26th April 2004 will follow the event and will be paid at the value agreed or assessed by the Costs Judge.

5. Where (2) applies, and Detailed Assessment proceedings have not been commenced before 4 pm on 6th February 2004:

a) the Claimant will not commence Detailed Assessment proceedings until after 26th April 2004;

b) the Defendant will not take any point on late commencement of Detailed Assessment proceedings which would otherwise have fallen due for commencement before 26th April 2004 provided they are commenced (in default of settlement) by 4pm on 23rd July 2004;

c) the costs of the Detailed Assessment proceedings issued after 26th April 2004 will follow the event and shall be paid at the value agreed or assessed by the Costs Judge."

ABUSE OF PROCESS

13. Mr Marven seeks to argue that raising the issue of compliance with Regulation 4 of the CFA Regulations, after there had been a successful mediation of the compliance issues in the Test Cases, is an abuse of process. He says that the abuse point was initially referred to in the response to Points of Dispute dated July 2004 and was specifically raised in the Claimant's skeleton of 29 April 2005. He places reliance for his arguments on a passage in the judgment of Wigram V-C in **Henderson v Henderson** [1843-60] All ER Rep 378, 3 Hare 100: *"In trying this question, I believe I state the rule of court correctly, when I say, that where a given matter becomes the subject of litigation in, and of an adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."*

14. Mr Marven submits that the House of Lords has set out the correct modern approach in **Johnson v Gore Wood & Co** [2002] 2 AC 1 at 31 where Lord Bingham stated*: "But **Henderson v Henderson** 3 Hare 100 abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as whole. The beginning of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad merits-based judgment which takes account of the public and private interest involved and also takes account of all the facts of the case, focussing attention on the crucial question of whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."*

15. Mr Marven also relied on a further passage at 32: *"Two subsidiary arguments were advanced by Mr Ter Haar in the courts below and rejected by each. The first was that the rule in Henderson v Henderson … did not apply to Mr Johnson since he had not been the plaintiff in the first action against GW. In my judgment this argument was rightly rejected. A formulaic approach to application of the rule would be mistaken …The correct approach is that formulated by Sir Robert Megarry V-C in **Gleeson v Wippell & Co Ltd**:*

> *"Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is a party. It is in that sense that I would regard the phrase "privity of interest"."*

On the present facts that test was clearly satisfied.

The second subsidiary argument was that the rule in **Henderson v Henderson** … did not apply to Mr Johnson since the first action against GW had culminated in a compromise and not a judgment. This argument also was rightly rejected. An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing."

16. Mr Marven also draws attention to the way in which abuse arguments have been dealt with in test litigation. He referred to the judgment of Stuart-Smith LJ in **Ashmore v British Coal Corporation**

[1990] 2 QB 338 at 354: *"As it is, if the matter were re-litigated on the applicant's claim, she would merely invite the tribunal to reach different findings of fact on the same evidence, as a result perhaps of different arguments being addressed to it. That, in my judgment, is not in the interests of justice; nothing could be calculated to cause a greater sense of injustice in those who lost in* ***Thomas v National Coal Board [****1987] 1 CR 757, if some other tribunal reached a different result on the same evidence. Alternatively, there is a risk, after so long a time, that the employers would be unable to call the same witnesses who had convinced the tribunal in Thomas' case; that would be a grave injustice to them."*

17. Relying on those authorities Mr Marven argues that the Defendants' insurers (Churchill – a member of the Royal Bank of Scotland Group) must have known about the mediation which took place, in connection with the TAG Tranche 3 compliance issues. If the Defendant's insurers were now allowed to raise the issue of compliance again, this would open the way for the same point to be run in hundreds of thousands of low value TAG claims. A similar problem arose in the litigation concerning credit hire agreements. Tuckey LJ (sitting alone) expressed the view of the court in **Clark v Dyer** and **Burnett v Harper** (4 May 2001 unreported):

> *"22. … The reality of this litigation is it is a dispute between the hire companies and the insurance industry. There will come a time, and I hope to try and speed that up, when enough is enough and it will be open to the hire companies to say it is an abuse of process: a Henderson v Henderson defence to prevent yet a further line of argument. But we have not, it seems to me … arrived at that stage quite yet, and so it is necessary to find a group of cases where we can flush out all the remaining points, good, bad or indifferent, and have them speedily tried and if necessary determined on appeal. That is what I said in Help Hire …"*

18. Mr Marven argues that in the TAG litigation that critical point has been reached, and that, if the Defendant is allowed to pursue the compliance issue it will have destroyed the point of the test litigation. He suggests that this challenge (which is one of two before this court by insurers belonging to the Royal Bank of Scotland Group) amounts to unjust harassment. There was a forum for these issues to be resolved, namely the mediation in the Test Cases, and the points which the Defendant now seeks to raise could have been raised in the Tranche 3 litigation. He submits that although this litigation is, on the face of it, between two individuals – the costs belong to Paul Richards, the Claimant – the real commercial interest in this issue is that of the Claimant's solicitors and the liability insurers.

19. The TAG litigation is long running and very large. This court was informed at the outset that some 200,000 cases awaited the outcome of the various issues on detailed assessment. Mr Marven submits that if the matter is allowed to proceed, it will open the floodgates to those in the industry hoping to re-litigate the same issues. In addition, if the matter is allowed to proceed, that will, he suggests, encourage insurers to stand on the sidelines and to have a second bite if they do not like the original result.

20. Mr Williams for his part argues that Churchill, the liability insurer, was not involved in any of the test litigation and was not party to the mediation, which was in any event confidential. He submits that following Johnson v Gore Wood, in order to be guilty of an abuse of process, the defendant would have had to be privy to the negotiations which took place during the mediation. He says that the Claimants in the test cases had control of those proceedings, whilst Churchill is a motor insurer, writing cover in the United Kingdom, which had no say or influence in the mediation, and it is not open to the court to impose on the Defendant terms to which it was not a party. He relies on the speech of Lord Millett in **Johnson v Gore Wood** at 59: *"It is one thing to refuse to allow a party to re-litigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). While therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and a defendant from oppression …"*

21. A little later (page 60) Lord Millett expresses the view that: *"The rule in **Henderson v Henderson** … cannot sensibly be extended to the case where the defendants are different. Then there is no question of double vexation."*

22. Mr Williams went on to suggest that there had been a delay in raising the abuse argument and suggested that such a point must be raised in good time. For abuse to succeed it is necessary to treat all the parties as being privy to the agreement. This applies to this Defendant and his insurers. Mr Williams referred to the decision of HHJ Holman in **Adair v Cullen** (14 June 2004 in the Manchester County Court) a TAG case dealing with compliance issues. In that case Judge Holman referred to the successful mediation of the TAG cases and stated:

> *"4. … Unhappily however not all insurers signed up to the agreement, and those, who did not, include the defendants insurers. I feel bound to record that it is, in my view, a matter of some considerable regret that, given the Herculean efforts which went into the mediation with a successful outcome to the mutual benefit of all concerned, some insurers have chosen not to sign up to it. The outcome is yet further expense with costs very significantly greater than the value of the claim being incurred."*

23. With those sentiments I wholeheartedly agree. Mr Williams points out that many claimants' solicitors across the country have refused to be bound by the mediation.

24. Lord Millett addressed the question of delay in Johnson v Gore Wood at 61: *"This makes it unnecessary to deal with Mr Johnson's submission that it is too late for the firm to raise the issue. If necessary, however, I should have regarded the delay as fatal. Indeed, I should have regarded it as more than delay; I think it amounted to acquiesance. There is no proper analogy with the case which discloses no cause of action. Although it is obviously desirable to apply to strike out a claim which is doomed to fail at the earliest opportunity, there is no point in proceeding with a trial which serves no useful purpose. Even if the point is taken at the trial itself it is a matter for the trial Judge to decide whether the hear the evidence and adjudicate on the facts before deciding whether they give rise to liability, or to assume that the plaintiff will establish his allegations and decide whether, as a matter of law, they give rise to liability.*

But the premise in the present case is that Mr Johnson has a good cause of action which he should have brought earlier if at all. I do not consider that a defendant should be permitted to raise such an objection as late as this. A defendant ought to know whether the proceedings against him are oppressive. It is not a question which calls for nice judgment. If he defends on the merits, this should be taken as acquiesance. It might well be otherwise if the ground on which the proceedings are alleged to be an abuse of process were different. But in a case of the present kind the court is not so much protecting its own process as the interests of the defendant."

Lord Bingham lends weight to Lord Millett's view at 34. Mr Williams points out that in the present case the court has never decided the compliance issues.

25. Finally, Mr Williams points out that, even if I had decided the Tranche 3 compliance issues, it would still have been open to the Defendant's insurers to challenge that decision on appeal. Furthermore even if the Defendant's insurers had participated in the mediation, it is quite possible that they would not have agreed to the terms upon which the mediation was concluded.

26. In response, Mr Marven suggests that the purpose of the Test Litigation was to resolve all pertinent issues. The Defendant's insurers, Churchill, had the opportunity to participate in the Test Litigation and in the mediation process. As to delay, he points out that the Johnson case had been running for some four years before the abuse point was raised. In this case Notice of Commencement of the detailed assessment was given in May 2004, the response to the Points of Dispute, dated July 2004, specifically referred to the mediation and the Claimant's skeleton argument of April 2005 raised the point specifically. He submits that there was no delay before taking the point and certainly no acquiesance on the part of the Claimant. The Defendant's insurers, he says, elected not to take part in the mediation process. There is however a commercial link between Churchill and NIG (another member of the Royal Bank of Scotland Group) which was a liability insurer and, coincidentally, also a TAG insurance provider.

CONCLUSION ON ABUSE OF PROCESS

27. It is, as I have said, extremely regrettable that the Defendant's insurers feel it is appropriate to continue litigating the compliance issues when a great deal of time and effort has been expended in the Test Litigation in reaching a sensible compromise. The compliance issues are by their nature fact sensitive, which means that any case which is allowed to proceed must be examined in detail.

28. It is worth reiterating the Overriding Objective of enabling the court to deal with cases justly:

"1.1(2) dealing with a case justly includes, so far as it is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

29. In this case the agreed damages (on a 50/50 basis) amount to £1,600. The Claimant's bill, including disbursements and VAT, amounts to £7,109.03. That figure includes the TAG ATE premium of £997.50, a medical agent's fee of £435 and an accident investigation fee of £310 plus VAT. CPR Part 45 Section II now fixes the recoverable costs in road traffic cases arising after 6 October 2003 at a far more modest level.

30. Regrettable though it is that the Defendant's insurers have chosen to contest this case rather than relying on the mediated settlement, in my judgment it cannot be an abuse of process for a defendant (or his insurer) to seek to argue compliance issues, when neither the defendant nor the insurer was a party to the mediation in the Test Litigation. The situation would have been different had a Group Litigation Order been made, but this was never done. Equally had I tried the compliance issues, as was originally envisaged, that decision would inevitably have been challenged on appeal and the resulting decision would have been binding on future litigation. It must also be borne in mind that the mediated agreement was on the basis that the Claimant's Solicitor or the TAG representative had given "the required advice". In this case the Defendant argues that "the required advice" was not given at all. In these circumstances it is necessary to consider the Defendant's challenges in detail.

THE COMPLIANCE ISSUES

31. Mr Williams seeks to establish that there has been a breach of Regulation 4 of the Conditional Fee Agreement Regulations 2000 which has had a materially adverse effect, either upon the protection afforded to the client or upon the proper administration of justice. If successful with that argument, the CFA would be rendered unenforceable and no profit costs would be recoverable, although the claimant would in principle be able to recover disbursements which he has financed, either personally or through a loan, and any ATE premium. Mr Williams' second line of argument is that the ATE insurance was unnecessary because the Claimant had legal expenses insurance under a DAS Legal Expenses Insurance Co Ltd (DAS) policy, a policy which had been used in connection with this accident in respect of the damage to the vehicle. If that argument is successful nothing would be payable in respect of the ATE premium.

THE LAW

32. Section 58 of the Courts and Legal Services Act 1990, so far as relevant, states:

"(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but … any other conditional fee agreement shall be unenforceable. …

(3) 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."

33. Those requirements are set out in the Conditional Fee Agreements Regulations 2000 and include, under the heading "Information to be given before conditional fee agreements made":

"4(1) 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:

(a) the circumstances in which the client may be liable to pay the costs of the legal representative in accordance with the agreement;

(b) the circumstances in which the client may seek assessment of the fees and expenses of the legal representative and the procedure for doing so;

(c) whether the legal representative considers that the clients risk of incurring liability for costs in respect of the proceedings to which the agreement relates is insured against under an existing contract of insurance;

(d) whether other methods of financing those costs are available, and, if so, how they apply to the client and the proceedings in question;

(e) whether the legal representative considers that any particular method of methods of financing any or all of those costs is appropriate and, if he considers that a contract of insurance is appropriate or recommends a particular such contract –

(i) his reasons for doing so, and;

(ii) whether he has an interest in doing so.

(3) before a conditional fee agreement is made the legal representative must explain its effect to the client. …

(5) information required to be given under paragraph (1) about the matters in paragraphs (2) (a) to (d) must be given orally (whether or not it is also given in writing), but information required to be so given about the matters in paragraph (2)(e) and the explanation required by paragraph (3) must be given both orally and in writing. …"

34. Although these Regulations were subsequently revoked (S.I. 2005 No.2305) that revocation with effect from 1 November 2005. However that revocation does not have retrospective effect. The Law Society has since passed the Solicitors Practice (Amendment) Rule 2005.

WHAT DID THE CLAIMANT AGREE?

35. I do not propose, in this judgment, to examine the operation of the TAG scheme, since it was examined in considerable detail in my earlier judgments.

36. Having suffered his accident on 18 January 2001, on 8 February 2002 Messrs Rowe Cohen wrote to the Claimant: *"I am pleased to inform you that we have been recommended by the Accident Group to act on your behalf in relation to your claim. Please note that we are an Accident Group Panel Member.*

It is a statutory requirement that you are provided with certain advice before you sign any documentation. I have enclosed for you a copy of the documentation and would like to confirm that a representative of the Accident Group will contact you by telephone very shortly to arrange an appointment to call and see you on our behalf to ensure that you understand the nature of your agreement. Please do not sign or return the documentation until this visit has been carried out."

37. The Claimant, Mr Richards, received another letter from Messrs Rowe Cohen dated 8 February 2002. This letter informed him that: *"We understand from the Accident Group Ltd that you would like us to act on your behalf in connection with your claim for damages …"*

38. The second letter of 8 February 2002 was a client care letter in accordance with Rule 15 of the Solicitors Practice Rules. The Claimant was requested to sign and return a copy of the letter to the solicitors. Enclosed with the letter was a CFA (the terms and conditions) and the Claimant was informed that the letter, together with the enclosed terms and conditions: *"forms the basis of the agreement between us.* ***Please make sure that you understand this letter and the enclosed terms and conditions before signing and returning the letter to us****;"*

39. The Claimant was also asked to sign the enclosed accident investigation questionnaire and a medical consent form.

40. The visit by the TAG representative took place on 19 February 2002, on which date the Claimant signed a copy of the client care letter under a paragraph stating:
*"**Please Note** that signature of this letter by you:*
1. Constitutes confirmation of your instructions to us.
2. Confirms that we have verbally explained to you the matters in paragraphs (a) to (f) under "other points" in the attached terms and conditions.
3. Confirms the matters at (e) in writing in Schedule 2.
4. Confirms that you have read and understood this letter (including the authority to deal with monies received on your behalf as set out in the section entitled "your obligations to repay your loan") and the attached terms and conditions and that you accept the same as being the basis of the agreement between us."

41. On the same day the Claimant also signed the CFA. The TAG Fact Find and Oral Explanation sheet was also completed and signed by the Claimant, as was the TAG Service Agreement and Declaration. The TAGProtect Legal Expenses insurance certificate was dated 27 February 2002. Mr Dwek, the Claimant's solicitor at Rowe Cohen, signed his copy of the client care letter after he had received back the signed copy from the Claimant. There is no indication of the date upon which Mr Dwek signed the letter.

DEFENDANT'S SUBMISSIONS

42. Mr Williams had a number of criticisms of this process. He submits that the solicitor has a two stage duty under the Regulations, firstly to consider the position with regard to BTE insurance, methods of funding and ATE insurance and, having considered the position, to give advice. In his submission there has been no consideration and no advice. In the letters of 8 February 2002, to which I have referred, the client is informed that he may have to produce his log book and current MOT certificate, but he is not requested to produce his motor insurance policy or any other policy.

43. In relation to the CFA paragraph (i) states: *"You have prior to signing this agreement, agreed with the Accident Group Ltd to pay a premium of £997.50 for a legal expense insurance policy …"*

Mr Williams argues that the Claimant had not at this stage agreed to pay anything. In his submission the agreement commences on 27 February 2002, the date of the inception of the insurance.

44. Similarly, under paragraph (J) the CFA states: *"Immediately before you signed this agreement, we and/or the duly appointed agent verbally explained to you the effect of this agreement and in particular the following: …*
(c) whether we consider that your risk of becoming liable for any costs in these proceedings is insured under an existing contract of insurance. In particular we drew to your attention that you had, prior to our instruction, agreed to purchase a legal expenses insurance policy from the underwriters; …
(e) other methods of funding your case may be available, including private funding, Community Legal Service funding or other legal expenses insurance policies and trade union funding. However in view of points (c) and (d) above we note that you do not wish to use these;"

45. Mr Williams again argues that the Claimant is being given incorrect information since he has not, at that stage, agreed to purchase a legal expenses insurance policy from the underwriters and had not been asked about other legal expenses insurance policies.

46. Mr Williams argues that the CFA is a pro forma document prescribed by TAG which the solicitor is not allowed to alter, and, in respect of which, there is no discussion between the solicitor or his agent and the client. In short the client is never given any advice about funding or insurance.

47. At paragraph (J)(f) of the CFA the client is told:
"(i) Having regard to the fact that you have already agreed to purchase the legal expenses insurance policy referred to in point (c) and (d) above we have not recommended any particular insurance product to you. Detailed reasons are set out in Schedule 2.
(ii) In any event, we believe it is desirable for you to insure your opponent's charges and disbursements in case you lose.

(iii) We confirm that we do not have an interest in recommending that you maintain this particular insurance agreement save that we are an approved member of the Accident Group Solicitors' Panel."

48. Schedule 2 is in these terms: *"**The Insurance Policy***
As you have already agreed to purchase a legal expenses insurance policy from the underwriters, we have not recommended any particular insurance product to you and you may in these circumstances wish to obtain independent legal advice in this regard.
In any event, in all the circumstances, and on the information currently available to us, we believe that a contract of insurance is appropriate to cover your opponent's charges and disbursements in case you lose. We are not however insurance brokers and cannot give advice on all products which may be available."

49. These passages, says Mr Williams, repeat the misinformation about the client having already agreed to purchase insurance; sidestep the Regulation 4 requirements; and actively recommend the TAG policy. On the Fact Find and Oral Explanation sheet Mr Williams points out that in answer to the question: *"Does the client have the benefit of any legal expenses insurance which would cover:*
(a) own costs …
(b) third party costs …
(c) both sides costs …"

The answer "No" is circled each time. Again in answer to: *"Does the client have legal expenses insurance attached to any motor or household policy?"* The answer is "No". The client is then informed: *"If I have any other legal expenses insurance cover in relation to this claim (which may be included with my household or motor insurance) … then it may affect my prospects of recovering the premium for the policy and it may be deducted from my damages, but I am happy to proceed on this basis."*

50. It is now clear that the Claimant did in fact have BTE insurance through DAS. It is not clear whether the negative answers to the above questions were given knowingly or out of ignorance.

51. Mr Williams further criticises the Fact Find and Oral Explanation sheet because it says nothing about the potential liability for costs if a Part 36 offer is not beaten or about paying costs not recovered on a detailed assessment. These are, he suggests, significant omissions.

52. At paragraph 7 of the Oral Explanation it is stated: *"We have checked with you and you have advised that you had no other form of legal expense insurance available to you. We have asked you to consider whether in the case of a motor accident when you are the owner or the driver, you might have legal expense insurance attached to your motor insurance policy …"*

53. In this case Mr Williams submits that the solicitor is passing the duty to consider the position onto the client.

54. The Oral Explanation points out to the client that his case can only be accepted if it is pursued under the TAG scheme on a conditional fee agreement with the benefit of TAG insurance. Finally the Claimant is informed: *"I do not have an interest in The Accident Group or with the underwriters. However my firm is a member of the Solicitors Panel for both of these companies."*

55. Mr Williams submits that what is in fact happening is that the TAG scheme is being recommended. The Claimant is given no information about any other products and is told that the solicitors have no interest in TAG. This too is incorrect, since they have a very clear commercial interest in accepting the cases which TAG send to them.

56. Turning to the TAG Service Agreement and Declaration, which was signed by the Claimant on the same day as all the other documents (19 February 2002), Mr Williams argues that this is not in fact an agreement, but an application form. Under the heading "Declaration" the document states: *"I agree that I will pay the premium of £997.50 (including insurance premium tax) for the policy, a copy of which is available upon request, in the event that evidence of insurance is not issued on the sole grounds of liability and quantum (amount of the case) only, then TAG will not seek to enforce my liability to pay the said premium."*

57. The Declaration goes on to set out the position if TAG does accept the case. At paragraph 8 the Claimant is required to state: *"I confirm that I have considered [BTE insurance] and … nor do I have any legal expenses insurance to cover legal expenses. I understand that the existence of such legal expenses*

insurance … may affect the recoverability of the TAG Protect legal expenses insurance premium from my opponent and that it (or part of it) may have to be deducted from my compensation."

58. At the end of the document under the heading "Important Note" the following appears: *"If I have any other legal expenses insurance cover in relation to this case (which may be included with my household or motor insurance) then I may not be able to recover the cost of the premium from my opponents and my compensation may be reduced by that amount. I have carefully read and understood this document before I signed it."*

59. In this instance Mr Williams argues that the Regulation 4 duty is being turned inside out, with the onus being put on the client who takes the risk rather than the solicitor. In Mr Williams' submission there is no binding contract between the Claimant and TAG until the insurance is incepted on 27 February 2002.

60. In summary Mr Williams asserts that there are multiple breaches of Regulation 4: the TAG representative is not allowed to depart from the script and cannot therefore comply with Regulation 4(1)(b) (providing further explanation); the client is told nothing of his potential liabilities in the event that a Part 36 offer is not beaten or there is a shortfall after detailed assessment (4(2)(a)); there is no true consideration as to whether the client is insured under a pre-existing contract of insurance (4(2)(c)); other methods of financing the litigation are only partially touched upon 4(2)(d); and, no information at all is given about other methods of financing the costs because of the unsatisfactory fiction that the client is already committed to TAG (4(2)(e)). Mr Williams suggests that the central failure is not eliciting the existence of the DAS legal expenses policy. In these circumstances he says that these are breaches which have a materially adverse effect upon the protection afforded to the client.

61. Mr Williams relies on the decision of the Court of Appeal in Sarwar v Alam [2000] EWCA Civ 1401 and a number of other cases in support of his submissions. Although the Conditional Fee Agreements Regulations 2000 were passed before the decision in Sarwar was delivered, those Regulations were not in force when Mr Sarwar took out his ATE policy. The central question in the appeal was whether it was reasonable in all the circumstances for Mr Sarwar, acting on his solicitor's advice, to incur the costs of the ATE premium without making any further enquiries into the possible existence of BTE cover. The Court noted (paragraph 13) that a solicitor's duty when first instructed by a client is set out in the Solicitors Costs Information and Client Care Code 1999. This Code is given teeth by Rule 15 of the Solicitors Practice Rule 1990 (as amended). The Court also noted (paragraphs 21 and 22):-

"21. In this country LEI has for the most part been sold with other insurance, typically motor and household policies. Its use has grown considerably over the last 10 years. In Callery Lord Woolf CJ noted, at paragraph 18 that in 1998 the Government disclosed that over 17 million people were now paying premiums for BTE cover at a trivial annual cost to themselves and that the Government was then keen to encourage the wider use of LEI. We were told that BTE insurance was now available in at least five main ways: as part of a motor insurance policy; as part of a household insurance policy; as part of an employment package (or of the benefits of membership of a trade union or a professional body); as part of a credit card agreement or charge card service; or by being sold directly as a stand alone policy (for which, unless there are any unusual features, the cost is unlikely to exceed £20).

22. The ABI told us that BTE insurance features most commonly as part of a motor insurance policy…. In 1999 23.5 million motor vehicles were licensed, and 9.9 million BTE motor policies were sold. This represents a 42% penetration. This market has grown significantly in the last two years and continues to do so".

62. Later in the Judgment the Court observed:-

"44…During the course of the hearing, however, members of the Court made critical observations from time to time about the size of some of the BTE insurers' panels and a possible inappropriateness in these post Woolf days of a BTE claimant being denied the freedom of choice of solicitor (at any event so far as members of the Law Society's or some other reputable panel of approved personal injury solicitors are concerned), at the time the procedures in a pre-action protocol come to be activated. We also saw correspondence (which DAS's representatives sought to explain away) that left us uneasy about the terms on which DAS is in practice willing to allow a claimant's solicitor of choice to act for their insured…."

63. The Court then went on to give guidance:-

"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. It would seem desirable for solicitors to develop the practice of sending a standard form letter requesting a sight of these documents to the client in advance of the first interview. At the interview the solicitor will also ask the client…whether his/her liability for costs may be paid by another person, for example, an employer or trade union.

46. If these simple steps are taken, they ought to reduce the burden and extent of the enquiries about which some of the interveners express concern. The solicitor will then be able to read through the policy and if BTE cover is available, if the motor accident claim is likely to be less then about £5,000 and if there are no features of the cover which make it inappropriate…the solicitor should refer the client to the BTE insurer without further ado [emphasis added]. The solicitor's enquiry should be proportionate to the amount at stake. The solicitor is not obliged to embark on a treasure hunt, seeking to see insurance policies of every member of the client's family in case by chance they contain relevant BTE cover which the client might use".

64. The Court further explained the guidance:-

"50. The guidance we have given in this part of our Judgment should not be treated as an inflexible code. The overriding principle is that the Claimant, assisted by his/her solicitor, should act in a manner that is reasonable. The availability of ATE cover at a modest premium will inevitably restrict the extent to which it will be reasonable for a solicitor's time to be used in investigating alternative sources of insurance.

51…We deprecate any attempt to equate the question of reasonableness that a Costs Judge has to decide with the question whether the Claimant's solicitor has been in breach of duty to his/her client. If a solicitor gives advice which proves unsound, it will not necessarily follow that the advice was negligent. The advice will necessarily be based on information provided by the client. If the information is inadequate or inaccurate, the advice may prove to be unsound without any question of fault on the part of the solicitor…

60. We do not consider that there is anything in this Judgment which is inconsistent with the Judgment of this Court in Callery…If the client is able to comply with the request contained in the suggested letter which he/she receives before the first interview (see paragraph 45 above), then there is no reason why the course suggested in Callery should not be adopted as soon as the solicitor is satisfied that no appropriate BTE cover is available. If this enquiry cannot be satisfactorily resolved at that first interview, the steps mentioned in paragraph 91 of the Callery Judgment should not be taken until such further enquiries into the availability of BTE cover as are reasonable and proportionate to the value of the claim being concluded".

65. Mr Williams also relies on the decision of HHJ Stewart QC sitting in Liverpool County Court in **Culshaw v Goodliffe** (24 November 2003) where Judge Stewart found:-

"15…the word "considers" in 4(2)(c) requires something more than asking the question and getting an answer in circumstances where there is no reasonable expectation that the person with whom the solicitor is dealing will by any means necessarily realise that they might find that they had BTE insurance in their motor policy or in the home policy…

*16. Of course this, on the basis of **Hollins v Russell** [2003] 1 WLR 2487, does not mean that insurers can go ferreting around asking for documents. That has been disallowed by the Court of Appeal. But where it becomes apparent, as here, that somebody in fact did have BTE insurance then the question can properly be raised as to whether there was compliance with 4(2)(c)…"*

66. Judge Stewart expressed the view that merely asking the question of a client *"do you have legal expenses insurance?"* does not satisfy the requirement of consideration under 4(2)(c).

67. Similarly, His Honour Judge Holman sitting in Manchester County Court in **Adair v Cullen (**14 June 2004), on whose decision Mr Williams also relies, followed Judge Stewart's decision in Culshaw.

68. Mr Williams also relies for support on the Judgment of Master O'Hare **in Bowen v Bridgend County Council** (SCCO ref: 0309853) and my own decision in **Samonini v London General Transport** in which I found that there had been a breach of the Regulations by the solicitors. It should be noted that Samonini was a fact sensitive case, which involved a Claims Management Company other than TAG in respect of which there was little evidence. I understand that the decision is being used on the basis

that it establishes some sort of principle which is applicable in other cases. As I stated at the beginning of this Judgment, it is the decision of the Court of Appeal in **Hollins v Russell** which should be borne in mind when considering issues of compliance.

CLAIMANT'S SUBMISSIONS

69. Mr Marven produced a fax addressed to the Defendant's solicitors from DAS dated 21 April 2005 stating: *"Paul Richards had legal expenses insurance with DAS as part of his motor policy…as at 18 January 2001. This would have covered him for a personal injury claim".*

70. He confirmed that DAS had successfully pursued a claim in respect of the damage to the Claimant's vehicle prior to the CFA being entered into, but was unable to say why his personal injury claim had not been taken up by DAS.

71. In relation to the witness statement of Mr Dennison dated 30 September 2005, he pointed out that there had been an attempt to obtain the DAS policy wording which had failed. He submits that DAS would not have brought a second claim for personal injuries, if asked, after the lapse of time which had taken place. In addition, he suggests that since the personal injuries damages claim was settled on a 50/50 basis, this was clearly a high risk case. If some funding arrangement other than the TAG scheme had been used this would have involved a high success fee as well as an ATE premium.

72. Although it is now acknowledged that the Claimant did make a claim under the DAS policy, this was not a case where the Claimant did not know about a BTE policy which later came to light. On that basis Mr Marven seeks to distinguish this case from other cases in which the BTE issue arises. He points out that the Court of Appeal decision in Sarwar v Alam was handed down only four months before the Claimant instructed his solicitors

73. In relation to the decision in **Culshaw** by HHJ Stewart QC, Mr Marven had to accept that the Claimant did know of his BTE insurance policy, but submits that, unless I am satisfied that there was other funding that the Claimant could and should have used, the failure to investigate BTE cover is immaterial.

74. Mr Marven referred particularly to paragraph 198 of the Court of Appeal Judgment in **Hollins** where the Court stated:- *"We did not in this context concern ourselves with the matters set out in Regulation 4(2)(e) because a particular feature of the TAG scheme is that the client has already agreed with TAG that she will purchase TAG's preferred insurance scheme before the solicitor appears on the scene, even if TAG does not actually procure the insurers to issue cover until after the credit agreement has been signed. This is the effect of the declaration signed by the Claimant when she enters the TAG scheme. In it, she agrees to pay the premium for the insurance policy on the basis that TAG will not enforce this liability in the event that evidence of insurance is not issued on the sole grounds of liability and quantum. What this all means in practice will have to be worked out at a later hearing [emphasis added] but at the level of generality with which we are concerned to determine the preliminary issues before us on this appeal, we consider it to be better to concentrate on the aspects of the regulation 4 duties which do not relate to advice about the policy".*

75. On this basis Mr Marven submits that the signing of the service agreement by the Claimant is indeed a contract and, he suggests that the Court of Appeal has analysed the agreement in the same way. I reject that submission since it is evident from the passage which I have just quoted that the Court deliberately left the meaning of these words to be dealt with at a later hearing. From my reading of the documents the service agreement appears to be part of a device to avoid the solicitors or their representatives having to comply fully with the Regulations.

76. In respect of the Fact Find and Oral Explanation Sheet, Mr Marven suggested that I should proceed on the basis that the TAG representative did what was necessary to obtain the information. He suggests that there was no evidence that the representative fell below the Regulation 4(2)(c) standard. He accepts that there was a BTE policy which was not referred to, but this was not because of a breach by the solicitors, and the client was warned in clear terms about the effect of any pre-existing insurance.

77. With regard to the Defendant's argument that the solicitors have failed in their duty to consider alternative methods of funding, Mr Marven argues that the solicitors have already given adequate consideration to the position in the questions asked in the Fact Find and that in the Oral Explanation

they are merely referring back to earlier questions. Furthermore, the Claimant is told by the solicitors that they can accept his claim only under the TAG scheme. The Claimant is also told that the solicitor is a panel member who can only act under the TAG scheme. All this, says Mr Marven, complies with Regulation 4(2)(e).

78. Mr Marven seeks to rely on the document signed by the Claimant on 19 February 2002 when the TAG representative visited him. The client care letter was countersigned by the solicitor when it was returned signed by the client. The solicitors proceeded on the basis that the Claimant had already signed up to the TAG scheme and that the client's signature was "confirmation of instructions". Mr Marven submits that it is not open to the client to take any point on breach of the Regulations against his own solicitors in the light of the documents which he has signed and that therefore, there can be no breach of Regulation 4(2)(e)

CONCLUSIONS

79. Mr Williams contends that following the decision in Sarwar and having regard to the wording of Regulation 4(2)(c), solicitors are required to take active steps to check the BTE position before entering into a CFA. In this case neither the solicitors nor the TAG representative ever asked Mr Richards for sight of his motor insurance policy. Consideration of that policy would inevitably have brought to the attention of the solicitors the existence of the DAS BTE insurance. It would then have been possible to consider the appropriateness or otherwise of the BTE insurance cover, particularly having regard to the fact that one claim had already been made under the policy by Mr Richards and the lapse of time between the accident and the date when he consulted his solicitors.

80. I accept Mr Williams' submission and find that neither the TAG representative nor the solicitors has considered whether the client's risk of incurring liability of costs in respect of the proceedings is insured against under an existing contract of insurance. The client was never asked to produce his motor policy, and neither the representative nor the solicitor read through the policy as envisaged in paragraph 46 of Sarwar.

81. The fact that the Claimant misled the solicitors (whether deliberately or mistakenly), merely underlines the necessity for the solicitor to read through the policy. Mr Marven sought to argue that it would be unjust for the Claimant's solicitors to be penalised (by being unable to recover any costs under the CFA) as a result of having been misled by their client. The fact is, however, that had the solicitors complied with Regulation 4(2)(c) and actually considered the client's motor policy, they would not have found themselves in this position.

82. For the reasons which I have given there has been a clear breach of regulation 4(2)(c) in that the Claimant was never asked to produce his motor policy. The question to be asked is whether that departure from the Regulation had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of the Justice. It is Mr Marven's submission that, by completing the Fact Find and Oral Explanation Sheet, the solicitors have complied with Regulation 4(2)(e). I find that there has also been a breach of Regulations 4(2)(d) and (e) in that there has been a complete failure to consider any alternative funding, other than TAG scheme. The Claimant's solicitors declined to give advice on the topic on the basis that the client had already agreed to enter the TAG scheme. This is not in fact the case. At the time when the client was told that he had agreed with TAG to pay a premium of £997.50, whereas in fact the client had merely applied to TAG for insurance which did not commence until TAG accepted the application form on 27 February 2002. Thus the statement in the CFA signed by the client to the effect that:- *"(J)(f)(i). Having regard to the fact you have already agreed to purchase the legal expenses insurance policy…above we have not recommended any particular insurance product to you…".* is quite simply a device to get round the provisions of the Regulation. The fact that the client is told in Schedule 2 to the CFA that he may wish to obtain independent legal advice is insufficient to satisfy the requirements of the regulations. Mr Williams argues with some force that this is tantamount to an admission that the Claimant's solicitors were not giving the independent advice in the best interests of the client, which is what is needed to comply with Regulation 4.

83. I am satisfied that the protection afforded to the client has been adversely affected in the present case. There is a clear lack of protection where the solicitors failed to give him advice on alternative methods of funding or failed properly to check for BTE cover. On the face of it, the client will have lost a significant proportion of his damages as a direct result of the failure to identify and recommend a suitable funding method. In addition, Mr Williams argues, and I accept, that there is a materially adverse effect on the proper administration of justice when costs claims are unnecessarily inflated by excessive claims for ATE premiums.

84. These findings mean that the CFA is unenforceable and accordingly, nothing is recoverable under it. The ATE premium is, however, at least theoretically recoverable. The evidence shows that there was in existence a DAS LEI policy. Whether, had proper investigation been carried out, this policy would have been found to be "appropriate" in all the circumstances is not a question which it is now possible to answer. All that can be gleaned from the information which has been produced is that the Claimant's solicitor, Mr Dennison, requested a copy of the policy from the Defendant's solicitors. No copy was supplied. I find this hardly surprising. The person with a copy of the policy is Mr Richards. I was not told whether he was asked for the policy even late in the day and, if not, why not.

85. In his witness statement of 30 September 2005, Mr Dennison asks me to infer that "had we asked for a copy of the policy [from DAS] at the outset (so we could consider its "appropriateness") we would have been met with a similar response from DAS, which would have been a refusal to provide us with a copy of the policy wording". I can find no basis on which I can draw such an inference. I am also asked to infer that the DAS policy would not have been appropriate because of the apparent limitation on the freedom of choice of solicitor when the policy is used. I have nothing to go on save the criticism in Sarwar to which I have referred and Mr Dennison's own general knowledge of DAS insurance policies. This is an insufficient basis from which to draw the inference requested by Mr Dennison. Finally, he suggests that the lapse of time between the accident and his firm being consulted was such that DAS would not have provided indemnity. Had the guidelines in Sarwar been followed, it could have been established very early on whether the DAS policy was no longer appropriate and if necessary, other funding arrangements made.

86. I am left with the position that Mr Richards had in force a DAS BTE policy under which he had already made one claim. No effort was made to consider the appropriateness of that policy and I therefore find it unreasonable and disproportionate to have taken out the TAG policy. The ATE premium is therefore not recoverable.

87. I reach these conclusions having regard to the following facts. The ATE premium was £997.50. The AIL fee a further £400 and a further £100 or so for medical reports. In addition, the Claimant took out a bank loan in order to finance these payments in respect of which he is liable for interest. Given the facts of the case the solicitors knew that it was most unlikely there would be any argument over liability, thereby minimising the importance of legal expenses insurance.

88. It is argued by Mr Marven that the test of reasonableness should be based on what was known to the Claimant's solicitors the time the policy was purchased. This appears to be uncontroversial and is in accordance with what is said in Costs Practice Direction paragraph 11.7*: "…when the court is considering the factors to be taken into account in assessing additional liability, it will have regard to the facts and circumstances as they reasonably appear to the solicitors or Counsel when the funding arrangement was entered into and at the time of any variation of the arrangement".*

89. This does not however assist the Claimant or his solicitors. Had the solicitors or the TAG representative followed the guidelines set out in Sarwar, they would have been well aware of the existence of the DAS policy. The facts and circumstances as they actually appeared to the solicitors when the funding arrangement was entered into could not reasonably be relied on because of the breach of Regulation 4.

90. There is no doubt that the protection afforded to the client has been materially adversely affected. Properly advised, he might not have found himself responsible for a bank loan and interest which, on the face of it, will reduce his damages significantly.

91. Although the Claimant instructed his solicitors only four months after the handing down of the decision in Sarwar, all solicitors engaged in personal injury work involving Conditional Fee Agreements and ATE insurance either knew or ought to have known of the Court of Appeal's decision.

92. Mr Marven is correct to point out that in revoking the CFA regulations Parliament's desire is clearly to prevent further technical challenges. Such challenges take up a disproportionate amount of court time and prevent the proper development of the CFA and ATE market. The client's protection has not simply been abandoned, but the regulation of the funding regime has been taken on by the professional bodies, in particular, by the Law Society which has passed the Solicitors' Practice (Amendment) Rule 2005. Nonetheless, this case falls to be decided under the CFA Regulations which were in force at the time.

93. I do not accept Mr Marven's submission that, since the client had confirmed his instructions on 19 February 2002, the solicitors could proceed on the basis that he was already signed up to the TAG scheme. Mr Richards had not been properly advised, nor had his BTE insurance been identified or considered. Mr Marven put forward similar arguments in respect of the CFA itself and the Service Agreement. All these submissions are, however, based on the assumption that the solicitor has complied with Regulation 4. It may be that Mr Richards did intentionally mislead the TAG representative and his solicitors and I make no comment about the position as between him and his solicitors. For the purpose of deciding what costs are recoverable from a paying party in respect of the CFA and ATE insurance, there have been breaches which have caused the materially adverse effects which I have described.

94. Mr Marven argues that I should look at materiality at the time when the challenge was made. He argues that, other than the DAS policy, the Defendant does not put forward, in evidence, any better form of funding than the TAG agreement. He suggests that the TAG policy is not necessarily bad value. In my Judgment this approach cannot be right. Any breach, if there is a breach, will take place at a time when the CFA and ATE insurance policy is entered into. If there is no breach at that stage there cannot in my view be a breach because of a subsequent change of circumstances. Whether or not the breach is material, must in my judgment be viewed from the date of the original agreements. As Mr Williams points out, one of the tests is whether the breach has a materially adverse effect on the protection afforded to the client. The fact that the client may not actually suffer major prejudice at the end of the day does not mean that the test is not met. In any event, on the facts of this case, it seems that the client has suffered financially.

95. Mr Marven also seeks to rely on the decision of Master Seager Berry in **Ganouchi v Houni Ltd** (4 March 2004) and says that HHJ Stewart QC and HHJ Holman are wrong. He suggests that the argument is circular. He asks rhetorically: Is client protection breached if no harm is done at the end of the day? He suggests that the answer to that question must be no, and argues that a material departure is only one which has the effect that Parliament is seeking to avoid.

96. That submission is also rejected. As Mr Williams points out, if the materiality test could be applied to a situation many months after the CFA has been entered into, the CFA would vary from being enforceable to unenforceable as time goes by. I respectfully disagree with Master Seager Berry's conclusions in Ganouchi.

96. For these reasons I find that the CFA is unenforceable and the ATE Premium is irrecoverable

Mr Benjamin Williams (instructed by DLA LLP) for the Defendant