JUDGMENT : Mr Justice Aikens : Commercial Court. 12th April 2006.

I. The Background to the litigation

1. This litigation concerns "After the Event" legal expenses insurance. This type of insurance was introduced with the reduction in the availability of legal aid for many types of civil claim and with the introduction of Conditional Fee Agreements for litigation. The second claimant, ("NIG") underwrote "After the Event" legal expenses insurance ("ATE policies") in connection with a litigation funding scheme operated by the first defendant. The first defendant was formerly called The Accident Group Limited. It then changed its name to AG (Manchester) Limited. The company has been in liquidation since 15 January 2004. In these proceedings the company has been called "TAG". The ATE insurance scheme run by TAG has been called "the TAG Scheme".

2. By a written agreement dated 1 July 2001, NIG appointed TAG as its agent. NIG effectively delegated to TAG the underwriting and claims handling of ATE policies. The TAG Scheme was marketed to the public as a "no win, no fee" scheme, which would finance the litigation of claims which members of the public wished to take to court. Typically the claims were comparatively small personal injury claims and the claimants were people who were not used to dealing with lawyers. Between February 2001 and December 2002 TAG issued to claimants approximately 75,703 ATE policies on behalf of NIG.

3. The TAG Scheme worked as follows:
   (1) An ATE policy would not be issued by TAG on behalf of NIG unless the claim passed a vetting process. The purpose of the vetting process was to ensure that only claims which had a chance greater than 50% of recovering at least £1500 were accepted into the TAG Scheme. In that way NIG hoped to ensure that the TAG Scheme would remain profitable.
   (2) The vetting process had four stages. The first stage was by TAG itself. The potential litigant/insured (who I will refer to as "the TAG Claimant") had to provide TAG with preliminary details about the potential claim to enable completion of the TAG Application Form. The TAG claimant also had to sign a TAG Service Agreement and Declaration. TAG then carried out its own initial vetting of the potential claim, based on the information in the TAG Application Form.
   (3) If TAG was satisfied by this vetting, then it passed the potential claim on to the second stage in the vetting. The potential claim went to a company related to TAG, called Accident Investigations Limited ("AIL"). That company is also now in liquidation. A representative of AIL would contact the TAG claimant and ask more questions so as to fill in an AIL Questionnaire. The aim was to obtain more details about the accident circumstances and losses. AIL then vetted the claim based on the AIL Questionnaire. It then returned the documentation to TAG, as well as providing TAG with a recommendation on liability and quantum.
   (4) If AIL was satisfied with the vetting, then the potential claim went to the third stage of the vetting process. TAG passed on all the material so far collated (including the AIL Questionnaire) to Rowe Cohen, who are the second defendants in these proceedings. Rowe Cohen is a firm of solicitors and the firm was appointed as being a specialist in this type of litigation. Rowe Cohen vetted the claim if there was sufficient information.
   (5) The fourth and last stage of the vetting process was to be conducted by one of the 800 or so solicitors on TAG's panel of solicitors. They have been called "the Panel Solicitors" in these proceedings. The vetting by the Panel Solicitors was based on the content of the AIL Questionnaire and, sometimes, the TAG Application Form.
   (6) Once a claim had passed all the vetting processes, an ATE Policy would be issued. At that stage a Panel Solicitor would be treated as retained, subject to the TAG Claimant's instructions. The Panel Solicitor then sent out to the litigant a standard form Client Care Letter and a Conditional Fee Agreement under cover of a standard form Introduction Letter.
   (7) A representative of TAG would then visit the TAG Claimant. The TAG representative's task was to explain the documents, (in particular the Client Care Letter and Conditional Fee Agreement), to complete a Fact Find and Oral Explanation Sheet and to obtain the TAG Claimant's signature on a number of documents.[1]
   (8) The TAG Claimant was provided with a Consumer Credit Agreement by which a funder (usually a bank) would give the TAG Claimant credit to pay for the ATE Policy premium, which was around £1000, and also to provide credit for the payment of disbursements incurred to pursue the personal injury claim. Interest would accrue on the outstanding loan balance.
   (9) From this point onwards, the ATE policy was on risk and the TAG Claimant would be issued with a Certificate of Insurance by TAG. The Panel Solicitor was obliged to pursue the claim in accordance with the Conditional Fee Agreement.
   (10) If the personal injury claim succeeded, then NIG would retain the premium and the successful TAG Claimant would seek to recover the premium and disbursements from the defendant to the claim, as part of the TAG claimant's recoverable costs.
   (11) But if the claim failed or was withdrawn, then NIG would pay, as an indemnity under the ATE Policy, any costs that the defendant to the claim was entitled to recover from the litigant, whether by judgment or settlement. The policy would also indemnify the TAG claimant/insured for the initial fees incurred (including the loan and loan interest) and any disbursements.

4. TAG concluded contracts with (i) Rowe Cohen, the specialist vetting solicitor firm; and (ii) with each of the Panel Solicitors. NIG and Winterthur allege that these contracts were concluded by TAG acting as the agent of NIG under the agreement with NIG of 1 July 2001, so that NIG can sue on them as principal.

[1] These were: the Client Care Letter; the Conditional Fee Agreement; the AIL Questionnaire; the Fact Find and Oral Explanation Sheet and the Consumer Credit Agreement.

5. By the end of October 2005, some 64,741 claims had been concluded under the TAG Scheme. Approximately 67.70% of those claims have resulted in demands for indemnity under the ATE Policies. The average amount of the claim for indemnity under these ATE Policies is at present no higher than £1923.14. The "failure" rate is vastly greater than the figure that NIG had used when it calculated the premium payable on ATE Policies. NIG had projected there would be a 7.5% failure rate. By the end of October 2005 the claims for indemnities under ATE Policies totalled about £90 million. It is estimated that if the present level and rate of claims for indemnity continues, then the total indemnity to be paid out may exceed £104 million.

6. This litigation has been brought because NIG asserts that it has suffered these large losses as a result of breaches of contract and duty by TAG, Rowe Cohen and the Panel Solicitors. The first claimant, ("Winterthur"), is involved as assignee under two Deeds of Assignment by NIG in favour of Winterthur. By these assignments NIG has purported to assign to Winterthur, first, all NIG's causes of action against TAG, Rowe Cohen and Panel Solicitors; and secondly, NIG's rights of access to information and documents relating to claims in respect of which ATE Policies were issued and on which an indemnity has been paid.[2]

7. It is said by Winterthur that it was proper to take these assignments because of its past and present relationship with NIG. Until June 2003, Winterthur was the parent company of the Churchill Group of Companies, which was the parent of NIG. On 13 June 2003, Winterthur sold its shareholding in the Churchill Group to the Royal Bank of Scotland. In connection with that sale, Winterthur and NIG concluded an arrangement whereby Winterthur covenanted to maintain almost complete responsibility for the losses (or profits) of NIG's "Special Risks Division". That division was responsible for ATE business, including that written under the TAG Scheme.

8. When the decision was taken to try and recover the losses suffered by NIG under the TAG Scheme, Winterthur and NIG decided that control of the litigation should be entirely in Winterthur's hands.

9. In December 2004 and January 2005, TAG, Rowe Cohen and some 626 the Panel Solicitors were notified of claims or potential claims against them in connection with NIG's losses under the TAG Scheme. Most of the Panel Solicitors then notified their professional indemnity insurers of these claims or potential claims. Eight different firms of solicitors have been retained by the various Panel Solicitors.[3] These defence teams represent nearly 600 out of the 626 firms of solicitors to whom letters were written on behalf of NIG and Winterthur.[4]

10. During 2005 there were various attempts by NIG and Winterthur to start litigation against TAG, Rowe Cohen and some Panel Solicitors. The details do not matter for present purposes. On 22 July 2005, HHJ Howarth granted NIG permission to start proceedings against TAG (in liquidation) pursuant to ***section 130*** of the ***Insolvency Act 1986.***

11. On 29 July 2005 the present proceedings were issued in the Commercial Court and served on the defendants. The defendants identified were TAG, Rowe Cohen and Ashington Denton, one of the many Panel Solicitors under the TAG Scheme. The idea was that the Particulars of Claim should constitute a lead action, in which damages were sought against TAG and Rowe Cohen in relation to many of the ATE policies written under the TAG Scheme between February 2001 and December 2002. Damages were sought against Ashington Denton in relation to TAG claims referred to and accepted by it. But the Particulars of Claim were also served on all the Defence Teams at the same time, although other Panel Solicitors had not then been joined in the proceedings as defendants. They still have not been joined. The TAG Claimants contemplate that other Panel Solicitors will be joined to the proceedings in the future, in circumstances which I explain below.

12. The question of the proper format for these proceedings, which court should determine them and the management of such large scale litigation has been the subject of a series of hearings before me since August 2005. In a series of Orders,[5] I determined that: (i) the proceedings, which are known by the collective name of "***the TAG Group Litigation***", would continue in the Commercial Court; (ii) a Group Litigation Order was not appropriate in this case where there are not multiple TAG Claimants, but multiple defendants; (iii) there should be a Register of all actual, potential and abandoned claims of the TAG Claimants against one or other of the defendants and potential defendants; (iv) details of the claims against Panel Solicitors and their status should be provided in the various Schedules of this Register; (v) any legal ruling and any finding identified by the court as one of "generic fact" would be binding in relation to "live claims" on the Register, unless otherwise ordered by the court; (vi) there would be some general rules for costs, in particular on "Common Costs", but subject to changes as circumstances dictated.

13. In the Order of 14 October 2005, I also gave directions concerning the "Privilege Issues", which are of fundamental importance to the whole of the litigation between the TAG Claimants and the Panel Solicitors. These issues require further explanation of the nature of the claims and why I concluded it was necessary that there should be an early determination of whether one or both of the claimants have any right to have disclosure of certain classes of documents that are in the possession, custody or power of the Panel Solicitors.

[2] The rights of access to information and documents are stated by the Assignment to cover all information and documents arising pursuant to ATE Policies; the TAG Service Agreement and Declarations; the TAG/Panel Solicitors Agreements and the Client Care Letters.

[3] They are: Berrymans Lace Mawer, Bond Pearce LLP, Fishburns, Kennedys, PI Brokerlink, Reynolds Colman Bradley, Robin Simon LLP and Squire & Co. The Panel Solicitors have marshalled themselves into 5 Groups. Membership depends on who the professional indemnity insurer is in each case and which solicitors have been instructed by which insurer. For present purposes the identity of the membership of the Groups does not matter.

[4] Originally NIG and Winterthur were represented by Barlow, Lyde & Gilbert ("BLG"), where Mr RA Spafford was the partner in charge of the matter. In April 2005 Mr Spafford became a partner of Richards Butler ("RB") and from that time RB has acted for both NIG and Winterthur.

[5] The first is dated 18 August 2005; the second 14 October 2005 and the third, 2 December 2005.

II. The "Privilege Issues"

14. The claimants' case against the defendants falls into two broad divisions. First, the claimants allege that, in respect of each of a large number of identified claims that were unsuccessful or abandoned, each of the defendants failed properly to vet TAG Claimants' claims before the ATE policy for that claim was issued. Under this head of claim, the claimants allege that NIG had a contractual relationship with TAG, Rowe Cohen and each of the Panel Solicitors. The claimants allege that TAG, Rowe Cohen and each of the Panel Solicitors owed contractual duties of care to NIG in relation to the vetting of claims and that each was in breach of its duties. As a result of those breaches, NIG suffered loss because it has had to pay out indemnities on so many unsuccessful or abandoned claims, which it should not have had to do if the claims had been properly vetted. Alternatively, it is said that the various defendants owed NIG duties of care in tort and the breach of those duties has caused NIG pecuniary loss and damage, which it is entitled to recover. It should be noted that these are said to be NIG's rights of action. It is not said that these are TAG Claimants' claims to which NIG is subrogated as a result of paying an indemnity under the ATE Policies. As noted before, Winterthur claims as assignee of the rights of action of NIG.

15. Under the second group of claims, the claimants allege that TAG and Panel Solicitors failed to monitor claims carefully after the ATE policies had been issued. The claimants' Particulars of Claim identify one of the Panel Solicitors, Ashington Denton, as the third defendant. The pleading gives particulars of allegations of breach of duty in respect of 50 sample claims which were referred to and handled by them. Again it should be noted that it is alleged that the right of action belongs to NIG and that has been assigned to Winterthur.

16. Each of the Panel Solicitors who were nominated when ATE Policies were issued obviously maintained a file for the claim that the solicitor was retained to pursue on behalf of the TAG Claimant. It is accepted that these files will contain documents that will be relevant to the claims now made by the claimants against Panel Solicitors.

17. The Panel Solicitors' files will contain documents in four broad classes. First, documents that were created prior to any application by a TAG Claimant to become an assured under the TAG Scheme. Within that class there will or may be documents created at the time of the original accident giving rise to the TAG Claimant's claim.

18. Secondly, there will be documents created at the time the potential TAG Claimant applied for ATE insurance. These documents will be: (i) the preliminary details that the TAG Claimant provided to TAG about his potential claim; (ii) the TAG Application Form; (iii) the TAG Service Agreement and Declaration; (iv) the AIL Questionnaire; (v) the Panel Solicitor's Introduction Letter, together with the Client Care Letter and Conditional Fee Agreement that were sent with it; (vi) the Fact Find and Oral Explanation Sheet prepared when the TAG representative visited the litigant.

19. Thirdly, there will be documents generated once the Panel Solicitor had been retained. These documents will include witness statements and proofs of evidence, medical and other reports, advices of solicitors and counsel, court documents and correspondence.

20. Lastly, there will be documents relating to the administration and operation of the TAG Scheme for the individual claims. Counsel for the Panel Solicitors have produced a very helpful schedule which summarises the documents in Panel Solicitors' files which might give rise to a claim for privilege. I have reproduced that schedule at the end of this judgment.

21. At the first hearing before me in these proceedings, on 18 August 2005, all parties agreed that it would be necessary to have an early court ruling on whether, and if so to what extent, the claimants were entitled to seek disclosure and production of the files held by the Panel Solicitors in connection with the TAG Scheme claims for which they had been retained. The reason for this is the structure of the TAG Group Litigation. This was finalised in my Order of 14 October 2005. The Order was arrived at as a result of much discussion between the parties and also the court. The aim of the structure is to manage this multi – party litigation in a cost effective and efficient way. To do this, it is recognised that lead or test cases must be identified which should be tried first. In that way it is hoped to provide rulings and guidance on key issues that will affect most if not all of the other claims.

22. In order to identify lead claims, the Order of 14 October 2005 provided that the TAG Claimants must keep a Register of all claims to be made against Panel Solicitors. This Register will comprise Schedules A to D. Schedule A will consist of each individual potential claim against each of the Panel Solicitors. The claimants intend to perform an audit of a sample of claims files for those claims identified in Schedule A. From the audit the claimants will decide which claims to pursue against those Panel Solicitors. Those claims will be transferred to Schedule B. A claim form will have to be issued in respect of each of these claims, thereby making that Panel Solicitor formally a party to the existing proceedings. Claims that the claimants decide not to pursue will be put in Schedule C. Schedule D is for claims that are started by the claimants against Panel Solicitors and subsequently compromised in the claimants' favour.

23. The Panel Solicitors have concluded that the TAG Scheme claims files that they have in their possession contain confidential information, documentation and evidential material relating to the TAG Claimants' claims and this material is subject to legal professional privilege. It is said by the Panel Solicitors that this privilege is that of the TAG Claimant, not that of the Panel Solicitor or any other party.

24. In all the cases where the TAG claims have been unsuccessful or abandoned, the TAG Claimant is, by definition, no longer the client of the Panel Solicitor. However, the Panel Solicitors are concerned that if they should give disclosure and production of their former clients' files to the claimants in the current proceedings then they might expose themselves to a risk of serious disciplinary sanctions and a claim by each TAG Claimant for breach of

confidence. The Panel Solicitors have therefore concluded that it is their duty, as solicitors, on behalf of their former clients, to assert a right to privilege in respect of the documents in the TAG claims files. They say that they must assert this right even if the former clients have no continuing interest in maintaining it.[6]

25. The claimants say that this decision will severely hamper their attempts to conduct an audit of the claims and is therefore preventing an identification of the claims that should go into Schedule B and the selection of test cases. Hence the need for an early decision on whether privilege can be maintained in respect of some or all of the ATE Claims files held by the Panel Solicitors.

26. Paragraph 14 of the Order of 14 October 2005 therefore directed the following matters be determined:
"14.1 Whether the files maintained by the Panel Solicitors in respect of TAG Scheme claims, or any parts of them, are privileged from production to the claimants or either of them;
14.2 Whether the documents and data held by TAG in respect of TAG Scheme claims, or any parts of them, are privileged from production to the claimants or either of them;
14.3 What consequential orders are appropriate in the light of the management court's conclusions in respect of paragraphs 14.1 and 14.2 above, including orders giving the claimants rights to inspect documents held by TAG and/or the Panel Solicitors for the purposes of conducting an audit preparatory to the possible issue of proceedings".

27. It is to be noted that: (i) for the purposes of answering these questions the Panel Solicitors are treated as if they were already parties to the proceedings, although they are not (apart from Ashington Denton). (ii) The Order focuses on files in the hands of Panel Solicitors and of TAG. The position of Rowe Cohen is not specifically dealt with. Rowe Cohen does not make any claim for privilege (either its own or on behalf of others) in respect of any documents of which the TAG Claimants seek disclosure. (iii) The court will have to make appropriate orders if it concludes that files in the hands of Panel Solicitors are not privileged as against the claimants. Given the various possible conclusions I might reach, no attempt was made to identify possible alternative orders and it was agreed that argument on appropriate orders would have to await my decision in principle.

28. The Order of 14 October 2005 also set out a timetable for the exchange of evidence and Outline Arguments by the parties, leading to a hearing of this question before me. That took place on 19, 20 and 23 January 2006. I heard submissions from Mr Charles Hollander QC on behalf of the claimants and from Miss Sue Carr QC and Mr Justin Fenwick QC on behalf of the Group 2 and Group 1 Panel Solicitors respectively. I also received written submissions from Mr Charles Phipps on behalf of the Group 4 Panel Solicitors and from Mr Ben Patten on behalf of Rowe Cohen, the second Defendants.[7] The Group 5 Panel Solicitors did not support the privilege argument and took no part in the hearing.

29. The liquidators of TAG have stated that they do not consider it to be in the interests of TAG's creditors to continue to defend the claim of the claimants against TAG. The liquidators applied to the court dealing with TAG's insolvency for permission that TAG cease to be represented in these proceedings or to participate in them in any way. That has been granted. Accordingly, TAG served no evidence and took no part in the Privilege Issue hearing before me.

30. At the end of the hearing I reserved judgment.

III. The relevant terms of the main documents relied on by the parties.

31. **The TAG Application Form:** This was filled in by or on behalf of the potential TAG Claimant. On it the TAG Claimant has to set out details of the "incident" giving rise to the claim; details of any "litigation friend"; whether any other legal advice has been taken and details of the injuries sustained in the incident. There is a "Declaration" at the end of the document before the signature of the applicant, in which the applicant states that he understands and agrees that:
"*1. my application is not accepted by TAG until such time as I have received confirmation of the same in writing from TAG and I have received Evidence of Insurance;* .....
9. the information given may form the basis of Court Proceedings and will be used to support an application for the Policy".

32. Underneath the applicant's signature is a further statement, headed "Uses of Your Information". That says: *"We will use the information that you have provided to process your application and we may share your information with other persons who need to use your information in order to process your claim, including TAG group companies, your insurer and your legal and medical representatives".*

33. **The TAG Service Agreement and Declaration:** This document was signed by the applicant at the same time as he signed the TAG Application Form. The document states that the applicant's signature "*confirms that you have carefully read and understood the form and that you have retained a copy".* The document sets out 10 numbered paragraphs which the applicant acknowledges that he understands. These include the following:
"5. If TAG accept my application I understand that they will (and I hereby confirm that I have instructed them to do so):
(a) recommend a solicitor to act on my behalf;

[6] See: *Guide to the Code of Conduct of Solicitors, (2004) Ch 16; Nationwide Building Society v Various Solicitors [1999] PNLR 52 at 65E-F and 69B – C, per Blackburne J.*

[7] They deal with: (i) the question of whether, and to what extent, TAG acted as agent of NIG; and (ii) the consequences of any ruling on privilege so far as it might affect Rowe Cohen in the litigation

(b) arrange for my claim to be investigated by [AIL] for a fixed fee (the "Investigation Fee") of £370.13 (inclusive of VAT) to provide sufficient information to enable my solicitor to present a claim to my opponent and to arrange for my claim to be funded by a suitable bank or other financial institution ("the Funder")".

34. The Declaration records that the TAG Claimant agrees to be bound by and comply with the terms of the policy. It continues:
"If TAG accepts this case, I further understand and agree that:
1. If I borrow the money to pay the premium and disbursements (if applicable) from the Funder I hereby irrevocably and unconditionally authorise any solicitor recommended to me by TAG to act on my behalf to: …….
(d) allow TAG and/or the Funder to have full access to my file of papers and I hereby authorise my solicitor to allow such access as may be required;
2. My solicitor will provide to TAG, and/or the Funder any information requested by them relating to my case; ……
9. The information I have given may form the basis of Court Proceedings and may be used to support an application for the Policy. ……
12. TAG will use the information that I have provided to process my application. I agree that TAG may share the information with other companies in the same group of companies as TAG and other persons who need to use the information in order to process my case, including the insurer, the legal and my medical representatives".

35. **The AIL Questionnaire:** This was completed by an AIL representative with the TAG Claimant. It sets out more details of the accident and the loss and damage said to have been suffered by the TAG Claimant as a result.

36. **The Client Care Letter:** This was sent out to the TAG Claimant by the Panel Solicitor after it had finished the vetting process. The letter asks the TAG Claimant to sign and return the enclosed copy of the letter. It stipulates that the letter, together with the Conditional Fee Agreement Terms and Conditions that are enclosed with it "*form the basis of the agreement between us*".

37. Under a heading in the letter which states "*Your obligation to repay your loan*", the letter states:
"We have been advised by [TAG]that you have agreed…[to]… ……..
Accordingly, by signing and returning a copy of this letter to us you irrevocably and unconditionally authorise us to:
(2) Allow TAG the Underwriters and/or the Bank to have full access to your file of papers as may be required;
(3) Provide to TAG, the Underwriters and/or the Bank any information requested by them relating to your claim; ……"

38. **The ATE Policy: Master Policy Document terms:** This contract is between the "*Assured*" as defined, and NIG, which is called "*the Company*" in the policy document. The relevant terms of the policy are:

"*Whereas the Assured (as hereinafter defined) has entered into an agreement with [TAG] (as hereinafter defined) and this agreement is hereby agreed to be the basis of this contract and is deemed to be incorporated herein providing the Company with a written proposal and declaration for the purposes of this insurance.*

THE COMPANY *hereby agree [sic] to the extent and in the manner herein set out, and subject to the terms, conditions, exclusions and the limit of indemnity contained in the Policy, which is identified in the schedule to this agreement, to provide the Assured with an indemnity in respect of:*
(i) Opponent's Legal Costs (as hereinafter defined)
(ii) Own Disbursements including Counsel's Fees (as hereinafter defined)
(iii) the Premium
(iv) any Deficiency in Damages
(v) any interest payable to the Funders (as hereinafter defined). ……

Definitions and Interpretation
The Assured The Clients (including their heirs and assigns) of the Accident Group who have been declared to the Company. …….
The Proceedings The legal proceedings, whether issued or not in relation to the pursuit by the Assured of a legal case for compensation arising out of personal injury, as confirmed in the Assured's Evidence of Insurance. …. …….
The Accident Group The Accident Group (to include its successors and assigns) which has entered into an agreement with the Assured to manage the pursuit of the Assured's case for compensation in respect of damages arising out of an accident which includes amongst other things a case for damages for personal injury suffered which is the subject matter of the Proceedings.
The Funders The Bank of Scotland or First National Bank [including their successors and assigns] or any subsidiary or associated company of either or any other lender which has agreed to provide the Assured with loan facilities in respect of the payment of the Premium and Own Disbursements including Counsel's Fees. ……"

Conditions
1. Compliance …….
(b) The Assured and the Appointed Representative shall conduct the Proceedings with due care and diligence and shall take all reasonable steps to minimise or avoid the costs and expenses payable under the Policy. During the course of the Proceedings, the Assured shall comply with any orders made by the Court, all the rules of the Court and shall follow all proper and reasonable advice given by the Appointed Representative with the terms of The Accident Group Operating Manual shall be a condition precedent to any liability of the Company to make payment under the Policy so that, whilst the Company will be prepared to provide an indemnity to the Assured and the Funders notwithstanding non-compliance by the Appointed Representative. In conducting the proceedings,

compliance by the Appointed Representative with the terms of The Accident Group Operating Manual, the Company will be entitled to make a recovery of any payment made in these circumstances from the Appointed Representative. …….

4. Progress of the Proceedings

(a) The Company and The Accident Group shall at all times have direct access to the Appointed Representative and the Assured shall co-operate fully with the Company in this respect. Both the Assured and the Appointed Representative shall keep The Accident Group informed in writing as promptly as reasonably practicable of all material developments in the Proceedings. ……..

6. Subrogation

In relation to any case or loss paid or payable under the Policy, the Company shall be subrogated to the Assured's rights of recovery. In this regard, the Assured shall do and concur in doing and permit to be done all such acts and things as may be necessary or required by the Company for the purpose of enforcing any rights and remedies or of obtaining relief or indemnity from other parties to which the Company shall be or would become entitled or subrogated upon their paying for any case or loss under the Policy, whether such acts and things shall be or become necessary or required before or after the Assured's indemnification by the Company."

39. **The Assignments:** The first Deed of Assignment[8] between NIG and Winterthur is dated 2 December 2004. This recites that NIG has or may have claims against "*the Claim Management Companies (including TAG)*", which are defined as "*entities or individuals who were or are engaged in marketing and administering the After the Event Policies on behalf of NIG*". Paragraph 2 of the Deed states:

*"**2.1.** To the extent permitted by law and, insofar as actual or potential claims against TAG are concerned, subject to the agreement of the liquidators of TAG, NIG hereby assigns absolutely to Winterthur all and any legal, equitable or other interests in the choses in action constituted by the rights (howsoever held by NIG) to prosecute and conduct causes of action against the following:*

***(i)** the Solicitors[9] in respect of any Loss or Losses[10] arising out of the Advice and/or Referral Fees; and*

***(ii)** the Claim Management Companies in relation to the Referral Fees and the conduct of the Claim Management Companies' in vetting, monitoring, managing or otherwise dealing with the After the Event Policies and resulting claims.*

***2.2** Winterthur shall hold the rights and benefits assigned under this Deed for its own absolute use and benefit.*

***2.3.** NIG agrees to sign, execute and deliver any further documents that may be reasonably required to give full effect to the assignment in Clause 2.1….."*

40. The "***Further Deed of Assignment"***[11] is dated 27 October 2005. This recites that NIG and Winterthur are entering into this Deed to "*assign the rights to information and documents needed to efficiently investigate [sic], prosecute and conduct actual or potential causes of action described in Clause 2.1 of the Initial Assignment Deed*". Clause 2. of the Further Deed provides:

*"**2.1** Subject to Clause 4.1, to the extent permitted by law NIG hereby assigns absolutely to Winterthur all and any rights of access to information and documents related to Claims,[12] arising under or in connection with the following agreements:*

2.1.1 any insurance policy between NIG and an Insured on materially the same terms as the Master Policy Document at 7A/11 in the TAG Operating Manual dated 19 November 2001;

2.1.2 any TAG Service Agreement and Declaration between TAG and an Insured…

2.1.3 any agreement between TAG and a Solicitor….

2.1.4 any Client Care Letter between a Solicitor and an Insured…."

41. Clause 4.1 of the Further Deed provides:

"***4.1** The assignment of the Rights to Winterthur pursuant to this Deed and in respect of any Claim shall not become effective until the relevant Loan[13] is repaid in full. Subject to a written agreement between NIG and Winterthur to the contrary, once the Loan is repaid in full, the assignment of the Rights will become effective".*

IV. The main arguments of the parties in outline.

42. **The claimants:** Mr Hollander QC submits that the documents in each of the Panel Solicitors' files must be divided into two categories. The first category consists of those documents that were created before the ATE Policy for that particular claim came on risk. The second category consists of all the documents that were created after the ATE Policy came on risk.

43. In relation to the pre – ATE policy documents,[14] Mr Hollander submits that they either attract no privilege at all, or, if they are privileged, the privilege is that of the insurer, ie. NIG, not that of the TAG Claimant. This is because

8 B/Tab 32/page 104.

9 These are defined as "*…those firms of solicitors who provided or will provide Advice*".

10 Defined as "*…any and all liabilities, losses, costs, claims, damages, penalties and expenses (including attorney's fees and expenses and costs of investigation and litigation)*".

11 *B/Tab 33/page 109*

12 *Claim*" is defined as " …. *all activities conducted in relation to the pursuit of claims by or on behalf of the Insured*".

13 This is defined as: " …*any loan facility provided to an Insured by a lender in respect of the payment of the premium for their respective After the Event Policy and disbursements connected with the pursuit of a Claim*".

14 As I understood the argument, Mr Hollander did not assert that any previous legal advice documents that might have been handed over by the potential claimant to TAG, AIL or Rowe Cohen came within what he called the "pre – ATE Policy" documents, so they were not covered by his argument.

the documents came into being for the purpose and benefit of the insurer, NIG, in order to decide whether the insurer would issue an ATE policy in respect of any particular claim. If any documents are privileged and the privilege is that of NIG, then those documents must be disclosable to NIG and also to Winterthur, because it is an assignee of NIG's rights of action and its rights of access to the documents and information.

44. In relation to the post – ATE policy documents, Mr Hollander accepts that the position is different once the Client Care Letter has been signed and the ATE Policy is in force. He accepts that communications between the Panel Solicitor and the client and other documents such as draft proofs or experts reports will be the subject of privilege, which is that of the TAG Claimant. But Mr Hollander submits that there are several reasons why the TAG Claimants cannot claim privilege in respect of post – ATE Policy documents, at least as against the ATE insurer, NIG and its assignee, Winterthur.

45. First, he submits that NIG has a contractual right to production of these documents by virtue of the terms of the ATE Policy, which is a contract between NIG and each TAG Claimant whose claim is accepted into the TAG Scheme. Mr Hollander relies principally upon the wording of Clause 6, which appears under the heading "Subrogation". He focuses on the wording:

"*In this regard, the Assured shall do and concur in doing and permit to be done all such acts and things as may be necessary or required by [the insurer] for the purpose of enforcing any rights and remedies or of obtaining relief or indemnity from other parties to which [the insurer] shall be or would become* ***entitled*** [15] *or subrogated upon their paying for any case or loss under the Policy, whether such acts and things shall be or become necessary or required before or after the Assured's indemnification by [the insurer]".*

46. Mr Hollander submits that, by this clause, the TAG Claimant has expressly agreed with the insurer that the TAG Claimant will co-operate with him for the purpose of enabling the insurer to sue any professional adviser whose negligence may have caused or contributed to the insurer having to indemnify the TAG Claimant under the ATE Policy. That co-operation must extend to making available to the insurer such documents as would otherwise be the subject of the TAG Claimant's privilege.

47. Secondly, Mr Hollander submits that the relationship between the insurer and the TAG Claimant means that there is a "community of interest" between the TAG Claimant and NIG in relation to the litigation costs that NIG has agreed to insure. This community of interest extends to all documents that are produced in connection with the TAG Claimant's claim, after the ATE Policy is on risk. He submits that this gives rise to "common interest" privilege as between the TAG Claimant and NIG, as insurer. The effect of this is that the TAG Claimant cannot assert privilege as against NIG. This position continues even after the original reason for the common interest, ie. the pursuit of the TAG Claimant's claim, has terminated. Mr Hollander relies in particular on the analysis of Moore – Bick J (as he then was) in ***Commercial Union Assurance Co PLC v Mander.***[16]

48. Thirdly, Mr Hollander relies on the terms of the Client Care Letter, which was sent to each TAG Claimant by a Panel Solicitor after a particular claim had been accepted into the TAG Scheme and a Panel Solicitor had been assigned that claim. The Client Care Letter required the TAG Claimant to sign a copy of the letter and return it to the Panel Solicitor. The Client Care Letter stated that by signing the copy letter, the TAG Claimant "*irrevocably and unconditionally*" authorised the Panel Solicitor to do various things, including: "…..
(2) Allow TAG, [the insurers] and/or the Bank to have full access to your file of papers as may be required;
(3) Provide to TAG, [the insurers] and/or the Bank any information requested by them relating to your claim".

49. Mr Hollander submits that, by this wording, the TAG Claimant has agreed with the Panel Solicitor to give TAG and the insurers, ie. NIG, full access to the TAG Claimant's file, including any privileged documents. Therefore the TAG Claimant has expressly authorised the Panel Solicitor to disclose all documents on the file, including any privileged ones, to the insurers. The Client Care Letter states expressly that the authority is both irrevocable and unconditional. Mr Hollander says that this provision in the Client Care Letter is for the benefit of the insurer, NIG, so that NIG is entitled to sue directly on the access right given, by virtue of ***section 1(1) and (2)*** of the ***Contracts (Rights of Third Parties) Act 1999.***

50. Mr Hollander relies on other contractual documents to show that the TAG Claimant has agreed that documents that are confidential and would otherwise attract privilege are to be made available to a variety of entities or people. In particular he relies on the TAG Application Form,[17] and the TAG Service Agreement and Declaration, which is incorporated into the ATE Policy.[18]

51. As for the position of Winterthur, Mr Hollander submits that the First Assignment between NIG and Winterthur, made in December 2004, and the Second Assignment, made in October 2005, are sufficient to assign to Winterthur all rights of action and rights of access to information and documents that NIG had as against TAG Claimants. He submits that the nature of the rights is not so personal as to be incapable of assignment. He notes that the definition of "Assured", "Accident Group" and "Funder" in the ATE Policy terms all contemplate that there could be assignments by those entities. Therefore Winterthur is entitled to take advantage, as assignee from NIG, of such privilege and rights of access that NIG would have had as against TAG Claimants.

15 *Emphasis supplied*
16 *[1996] 2 Lloyd's Rep 640, particularly at 644 – 8*
17 Declaration 3 and the bottom of page 2: "Uses of your Information".
18 See: declaration 12 (in relation to the insurers) and declarations 1(d), 2, 12 and 13 in relation to other entities and persons.

52. **The Panel Solicitors:** Miss Carr QC led the argument for the Panel Solicitors' groups. She emphasised that the Panel Solicitors were arguing the case in favour of maintaining privilege over documents on behalf of the TAG Claimants. The documents might well contain sensitive personal information, which they may well wish to keep confidential and within the protection of legal professional privilege.[19]

53. Miss Carr submits that, in relation to the pre – ATE Policy classes of documents, in particular the Claim Application Form and the AIL Questionnaire, these contain material that is confidential to the TAG Claimant. She submits that the dominant purpose for which these documents were created was, objectively speaking, that of conducting litigation which was reasonably in prospect at the time they were created. Therefore the pre – policy documents, but in particular the Claim Application Form and the AIL Questionnaire, will be covered by "litigation" privilege.

54. Alternatively, Miss Carr submits that the AIL Questionnaire is covered by "legal advice" privilege. That Questionnaire was provided for, and did provoke, advice from the the Panel Solicitor. At the least it was part of a series of communications aimed at keeping the client and solicitor informed so that advice might be given and sought as required. Reliance was placed on ***Balabel v Air India,***[20] in particular the passage in Taylor LJ's judgment at ***page 330E - F,*** where he stated: *"In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly….Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach."*

55. In relation to post – ATE Policy documents, Miss Carr submits that NIG does not have and has never had any contractual right to disclosure and inspection of TAG Claimants' files for the purposes of using those files in an action against the Panel Solicitors for damages for their alleged negligence. First, she submits that the only direct agreement between the TAG Claimants and NIG (as insurer) is the ATE Policy. Miss Carr submits that the scheme of the Policy wording makes it clear that any rights conferred on NIG, as insurer, to have access to the TAG Claimant's documents only extend to the prosecution of the TAG Claimant's claims, but no further. In this regard, Miss Carr relies in particular on the fact that ***"Proceedings"*** are defined in a limited way in the Policy terms to mean the prosecution of the TAG Claimant's claim. Miss Carr submits that Condition 4 of the Policy terms obliges the assured to cooperate with NIG only in relation to the "Proceedings" as defined.

56. Miss Carr also submits that the terms of Clause 6 of the Policy Conditions (the "Subrogation" clause), cannot apply to this litigation. Its terms do not oblige Panel Solicitors to divulge materials that are covered by the TAG Claimants' privilege.

57. As for the other documents on which NIG and Winterthur relied, Miss Carr submits that, in the absence of any right of access (for the present purposes) in the only direct contract between the TAG Claimant and the insurer, there would need to be very clear words in any other documentation to create such a right. There are none. Thus, by the Client Care Letter (written by the Panel Solicitor), the TAG Claimant only grants "irrevocable and unconditional authority" to allow NIG to have full access to the TAG Claimant's file for the purposes of prosecuting his claim, but not for any wider purposes. NIG cannot therefore invoke the ***Contracts (Rights of Third Parties) Act 1999*** to take the benefit of the terms of the Client Care Letter to claim a contractual right of access to the TAG Claimant's file for the purposes of NIG/Winterthur's claims against Panel Solicitors. Moreover, the question of whether NIG/Winterthur would be entitled to take the benefit must be dependent on evidence of the intention of the parties to the TAG Claimant/Panel Solicitor contract. That issue cannot be finally determined on this application. A provisional view or a conclusion that such a case is "arguable" does not assist NIG/Winterthur.

58. As to the argument that NIG (and therefore Winterthur) can rely on "common interest" privilege, Miss Carr accepts that common interest privilege can be used as a "sword". In that way it can bring another party within the bounds of legal professional privilege, so that the other party can have access to documents that would otherwise be privileged from production to that party. However, Miss Carr submits that at no time (and in particular now) was there sufficient common interest between the TAG Claimant and NIG to entitle NIG to obtain disclosure of documents that would otherwise be privileged from production to it. In fact, there is a sharp division of interest from the time when it has to be decided whether a TAG claim should be pursued or settled for a sum offered by the opposing party. No common interest can now exist, given that these TAG claims have all failed and are no longer on foot at all.

59. On the question of whether Winterthur can assert any rights of access to the documents sought by virtue of the two assignments, Miss Carr stated that the Panel Solicitors were prepared to accept, for the purposes of this ruling only, that Winterthur had a sufficient commercial interest in taking the two assignments to prevent them from being invalid because they savoured of maintenance. However, the Panel Solicitors reserved the right to reopen the matter at a later stage in the proceedings. Miss Carr also reserved the question of whether the two assignments operated as statutory assignments[21] or whether they could only operate in equity as far as the Panel Solicitors were concerned. This would depend on whether the Panel Solicitors had been given notice in writing of the assignment of the choses in action covered by the two assignments, as required by ***section 136*** of the ***Law of Property Act 1925.***

[19] I did ask the parties whether any attempt had been made to see if individual TAG Claimants were prepared to waive privilege in relation to the documents sought by Winterthur. I was told that this had been attempted in a few cases but there had been little response. No attempt to contact individual TAG Claimants had been made in the vast majority of cases so far because of the difficulty and expense involved.

[20] *[1988] 1 Ch 317.*

[21] Under *section 136* of the *Law of Property Act 1925.*

60. Miss Carr submits that a distinction must be drawn between the chose in action constituted by NIG's right (if any) to sue Panel Solicitors for alleged breach of contract or duty and NIG's right (if any) to obtain access to documents or information in the hands of Panel Solicitors that are subject to privilege. The latter right belongs to the TAG Claimants. Miss Carr submits that both the right of access to documents and information and the right to assert privilege are personal rights that are not capable of being assigned. The right of access is a right exercisable only by NIG.

61. Miss Carr submits that even if NIG were entitled to assert a common interest privilege over documents, that right to common interest privilege cannot be assigned to Winterthur. "Common interest" privilege, like all rights to privilege, is personal and cannot be assigned. Accordingly, if the only basis on which NIG could see the documents sought is in reliance on common interest privilege, then Winterthur cannot use that argument in its favour.

62. Mr Fenwick advanced several oral arguments in support of the submissions of Miss Carr, in addition to the written submissions served on behalf of the Group 1 Panel Solicitors that he represented.

V. Questions for Analysis and Decision

63. As I have already noted, the "Privilege Issue" has been brought up and argued as if the Panel Solicitors were already a party to the proceedings. Therefore I have been asked to deal with both the question of any contractual rights of access to documents and also "privilege" questions that would otherwise arise at the discovery stage of proceedings. On that basis it seems to me that the following issues arise for analysis and decision:

(1) Are any pre – ATE Policy documents in the hands of the Panel Solicitors referred to in the Schedule to Miss Carr's Outline Argument, subject to any form of "legal professional privilege"? If so, what form is it and whose privilege is it?

(2) Are any post – ATE Policy documents in the hands of the Panel Solicitors, referred to in the Schedule to Miss Carr's Outline Argument, subject to any form of "legal professional privilege"? If so, what form is it?

(3) Is NIG entitled to rely on any contractual or other agreement such that, as between the TAG Claimants and NIG, the latter is entitled to have access to documents that would otherwise be covered by privilege in favour of the TAG Claimants?

(4) Is NIG entitled to rely on "common interest privilege as a sword" so as to have access to documents that would otherwise be covered by privilege in favour of the TAG Claimants?

(5) Assuming that NIG is entitled to have access to documents in the hands of Panel Solicitors, is Winterthur entitled to the same access?

64. In order to deal with these issues it may help to state some general propositions about "legal professional privilege", its scope and when it can be exercised or not.

65. **What is "legal professional privilege"?**

"Legal professional privilege", which is often referred to simply as "privilege", is recognised as a fundamental human right granted by the common law.[22] The right is given to citizens or other legal entities that obtain legal advice from a lawyer. In ***B v Auckland District Law Society***[23] Lord Millett described "privilege" as "*a right to resist the compulsory disclosure of information*". The corollary of this right of the client is the duty of the lawyer to keep confidential and not to disclose to others information that is covered by legal professional privilege. The right to resist the compulsory disclosure of information can be exercised in litigation or other adversarial legal processes, such as arbitration. But the right to resist the compulsory disclosure of information is not confined to such processes. Generally speaking, information that is covered by legal professional privilege cannot be subject to any order for compulsory production to another at all, unless there is an express statutory power, or one by implication, that requires it.[24]

66. The cases have noted that this right to resist the compulsory disclosure of information is confined to information relating to legal advice, as opposed to information and advice given and received in other confidential relationships such as between a patient and his doctor or an accountant and his client.[25] I mention below the rationale for this rule only applying in relation to legal advice, as opposed to other confidential relationships.

67. The cases have developed a distinction between two sub – types, or "sub – heads"[26] of "legal professional privilege". In the earliest cases the privilege from compulsory production was confined to information (principally documentary) that was created where legal proceedings were in contemplation. That type of legal professional privilege has become known today as "litigation privilege". But, in two landmark cases in 1833, Lord Brougham LC held that legal professional privilege extended to communications where legal advice was sought and given when no litigation was contemplated.[27] That sub – type of legal professional privilege has become known today as "legal advice privilege".

22 ***R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*** *[2003] 1 AC 563 at para 7 (page 606) per Lord Hoffmann.*
23 *[2003] 2 AC 736 at para 67 on page 761*
24 ***R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*** *[2003] 1 AC 563 at paragraph 30 per Lord Hoffmann.*
25 ***Duchess of Kingston's Case*** *(1776) 1 East PC 469.*
26 The phrase of Lord Carswell in ***Three Rivers DC v Bank of England (No 6)*** *[2005] 1 AC 610 at para 105.*
27 ***Greenough v Gaskell*** *(1833) 1 M&K 98 at 103;* ***Bolton v Liverpool Corporation*** *(1833) 1 M&K 88 at 94.*

68. The rationale for the first sub - type (ie. "litigation privilege") rests, in modern terms, on the principles of access to justice, the proper administration of justice, a fair trial and equality of arms. Those who engage in litigation or are contemplating doing so may well require professional legal advice to advance their case in litigation effectively.[28] To obtain the legal advice and to pursue adversarial litigation[29] efficiently, the communications between a lawyer and his client and a lawyer and a third party and any communication brought into existence for the dominant purpose of being used in litigation must be kept confidential, without fear that what is said or written might be disclosed. Therefore those classes of communication are covered by "litigation privilege".[30]

69. The rationale for the second sub - type of privilege, (ie. "legal advice privilege"), is that it advances the rule of law.[31] Citizens, corporations and other legal entities need to know what the law is so that they can decide what they can and cannot do and so manage their affairs according to law. If a citizen or corporation is to obtain advice on his legal rights and obligations, the lawyer consulted must be given all the relevant facts so as to give effective advice. Many cases have concluded that all the relevant facts will not necessarily be given unless they are imparted in confidence to the lawyer and the lawyer is under a duty to keep that information and his advice confidential. To protect that confidentiality and so advance the rule of law, the cases have developed the rule that communications between lawyers and clients[32] that are generated even when no litigation is contemplated, will not be subject to compulsory production, unless a statutory power expressly or by implication requires it.[33] But "legal advice privilege" does not extend to communications obtained from third parties that are to be shown to the lawyer for the purpose of obtaining legal advice.[34]

70. In the present case issues on legal advice privilege arise only at the pre – ATE Policy stage. Mr Hollander is prepared to accept, if necessary, that the vetting by Rowe Cohen and the Panel Solicitors before the ATE Policies were issued will be subject to "legal advice privilege". But he submits that legal advice at that stage was being sought by NIG to see whether an ATE Policy should be issued. Therefore if there is privilege in communications to Rowe Cohen and the Panel Solicitors by the potential TAG Claimant and the legal advice given by them, the privilege must be that of the insurer, NIG.

71. **The scope of "litigation privilege".**

"Litigation privilege" extends, in time, to information (which must include information stored in electronic form as well as in documentary form) which is produced either during the course of adversarial (as opposed to inquisitorial or investigative) litigation, or when such litigation is in contemplation. The privilege obviously covers legal advice given by a lawyer to his client for the purposes of such existing or contemplated litigation. It also extends to communications between the lawyer and his client and the lawyer and third parties, provided that those communications are made for the sole or dominant purpose of obtaining legal advice or conducting that litigation.[35] In deciding whether a communication is subject to "litigation privilege", the court has to consider objectively the purpose of the person or authority that directed the creation of the communication.[36]

72. **In what circumstances might a person be unable to exercise a right to assert Legal Professional Privilege over communications that would otherwise be covered by that right?**
The general rule, applicable to both sub – types of legal professional privilege, is that a communication that is protected by the privilege continues to be protected for ever, unless the privilege is waived by the client, who alone has the right to waive privilege. No one can waive privilege on his behalf unless the client's consent has been given: "*once privileged, always privileged*". Moreover, if the client refuses to waive his right to maintain privilege, for whatever reason or for none, that refusal cannot be questioned or investigated by the court.[37] Although Lord Nicholls of Birkenhead said in the ***Derby Magistrates' case*** that he was "*instinctively unattracted*" to a rule that a client can insist on maintaining privilege, when the client no longer has any interest in asserting it and where the non – disclosure would prejudice a third party, the law remains "*once privileged, always privileged*"[38] Moreover, the privilege remains absolute, unless the privileged communication is itself the means of carrying out a fraud.[39]

[28] Several cases have quoted Dr Johnson's description of the function of lawyers as a "*class of the community who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself if he could". Boswell, Life of Johnson, ed. Birkbeck Hill (1950) vol 5,p 26.*

[29] Litigation privilege" cannot be relied on in legal proceedings that are not "adversarial", per the majority of the House of Lords in: ***In re L (A Minor) (Police Investigation: Privilege)*** *[1997] AC 16.*

[30] ***Three Rivers DC v Bank of England (No 6)*** *at para 27 per Lord Scott of Foscote.*

[31] *Ibid. at para 34 per Lord Scott of Foscote,* referring to paras 15.8 to 15.10 of Professor Adrian Zuckerman's book: *Zuckerman's Civil Procedure (2003).*

[32] 32 In ***Three Rivers DC v Bank of England (No 5)*** *[2003] QB 1556,* the Court of Appeal held that, in the case of a corporate client, in relation to "legal advice privilege" the privilege could not attach to communications to the legal adviser by either employees who were not part of the directing mind and will of "the client" or by others who were not "the client".

[33] ***R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*** *[2003] 1AC 563.*

[34] ***Waugh v British Railways Board*** *[1980] AC 521 at 541 – 2, per Lord Edmund – Davies.* See also: ***Three Rivers DC v Bank of England (No 5)*** *[2003] QB 1556 at paras 19 and 21 per Longmore LJ, giving the judgment of the court.* The House of Lords dismissed a petition to appeal this decision and refused to consider its correctness in ***Bank of England (No 6).***

[35] ***Grant v Downs*** *[1976] 135 CLR 674, per Barwick CJ (dissenting in the result) at page 677;* ***Waugh v British Railways Board*** *[1980] AC 521;* ***Three Rivers DC v Bank of England (No 6)*** *at paras 100 to 102 per Lord Carswell.*

[36] ***Guinness Peat Properties Ltd v Fitzroy Robinson Partnership*** *[1987] 1 WLR 1027 at 1037 per Slade LJ, with whom Woolf LJ and Sir George Waller agreed.*

[37] ***Reg v Derby Magistrates' Court ex p B*** *[1996] 1 AC 487 at 503 per Lord Taylor CJ.*

[38] ***Derby Magistrates' case*** *at page 513, per Lord Nicholls;* ***B v Auckland District Law Society*** *[2003] 2 AC 736 at para 44 per Lord Millett.*

[39] *Ibid.*

73. A client can consent to privileged communications being made available generally for disclosure. In that case the privileged nature of the communications is lost completely. But a client can also agree to produce privileged communications for a limited purpose only. If that happens, the privileged nature of those communications is not lost completely. The client can assert the right not to produce the same communications for any purpose outside the limited purpose for which he agreed to produce the communications.[40]

74. I must consider next the situation where privileged documents or communications either have been or will be created and the person in the position of the client agrees, by contract or otherwise, with a third party, to grant that party access to such privileged communications. In ***Brown v Guardian Royal Exchange Assurance PLC***[41] there was an express term in the contract for a solicitor's professional indemnity insurance that where solicitors or other expert advisers were employed in relation to a claim against the insured, then "*the Insurers…may require the solicitors' reports to be submitted directly to them*". The Court of Appeal held that this term in the insurance was crucial. It meant that if solicitors were appointed to deal with a claim against the insured solicitor, then the insurers were entitled to see communications from both the insured and third parties to and from solicitors employed in relation to a claim against the insured, provided that the communications concerned the subject matter of the claim against the insured.[42] It seems to follow that the person who has the right to exercise privilege must be entitled to agree with a third party to give that person access to privileged communications. The agreement might be general or for specified purposes. That will depend on the correct construction of the agreement.[43] Once the assent to access is given to a third party, then in general the right to privilege cannot be re-asserted as against that party, except with agreement. However, where the agreement to give access to privileged communications is founded on a joint or common interest between the person in the role of client and another, as it was in ***Brown's case,*** then it would appear that if the joint or common interest ends, eg. when an actual conflict of interest arises, then the right to have access to privileged information that is created thereafter by or on behalf of the client, will end.[44]

75. That leaves the question of whether someone other than the third party to whom the right of access is given is entitled to claim a right of access to privileged communications, eg. by claiming it is an assignee of the third party's rights. That is a major issue in this application, because Winterthur claims the right of access to communications that are privileged in its position as assignee of NIG. I will deal with it below.

76. **"Common Interest" privilege**
The concept of "common interest" privilege derives from ***Jenkyns v Bushby,***[45] a decision of Kindersley V-C. He held that a case for the opinion of counsel, prepared in relation to separate litigation for the benefit of the predecessor in title to the defendant in the action, but after the present dispute had arisen, was privileged from production in the later action. The concept was developed in the Court of Appeal's decision in ***Buttes Gas and Oil Co v Hammer (No 3)***[46] Brightman LJ expressed the proposition of law to which he gave assent in this way:

"…if two parties with a common interest and a common solicitor exchange information for the dominant purpose of informing each other of the facts, or the issues, or advice received, or of obtaining legal advice in respect of contemplated or pending litigation, the documents or copies containing that information are privileged from production in the hands of each".[47]

77. In ***Guinness Peat Properties Ltd v Fitzroy Robinson Partnership,***[48] the defendants in the action had, as insureds, written a letter report to their insurers about a claim made against them by the plaintiffs. The Court of Appeal held that the letter had been brought into existence at the instance of the insurers in order to obtain legal advice or to assist in the conduct of litigation. Solicitors for the defendants had inadvertently allowed the plaintiffs' solicitors to inspect the letter and it was referred to in the plaintiffs' expert's report. The Court of Appeal upheld the judge's decision to grant an injunction to restrain the plaintiffs from using the letter further and ordering them to return all copies to the defendants. Slade LJ noted that although it was the insurers that had caused the letter to be created, it was the defendant insured that now claimed that it was covered by "litigation privilege". He held, following the statement of the law of Brightman LJ in the ***Buttes Gas case,*** that the document was privileged in the hands of the defendant insured.[49]

78. These cases demonstrate that where a communication is produced by or at the instance of one party for the purposes of obtaining legal advice or to assist in the conduct of litigation, then a second party that has a common interest in the subject matter of the communication or the litigation can assert a right of privilege over that communication as against a third party. The basis for the right to assert this "common interest privilege" must be the common interest in the confidentiality of the communication. The cases I have referred to concerned applications for production of communications to a third party, which were resisted. They assume that the communications concerned will be covered by one or other sub – type of legal professional privilege in the hands

40 ***B v Auckland District Law Society*** *[2003] 2 AC 736 at para 69 (page 762) per Lord Millett.*
41 *[1994] 2 Lloyd's Rep 325.*
42 *Ibid. at 327 per Hoffmann LJ; at 330 per Neill LJ.*
43 *Ibid. at 329 per Hoffmann LJ; at 330 per Neill LJ.*
44 ***Brown v Guardian Royal Exchange Assurance PLC*** *[1994] 2 Lloyd's Rep 325, in particular at 330 per Neill LJ;* ***TSB Bank PLC v Robert Irving & Burns (Colonia Baltica Insurance Ltd, third party)*** *[2000] 2 All ER 826 at para 17 per Morritt LJ and page 835 per Tuckey LJ.*
45 *(1866) LR 2 Eq 547*
46 *[1981] 1 QB 223; see particularly per Lord Denning MR at 243; and Brightman LJ at 267 – 268.*
47 *Ibid. page 267H.*
48 *[1987] 1 WLR 1027*
49 *Ibid at page 1038H to 1039A. Woolf LJ and Sir George Waller agreed.*

of the party that caused the communication to be produced in the first place. That type of situation, where a second party resists the application of a third party for production of communications, has been called "using common interest privilege as a shield".[50]

79. However, it is not this use of common interest privilege that arises in the present applications. The submission of Mr Hollander is that NIG (and Winterthur) can rely on "common interest privilege as a sword".[51] That type of common interest privilege is established by such cases as ***Cia Barca de Panama SA v George Wimpey & Co Ltd,***[52] and ***Commercial Union Assurance Co plc v Mander.***[53] The principle is that if party B has a sufficiently common interest in communications that are held by party A, then party B can obtain disclosure of those communications from party A even though, as against third parties, the communications would be privileged from production by virtue of legal professional privilege. In ***Svenska Handelsbanken v Sun Alliance and London Insurance PLC,***[54] Rix J (as he then was) held that "common interest privilege as a sword" could be asserted in relation to both "litigation" privilege and also "legal advice" privilege. I respectfully agree.

80. The questions of what type of relationship between the two parties can give rise to a "common interest" in the communication concerned has been considered in a number of cases. Amongst the types of relationship that can give rise to a "common interest" are those of insured and insurer and insurer/reinsured and reinsurer.[55] The cases have refused to be prescriptive about the circumstances in which the two parties will have a sufficient "common interest" in the particular communications concerned. The issue has to be decided on the facts of the individual case.

81. Two cases deal with the time at which the common interest in the privileged communication must exist in order to permit the exercise of "common interest privilege as a sword". In ***Cia Barca v Wimpey,*** Bridge LJ formulated the principle on the basis that the two parties (A and B in my example) have a common interest in the communication at the time the relevant communication was created.[56] It will not matter that, subsequently, the two parties (A and B) fall out.[57] That analysis was followed by Moore – Bick J (as he then was) in ***Commercial Union v Mander.***[58] It therefore appears to follow that, at least in cases of "common interest as a sword", once a communication is subject to common interest privilege, then it will always remain so.

82. With that introduction of the legal principles, I consider the five issues for decision that I have set out above.

VI. Are any pre – ATE Policy documents in the hands of the Panel Solicitors referred to in the Schedule to the Outline Argument submitted by the Panel Solicitors subject to any form of "legal professional privilege"; if so, what form?

83. Both "legal advice privilege" and "litigation privilege" are claimed in relation to pre – ATE Policy communications. Logically it seems sensible to consider first "litigation privilege", because that can cover not only communications between the client and his lawyer, but also third parties and the lawyer. In so far as the relevant pre – ATE Policy communications might be subject to "litigation privilege", three questions arise. First, at the time that the relevant communications were created, was litigation contemplated? Secondly, were the communications created for the dominant purpose of obtaining legal advice for that litigation or in aid of that litigation? Thirdly, under the direction of which person or entity, objectively speaking, were those communications created; that of the putative TAG Claimant, or the putative ATE insurer, NIG?

84. Insofar as "legal advice privilege" is asserted, the major question is: at whose direction were communications produced that went to Rowe Cohen or a Panel Solicitor? Was "the client" at that stage NIG or the potential TAG Claimant? A secondary question might arise if the answer to the first question is: "the potential ATE claimant". That is, was the communication to Rowe Cohen or the Panel Solicitor from the potential TAG Claimant, as "the client", or from a third party.

85. Mr Hollander submits that there was, in effect, a condition precedent to an ATE Policy being issued. That was that the potential claim had been properly vetted. Until it had been, there could be no question of pursuing a claim through litigation. So, before the ATE Policy was issued, litigation was not contemplated and no communications could have been produced with the dominant purpose of obtaining legal advice as to contemplated litigation or in aid of such litigation. He relies on the House of Lords' decision in ***Jones v Great Central Railway Company.***[59] The House held that letters written by a trade union member to his union so as to provide evidence to see whether it would provide him with legal assistance to bring a claim for wrongful dismissal were not covered by legal professional privilege.

50 *Phipson on Evidence 16th Ed (2005) Ch 24 – 03, page 649.*
51 *Ibid.*
52 *[1980] 1 Lloyd's Rep 598.*
53 *[1996] 2 Lloyd's Rep 640.*
54 *[1995] 2 Lloyd's Rep 84 at 88.*
55 See, respectively: ***Guinness Peat Properties Ltd v Fitzroy Robinson Partnership*** *[1987] 1 WLR 1027;* ***Commercial Union v Mander*** *[1996] 2 Lloyd's Rep 640.*
56 See: *[1980] 1 Lloyd's Rep 598 at 615*
57 As they did in ***Barca v Wimpey***. This rule appears to be different from the situation where one party gives another a contractual right to access. There, if there is a subsequent falling – out, the court has held that the contractual right will no longer exist: ***Brown v GRE*** *[1994] 2 Lloyd's Rep 325.*
58 *[1996] 2 Lloyd's Rep 640 at 648.*
59 *[1910] AC 4.*

86. Miss Carr submits that "litigation privilege" applies to the pre – ATE Policies, in particular the key documents, which are the Claim Application Form and the AIL Questionnaire. In her submission there was a "unified" purpose in completing these pre – ATE Policy documents, because the process of obtaining the ATE Policy was an intrinsic part of the litigation process. In this regard, Miss Carr relies on the wording of what was dubbed by TAG agents as the "Second Aid Pack"; these packs were handed to TAG Claimants, "outside the supermarket", as it were. The packs suggest that information provided will go to a solicitor. Miss Carr also relies on the wording of the TAG Service Agreement and Declaration, in particular declarations 9 and 12, with the references to "my claim" (ie. that of the potential TAG Claimant); "my case"; "my solicitor" and "my application for a policy". Miss Carr submits that the whole process, considered objectively, is in aid of litigation.

87. Miss Carr relies on the analysis of the Court of Appeal in ***Re Highgrade Traders Ltd.***[60] In that case the court adopted the labels "legal advice privilege" and "litigation privilege".[61] The question before the court was whether reports prepared on behalf of insurers by loss adjusters, accountants and fire experts for the purposes of providing expert advice and information to the insurers' solicitors after an insured had made a claim on a property insurance following a fire, were covered by legal professional privilege. The court held that as the reports were from third parties (as opposed to the client), they could not be covered by "legal advice" privilege.[62] However, Oliver LJ (who gave the only substantial judgment) noted that the insured had made a claim on the policy by the time the reports were prepared. He held that the decision on whether to pay the claim depended on the legal advice that was given; and, on the facts, it was clear that if the claim was not paid then litigation was bound to ensue. Oliver LJ concluded that:

"…there was no purpose for bringing the documents into being other than that of obtaining the professional legal advice which would lead to a decision whether or not to litigate. That, in my judgment, was a sufficient purpose on its own to entitle them to privilege quite apart from any subsidiary purpose which they might serve in any litigation which might ensue as a result of the decision"[63]

88. Oliver LJ also emphasised, however, that each case depended on its facts. He said that it was the task of the court, in each case "*to determine the actual intention of the party claiming privilege and where it [the court] discerns a duality of purpose, to determine what is the dominant purpose".*[64]

89. Miss Carr submitted that in the present case, on the facts: (i) litigation was contemplated at the time the pre – ATE communications were made; (ii) the communications identified in the Schedule to her Outline Argument were all created with the dominant purpose of obtaining legal advice in relation to that contemplated litigation; and (iii) on an objective view, the person under whose direction these communications were created was the potential TAG Claimant.

90. I accept that, at the time those communications were created, litigation was contemplated. The aspiration of the potential TAG Claimants was that they could pursue claims for their personal injuries or other claims and they began the vetting process with the aim of litigating their claims. NIG, as the potential ATE insurer, must have considered that litigation in relation to each potential TAG Claimant was a distinct possibility, although whether it became a probability would depend on the vetting process.

91. That leads on to the next question: whether the pre – ATE Policy documents identified in the Panel Solicitors' schedule were created for the dominant purpose of obtaining legal advice in respect of that contemplated litigation. For this I have to ask: why did enquiries have to be made as to the circumstances giving rise to the potential claims? Was the dominant purpose one which would lead to a decision on whether or not to litigate the claim?[65] This is a more difficult issue. In the end I have concluded that, at the time that these documents were created, the dominant purpose was to make a decision on whether the ATE Policy would be issued and the potential claim funded. If the policy was not issued, then there would be no litigation. I appreciate that there are indications in the documents (to which Miss Carr drew my attention) which suggest that there will be litigation. But that was not guaranteed until the ATE Policy had been issued. I accept that a subsidiary reason for producing the documents was the potential litigation, but it was not what was uppermost in the minds of NIG and TAG at the point they were created.

92. That leads to the third and, in my view, most important question concerning these pre – ATE Policy documents. That is: considering the matter objectively, under the direction of which person or entity were all the relevant pre – ATE Policy communications created? The answer must be: NIG. The whole scheme was devised by NIG. It was NIG, through its agent, TAG, that demanded the production of these documents for vetting purposes. NIG and TAG decided whether, at each stage, the next particular step towards the issue of an ATE Policy should be taken. At no stage was this process driven by the potential TAG Claimant, nor could he determine what happened next, because at that stage he was only an aspirant TAG Claimant. This is all plain from the "*Step by Step Procedures"* set out in the Operating Manual prepared by the Accident Group.[66] It therefore seems to me that if "litigation privilege" applies to the pre – ATE documents, it must be that of NIG.

[60] *[1984] BCLC 151.*
[61] It appears that the expressions had been coined by counsel for the liquidators, Mr M Crystal QC: *see page 161 of the report.*
[62] *page 165, per Oliver LJ,* with whom Goff LJ agreed.
[63] *Page 174F.*
[64] *Page 175B.*
[65] Compare the questions posed by Oliver LJ in ***Re Highgrade Traders Ltd*** *[1984] BCLC151 at 173G and 174F*
[66] See *B/Tab 36 at page 151, part of Operating Manual No 5, setting out 12 steps to the policy issue.*

93. In this respect, the facts in ***Re Highgrade Traders Ltd***[67] should be noted. The various reports there were obtained at the direction of the insurers and for their purposes. Privilege in the communications relating to those reports was therefore the privilege of the insurers. In the present case the person directing that the various communications be created was NIG, through TAG. Therefore, if any privilege exists over those documents it must be NIG's to assert.

94. As for "legal advice" privilege, this can only attach to communications between the client and the lawyer. This privilege could apply to any communications between the potential TAG Claimant and Rowe Cohen, the vetting solicitor, and also communications between the potential TAG Claimant and the Panel Solicitor before the ATE Policy was actually issued. But I still have to ask the question: on an objective view, which party directed that this advice be obtained? The answer can only be: NIG, either through itself or its agent, TAG. It was NIG who, at that stage, needed advice to see whether a policy should be issued. So if there are any communications of the type I have identified, the "legal advice" privilege must be that of the insurer, NIG.

VII. Are any post – ATE Policy documents in the hands of the Panel Solicitors, referred to in the Schedule to the Panel Solicitors' Outline Argument, subject to any form of "legal professional" privilege: if so, what form?

95. Mr Hollander accepts that the Client Care Letter constitutes a retainer of a Panel Solicitor by the TAG Claimant. He accepts also that from that point onwards there will be a solicitor's file and that post – ATE Policy documents in that file will be subject to "litigation" privilege. He accepts that, in the normal course, "litigation" privilege would be a right belonging to the TAG Claimant. But he relies upon various contractual terms, in the ATE Policy and the Client Care Letter, to argue that NIG, as insurer, has a right of access to the post – ATE Policy documents; alternatively that NIG can assert a "common interest" privilege in them.

VIII. Is NIG entitled to rely on any contractual agreement such that, as between the TAG Claimants and NIG, the latter is entitled to have access to communications that would otherwise be covered by privilege in favour of the TAG Claimants?

96. As I have already stated, Mr Hollander's primary case is that, by virtue of the terms of the ATE Policy, NIG has a contractual right of access to the post – ATE Policy documents that would otherwise be subject to the TAG Claimants' litigation privilege. He relies in particular on Conditions 4 and 6 of the ATE Policy terms, which I have already set out.

97. In my view Miss Carr is correct in submitting that Condition 4 of the Policy terms is directed to the period when "*The Proceedings*", as defined in the Policy, are taking place. "*The Proceedings*" are: "*The legal proceedings, whether issued or not, in relation to the pursuit by the Assured of a legal case for compensation arising out of personal injury, as confirmed in the Assured's Evidence of Insurance…*"

    Therefore the agreement between NIG and the TAG Claimant/assured, in Condition 4(a), that NIG and TAG "*shall at all times have direct access to [the appointed solicitors]*" and that "*the Assured shall co-operate fully with [NIG]in this respect*", is concerned with the period up until "*The Proceedings*" have been completed in one way or another. In my view that Condition does not impose any contractual obligation on the TAG Claimant/assured, to grant NIG access to the appointed solicitors or the files held by them, after "*The Proceedings*" have ended. So NIG cannot rely on Condition 4 to create a contractual right of access to post - ATE Policy documents for the purposes of the proposed action by NIG/Winterthur against the Panel Solicitors.

98. However, that is not the end of the matter. The ATE Policy is one of indemnity. The cover provided by the ATE Policy is defined in the policy terms under the heading "*The Cover*". There are three sections of cover. (i) Section A deals with the situation where the TAG Claimant has made no recovery, has to pay costs to the other side and has incurred his own legal costs. Under this Section, NIG agrees to indemnify the TAG Claimant in respect of the "*Opponent's Legal Costs*" and "*Own Disbursements including Counsel's Fees*". Those are all defined terms in the Policy. (ii) Section B deals with the situation where the TAG Claimant makes a recovery from the other side but, after payment of the TAG Claimant's own costs, the net recovery will be less than £500. Section B provides an indemnity "*for this Deficiency in Damages*". (iii) Section C deals with the same type of situation as in Section A. It provides an indemnity for the loan that the TAG Claimant will have taken out from a Funder to pay for the Premium (for the policy), for his own solicitor's disbursements and for counsel's fees, together with any interest on the loan.

99. The policy is, therefore, an insurance to indemnify against loss resulting from a legal liability to pay sums to others. The legal liability may be (i) to pay costs to the opponent in the litigation; or (ii) to pay the fees and disbursements of the TAG Claimant's own solicitors and counsel; or (iii) to repay the loan advanced by the Funder.

100. Condition 6 of the Policy Terms is headed "*Subrogation*". It provides that *"in relation to any case or [**sic**] loss paid or payable under the Policy, [NIG] shall be subrogated to the Assured's rights of recovery"*. Condition 6 acknowledges, in a contractual term, what occurs by operation of law upon payment of the indemnity in accordance with the insurance policy terms. The insurer, as the indemnifier, is then subrogated to the legal rights of the party indemnified. The rights granted by this clause are greater than those given by operation of law, however. In the latter case, an indemnifier is only subrogated to the rights of the insured upon payment of a full indemnity.[68] But, by Condition 6, the right to be subrogated arises "*in any case or loss paid **or payable** under the Policy*"[69]

[67] *[1984] BCLC 151*

[68] See eg.: ***Page v Scottish Insurance Co*** *(1929) 140 LT 571 at 577 – 8.*

[69] Emphasis supplied.

101. The rights obtained upon an insurer being subrogated to the insured are as broad as can be. They are as set out in the celebrated passage of the judgment of Brett LJ in ***Castellain v Preston,***[70] which is too well known to need repeating. Yet despite the breadth of the rights granted to an insurer by subrogation, at first blush the wording of Condition 6 appears to be slightly curious, given the nature and extent of the indemnity that is granted by the Policy. But, on further examination, I think the statement that the insurer is subrogated "*to the assured's right of recovery"* makes sense. The TAG Claimant may well have "*rights of recovery"* against his own solicitor or others in respect of costs which he was liable to pay to the other side and also those which he has to pay to his own lawyers. For example, if, as a result of the solicitor's breach of duty in handling a case, the client is obliged to pay costs to the other side, then they could well be recoverable from his solicitor. Also, if it transpires that the solicitor's services were valueless as a result of his breach of duty, the client would be entitled to recover any sum which he has paid to the solicitor by way of costs and any costs that have had to be paid to the other side.[71] Further, it seems to me at least highly arguable that if a litigant has to pay the other side's costs and costs to his own solicitor because of the breach of duty of a third person, then the client could recover those costs from that third person.[72]

102. It follows that I cannot accept Miss Carr's characterisation of the claims by NIG against either Panel Solicitors or Rowe Cohen as "collateral claims" by the insurer, which are made simply to recover its own losses. The claims made by NIG against Panel Solicitors or Rowe Cohen will be claims to recover sums for which NIG agreed to grant an indemnity to the TAG Claimants. It seems to me that, in origin, those losses and the rights to recover them are really those of the TAG Claimants.

103. Condition 6 of the ATE Policy terms expressly requires the TAG Claimant/Assured: "*…to do and concur in doing and permit to be done all such acts and things as may be necessary or required by [NIG] for the purpose of enforcing any rights and remedies or of obtaining relief or indemnity from other parties to which [NIG] shall be or would become entitled or subrogated upon their paying for any case or* ***[sic]*** *loss under the Policy….".*

    It is important to note that this wording envisages two types of "*rights and remedies"* or "*relief or indemnity"* that NIG might pursue after it has paid "*for any case or loss under the Policy".* The first type is that which to which NIG is "***subrogated*** *upon their paying for any case or loss under the Policy".* The second type is that "*to which NIG shall be or would become* ***entitled****…upon their paying for any case or loss under the policy".* In my view the use of the two formulae – subrogated rights and those rights to which NIG is entitled - is deliberate. It recognises that there are rights etc. which NIG can exercise "in the shoes of" the TAG Claimant; and there are those rights which NIG can exercise itself having paid an indemnity under the policy.

104. In my view the wording in Condition 6 places an express, contractual duty on the TAG Claimant to co-operate with NIG to enable it to pursue any claim to which it is "*entitled"* or "*subrogated"* upon paying the indemnity under the policy. The obligation to co-operate will embrace a duty to produce documents as required by NIG, provided that they are genuinely "*necessary or required"* for the purpose of enforcing rights and remedies "*from other parties"* to which NIG is entitled or subrogated. As I have already indicated, those rights will include a right to pursue a solicitor for damages incurred as a result of breach of duty. That right, in this case, must extend to both the relevant Panel Solicitor and also Rowe Cohen, the vetting solicitors. The rights must also extend to being able to pursue TAG.

105. The pre – ATE Policy documents and the post – ATE Policy documents are, in principle, documents that can legitimately be required by NIG to pursue claims against the relevant Panel Solicitor, Rowe Cohen and TAG. Those claims will be made in an attempt to recover from them as damages the costs paid out to opponents and to the TAG Claimant's solicitors and counsel, as well as funding costs.[73]

106. The claims made by NIG/Winterthur are not subrogated claims, as I understand it. They are claims that NIG allege it is "*entitled"* to bring, having paid an indemnity under the ATE Policy. Miss Carr submits that any right of access to documents that is granted to NIG by virtue of Condition 6 must be limited to a right of access for a purpose that is within the interests of the TAG Claimant. That is not what the wording states. It contemplates a duty on the TAG Claimant/insured to assist the insurer to enforce its rights and remedies once the TAG Claimant has received the benefit of the indemnity that the insurer has agreed to provide under the ATE Policy.

107. Therefore, once NIG has become obliged to indemnify the TAG Claimants for the losses it suffers as a result of its legal liabilities to pay his opponent's costs and his own legal team's bills and to repay the Funder, NIG has a contractual right to demand that the TAG Claimant give it access to documents in the hands of the Panel Solicitors for use to pursue its the rights and remedies to which it is "*entitled".* That right of access must extend to both pre – ATE Policy documents and post – ATE Policy documents. Any assertion of a right to "litigation" privilege by the TAG Claimant in respect of pre – ATE or post – ATE Policy documents would be inconsistent with NIG's right of access. On the authority of cases such as ***Brown v GRE,***[74] the insured cannot use "litigation privilege" to prevent the insurer using his contractual right of access to the documents.

[70] *(1883) 11 QBD 380 at 388.*

[71] See: *Jackson & Powell on Professional Negligence (5th Ed. 2002); para 10 – 301 and 10 – 307.*

[72] An example might be where an expert gives negligent advice and as a result the client pursues litigation which he then loses and so has to pay costs to both his solicitor and the other side.

[73] I emphasise, of course, that I am making no statement about the merits of any claim against Rowe Cohen or Panel Solicitors or TAG; nor am I making any judgment on what heads of damage, if any, are recoverable.

[74] *[1994] 2 Lloyd's Rep 325*

108. Having reached this conclusion, I need only deal shortly with the question of whether NIG is entitled to obtain access to the post – ATE Policy documents by relying on the terms in the Client Care Letter between the relevant Panel Solicitor and a TAG Claimant the Panel Solicitor. By this the TAG Claimant *"irrevocably and unconditionally authorises"* the Panel Solicitor nominated to allow TAG, NIG and/or the funding bank "*to have full access to your file of papers as may be required"*. The Panel Solicitor is also authorised to provide to NIG "*any information requested by them relating to your claim"*.

109. These terms of the Client Care Letter confer an irrevocable and unconditional authority upon a Panel Solicitor to allow NIG to have full access to the TAG Claimant's file of papers "*as may be required"*. I agree with Miss Carr that, in its context, this authority is limited to authorising the Panel Solicitor, as agent, to allow NIG to see the TAG Claimant's documents for the purposes of pursuing the TAG Claimant's claim; but there is no wider authorisation.

110. I accept that the Client Care Letter must constitute a contract of retainer between the TAG Claimant and the Panel Solicitor and I accept that the authorisation provision in it must be a term of that contract. I am prepared to assume for the present that this term "*purports to confer a benefit"* on NIG ("*the Underwriter"*), within the terms of ***section 1(1)(b)*** of the ***Contracts (Rights of Third Parties) Act 1999***. I am far from convinced that, upon the proper construction of that term, the parties to that contract did intend that NIG should be entitled to enforce that term directly: see ***section 1(2)***. But I do not need to decide that point. Even if NIG had the right to enforce the term, it could only do so to the extent to which the Panel Solicitor can exercise his authority. That is limited to allowing NIG (and others identified) to have full access to the file of papers as may be required for the purposes of pursuing the TAG Claimant's claim against the potential third party, but no more than that.

111. Therefore, on the basis that the claims of NIG (or Winterthur if it can claim as assignee) are claims that it is "*entitled"* to bring to enforce rights or remedies from other parties upon paying for any "*case or loss"* under the ATE Policy, then NIG has a contractual right under the ATE Policy to demand that the TAG Claimant give it access to the relevant pre and post ATE Policy documents. NIG's contractual right to access must override any right to "litigation privilege" that the TAG Claimants have in respect of documents in the hands of the Panel Solicitors.

IX. Is NIG entitled to rely on "common interest privilege as a sword" so as to have access to documents that would otherwise be the subject of privilege in favour of the TAG Claimants?

112. Miss Carr submits that there can only be a community of interest between NIG and the TAG Claimant that will give NIG the right to use "common interest privilege as a sword" if that interest exists now. She submits that there is not and never has been a community of interest because there is always a tension between the TAG Claimant and NIG, the insurer. The former will wish to advance his case, but the latter will wish to minimise its potential liability. Miss Carr also submits that, in any event, any documents that are subject to common interest privilege can only be used for the purposes for which they were originally intended: viz. the advancement of the TAG Claimant's claim.

113. I cannot accept either argument. The first question to answer is whether the relationship between the TAG Claimant and NIG as ATE insurer is one that can give rise to a common interest that can found "common interest privilege". The answer must be: yes. The TAG Claimant and NIG were at all times in the relationship of insured and indemnity insurer. That relationship carries on even when the indemnity has been paid in two respects. First, because the insurer is then subrogated to the rights of the insured. Secondly, in this case, because, under Condition 6 of the ATE Policy, the insured also has contractual duties of cooperation towards the insurer in relation to subrogated and other claims, once an indemnity is either payable or paid under the policy terms.

114. The second question is whether there is a sufficient "common interest" as between the insurer and the insured at the time that the relevant documents were created.[75] In my view the relationship of the TAG Claimant and indemnity insurer will create a sufficient community of interest in the documents that were created for the purpose of deciding whether ATE insurance should be granted. Further, that community of interest will continue in relation to documents produced to pursue the TAG Claimant's case.

115. I do not accept Miss Carr's argument that there was necessarily always a tension between the two sides. First, the insured and insurer are under a duty to act in good faith towards one another because the ATE insurance contract is one of "utmost good faith". On the insured's side this duty is emphasised by the contractual obligations set out in Condition 4 of the Policy terms. Secondly, in practical terms, the insurer will wish to see the insured's claim being successful. The more successful the claim, the less likely the insurer will have to pay any indemnity under the policy terms. Thirdly, a number of documents demonstrate that it was always intended that the insurers would see the insured's documents and that he must allow the insurer to see them if the insurer wished to do so for the purposes of pursuing the TAG Claimant's claim. This is clear from the terms of the Client Care Letter that I have set out above; the declaration in the TAG "Client Application Form" which is headed "*Uses of Your Information";*[76] and Condition 12 in the TAG Service Agreement, which is in the same terms.

116. Nor can I accept Miss Carr's argument that NIG cannot obtain disclosure of these documents using "common interest privilege" and then use them in litigation against the Panel Solicitors. Documents that are obtained in the exercise of common interest privilege obviously cannot be used for any purpose the applicant wishes. But it is

[75] See para 81 above.

[76] This states: "*We will use the information you have provided to process your application and we may share your information with other persons who need to use your information in order to process your claim, including TAG Group companies, your insurer and your legal and medical representatives*".

clear that they can be used in litigation between the two parties who at an earlier stage had a "common interest", as happened in ***Commercial Union Insurance Co PLC v Mander***.[77] It seems to me that it is a legitimate extension to allow use of the documents in litigation between one of the two parties that had a common interest at the time the document was created, (say A and B), and a third party where B (in this case the TAG Claimant) is under an express contractual obligation to A (in this case, NIG) in the wide terms set out in Condition 6 of the ATE Policy wording.

117. Therefore NIG can rely on "common interest privilege as a sword" to have access to the pre and post – ATE Policy documents in the hands of the Panel Solicitors that would otherwise be subject to the TAG Claimants' privilege.

X. Assuming that NIG is entitled to have access to documents in the hands of Panel Solicitors, (whether by contractual right or by assertion of "common interest privilege as a sword"), is Winterthur entitled to the same access?

118. **What is assigned by the Assignments?** The first thing to consider under this issue is precisely what NIG has purported to assign to Winterthur by virtue of the two Deeds of Assignment. Under the first Deed, NIG purports to assign "*absolutely*" to Winterthur:

"… all and any legal, equitable or other interests in the choses in action constituted by the rights (howsoever held by NIG) to prosecute and conduct causes of action against…[the Panel Solicitors; TAG and Rowe Cohen][78]

A "chose in action" is:

"*..a thing recoverable by action, as contrasted with a thing in possession…..the expression "chose in action" …is now used to describe all personal rights of property which can only be claimed or enforced by action and not by taking physical possession"*[79]

Rights of action for damages for breach of contract or tortious activities will, obviously, be within the concept of "choses in action". For present purposes everyone accepts the general proposition that if an entity has a right to bring proceedings to enforce a cause of action, then that right can be assigned to an assignee that has a sufficient commercial interest in taking the assignment. Miss Carr also accepts, for the purposes of this hearing only, that Winterthur has a sufficient commercial interest in taking both the assignments from NIG. Therefore, in principle, if NIG has the right to bring actions to enforce causes of action against Panel Solicitors, TAG or Rowe Cohen, that right is capable of being assigned to Winterthur.

119. These rights of action are not "personal" in the way that some contracts are personal and so incapable of assignment. These rights are no different from any other rights of action to sue for breach of contract or tort. Therefore, in my view, NIG can assign and has assigned to Winterthur the rights identified in the First Assignment. Whether the assignment is a statutory one or not may be debatable, but I believe that does not matter for present purposes.

120. The Further Deed of Assignment purports to assign absolutely from NIG to Winterthur: "*…all and any rights of access to information and documents related to Claims, arising under or in connection with the following agreements* ***[viz.]****…[the ATE Policy]…".*

This assignment therefore also purports to assign choses in action, ie. the "*rights of access to information and documents relating to Claims*".[80] The Further Deed states that rights of access to information and documents arising under or in connection with various agreements, which include the ATE Policies, are being assigned. In my view, the only choses in action which NIG can purport to assign must be those that it can enforce by action. Therefore any purported assignments made by the Further Deed must be limited to those rights of access to information and documents relating to Claims that NIG can enforce by action; ie. the rights of action must be limited to NIG's ***contractual*** rights of access to information and documents.

121. In principle, those contractual rights of access to information and documents will include those given to NIG under Condition 6 of the ATE Policy terms. I have already held that this provision obliges TAG Claimants to give access to documents genuinely necessary or required for the purpose of enforcing rights and remedies that NIG is "***entitled***" to enforce upon payment of an indemnity under the ATE Policy. The Further Deed purports to assign that right, subject to the precise scope of the definition of "*Claims*" set out in the Further Deed.

122. However, Miss Carr submits that the rights of access to documents granted to NIG by Condition 6 are personal to NIG. Miss Carr submits those rights are not, as a matter of law, capable of assignment. This submission is based on the nature of a contract of insurance, which in general is regarded as a personal contract whose benefit cannot be assigned by either party.

123. I cannot accept that argument. First, it is clear that the TAG Claimant does not choose the insurer. The insurer is chosen by TAG, as is emphasised in the Client Care Letter, which states: "*The Accident Group will advise you of the Insurer/Underwriter ("the Underwriter") and the lender ("the Bank")…*". Secondly, the policy terms contemplate that rights can be assigned by the ATE Claimant/insured, The Accident Group and the Funder: see the definitions.

[77] *[1996] 2 Lloyd's Rep 640*

[78] The actual phrases are "*the Solicitors*" as defined, and "*the Claim Management Companies*", as defined. There is no dispute that those definitions cover the Panel Solicitors, TAG and Rowe Cohen.

[79] *Halsbury's Laws, Vol 6, "Choses in Action" para 1.*

[80] "*Claims*" are defined in the Further Deed as "*…all activities conducted in relation to the pursuit of claims by or on behalf of the Insured*", ie. an ATE Claimant.

Given that the causes of action themselves can be assigned, it seems to me to follow that the contractual rights of access to information and documents which will be connected with such causes of action, must also be capable of assignment.

124. Therefore I conclude that the Further Assignment does take effect as an assignment of the rights of access to documents that were granted to NIG by the TAG Claimants under Condition 6 of the ATE Policy terms.

125. However, in my view it does not make sense to talk of NIG purporting to assign "privilege" or "common interest privilege" by virtue of either Deed. Legal professional privilege is not a right to conduct and prosecute causes of action against TAG, Rowe Cohen or Panel Solicitors. Nor, in my view, is it a right of access to documents or information that "*arises under or in connection with*" the ATE Policy, upon the proper construction of the Further Deed. As I have indicated, in my view the rights assigned are limited to contractual rights of access granted to NIG; they do not extend to any rights of "privilege" created by the law.

126. If this analysis is correct, then the next question is whether, in the present circumstances, Winterthur is entitled to claim access to the pre and/or post ATE Policy documents, as assignee of the rights identified in the two Deeds? I propose to consider the pre and post ATE Policy documents separately.

127. **The position of Winterthur in relation to pre – ATE Policy documents.** In relation to the pre – ATE Policy documents, I have held that the TAG Claimants do not have any legal professional privilege in the documents; and if any party does have privilege in them, it is NIG. I will take first the conclusion that the pre – ATE Policy documents do not attract any privilege at all. I must also assume, for present purposes, that Winterthur is entitled to take an assignment of NIG's rights to prosecute and conduct causes of action against the Panel Solicitors. In that case, Winterthur will be in the same position with regard to discovery of documents by the Panel Solicitors as would NIG in any action against them. Those documents are in the Panel Solicitors' possession, control or power. Those documents will (it is assumed for these purposes) be relevant to the claim by NIG/Winterthur against the Panel Solicitors. Therefore, in principle, they must be disclosable. Winterthur, as assignee of NIG's causes of action against the Panel Solicitors, must be in the same (but no better) position with regard to disclosure of documents as the assignor of the claim. Therefore they must be disclosable to Winterthur in any action it brings against Panel Solicitors.

128. If the position is that the pre – ATE Policy documents are subject to "legal professional privilege", which privilege is the right of NIG, then it seems to me that if Winterthur brings an action against Panel Solicitors, it must still be entitled to discovery of pre – ATE Policy documents in the possession of the Panel Solicitors. This conclusion can be approached from two directions.

129. First, NIG can waive its legal professional privilege in those documents. It can either do so generally, or for a specific purpose.[81] In my view NIG has, by implication, waived privilege in favour of Winterthur by granting Winterthur the assignment of the causes of action under the First Deed. Therefore Winterthur is entitled to disclosure of these documents by the Panel Solicitors in any action against them.

130. Secondly, if there is an assignment of causes of action in favour of Winterthur as assignee, then Winterthur stands in the place of the assignor. In my view, an assignee is in a similar position to a successor in title with regard to the incidence of legal professional privilege. It is well established that a successor in title succeeds to and is entitled to assert any legal professional privilege that was available to its predecessor in title.[82] Therefore, if NIG was entitled to claim legal professional privilege in relation to pre - ATE Policy documents, then so can its assignee, Winterthur. It follows that, as between Winterthur and the Panel Solicitors, the latter cannot refuse to give the former disclosure of pre – ATE Policy documents, because as against Winterthur, the Panel Solicitors cannot assert any privilege on behalf of the TAG Claimants.

131. I should add that I have considered the Canadian case of ***Deloitte & Touche Inc v Bennett Jones Verchere***,[83] to which Miss Carr referred. I do not find it helpful, not least because the law in Canada is different to English law on the question of the succession to interests by a trustee in bankruptcy.

132. **The position of Winterthur in relation to the post – ATE Policy documents.**
With regard to the post – ATE Policy documents, the starting point for the analysis varies depending on whether NIG's right to access is based on "common interest privilege as a sword", or is based on the contractual right to access contained in Condition 6 of the ATE Policy terms. In each case I have to assume for present purposes that NIG has assigned to Winterthur the causes of action against Panel Solicitors, TAG and Rowe Cohen and Winterthur is bringing an action against them.

133. If the correct analysis is that NIG is entitled to access to the post – ATE Policy documents by virtue of its "common interest privilege as a sword", then although Winterthur would be entitled to discovery as against the Panel Solicitors, it would be met by the claim that the post – ATE Policy documents are subject to privilege, which is a "common interest privilege" in favour of both the TAG Claimants and NIG. Moreover, if legal professional privilege is held jointly, then it cannot be waived by one person alone. In my view that rule must apply equally to common interest privilege as much as to "joint privilege" where, eg. two parties jointly obtain advice from a lawyer.

81 ***B v Auckland District Law Society*** *[2003] 2 AC 736.*
82 ***Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd*** *[1972] Ch 553;* ***In re Konigsberg*** *[1989] 1 WLR 1257 at 1266 per Peter Gibson J.*
83 *(2001) 206 DLR (4th) 280.*

134. As I have already stated, the assignment of the rights given by the First Deed will not, by itself, enable Winterthur to obtain disclosure of the post – ATE Policy documents that are the subject of "common interest privilege". I agree with the submission of Miss Carr that Winterthur must take the assignment of the causes of action with "all its benefits and burdens", one of which is that the post – ATE Policy documents are subject to a privilege that is common to the TAG Claimants and NIG. NIG's right to assert that privilege is not within the assignment of the causes of action covered by the First Assignment. Nor, as I have already stated, is the right to assert "common interest privilege" within the terms of the assignment of the Further Deed.

135. Therefore, if the only basis on which NIG can assert a right of access to the post – ATE Policy documents is "common interest privilege", then Winterthur faces two difficulties. First, it has not obtained any assignment of NIG's right to claim "common interest privilege" in those documents. And secondly, unless the TAG Claimants either have waived or are now prepared to waive their "common interest privilege" in the post – ATE Policy documents, those documents will remain confidential as against all other third parties.

136. But I have held that NIG is also entitled to have access to the post – ATE Policy documents because of the contractual right to access contained in Condition 6 of the ATE Policies, which are contracts with the TAG Claimants. It is important to recall the very wide terms of Condition 6, which place an obligation on the TAG Claimant to do:

> "…*all such acts and things as may be necessary or required by the Company for the purpose of enforcing any rights and remedies…from other parties to which the Company shall be or would become entitled…upon their paying for any case or loss under the Policy…*".

In my view, that wording gives NIG the right to require the TAG Claimant to waive any privilege that it may have in documents if that is necessary or required by NIG for the purpose of enforcing claims against third parties if it is entitled to bring such claims upon paying an indemnity under the policy. As the TAG Claimant has no choice, then I think that the wording of the Condition 6 is, effectively, an automatic waiver of privilege by the TAG Claimant, provided that it is necessary or required by NIG for the purposes defined in the clause. That conclusion is, I think, consistent with the decision in ***Brown v GRE,***[84] which holds that an insured cannot use "litigation privilege" to prevent the insurer from using his contractual right of access to the documents.

137. As I have already held, NIG has assigned a contractual right of access to the post – ATE Policy documents to Winterthur by virtue of Clause 2.1 of the Further Deed, insofar as those documents relate to Claims, as defined in the Further Deed. As already noted, "*Claim"* means "*all activities conducted in relation to the pursuit of claims by or on behalf of the Insured"* – ie. the TAG Claimant. That has two consequences. First, it means that Winterthur can demand those documents, as against TAG Claimants. Secondly, it also means that, as between Winterthur and the TAG Claimant, the latter cannot enforce its common interest privilege that it would otherwise have had with NIG.

138. Therefore, as between Winterthur and the TAG Claimants, Winterthur is entitled to obtain access to the post – ATE Policy documents. Furthermore, the TAG Claimants are not entitled to assert a common interest privilege as against Winterthur to prevent Winterthur from disclosing those documents to third parties, subject to a proviso. That is that disclosure must be necessary or required by Winterthur for the purpose of enforcing rights and remedies against third parties to which it has become entitled (by assignment) upon NIG paying the indemnity under the ATE Policy.

XI. Conclusions

139. I will summarise my conclusions:

(1) The pre – ATE Policy documents in the hands of the Panel Solicitors are either not subject to any form of "legal professional privilege" or, if they are, then the privilege is one in favour of NIG, not the TAG Claimants.

(2) The post – ATE Policy documents are subject to legal professional privilege, in the form of "litigation privilege".

(3) NIG is entitled to rely on Condition 6 of the ATE Policy to obtain access to the pre and post – ATE Policy documents. The exercise of "litigation" privilege by the TAG Claimants would be inconsistent with NIG's contractual right of access and so cannot be utilised as against NIG.

(4) NIG is entitled to use "common interest privilege as a sword" in relation to the post – ATE Policy documents. The TAG Claimants are the other parties that have the common interest in those documents.

(5) Winterthur is entitled to obtain access to the post – ATE Policy documents by virtue of (a) the assignment of causes of action that NIG has against Panel Solicitors, Rowe Cohen and TAG; and (b) the assignment of the rights to access to documents covered by Clause 2 of the Further Deed. The Further Deed assigns the contractual right to access contained in Condition 6 of the ATE Policy Terms. The effect of the assignment of the rights of access to the post – ATE Policy documents means that the TAG Claimant is not entitled to exercise its "common interest privilege" in those documents to the extent that this is inconsistent with the assigned right of access to those documents.

140. I now return to the questions set out in paragraph 14 of the Order of 14 October 2005. Under paragraph 14.1, I have determined that files maintained by the Panel Solicitors in respect of TAG Scheme claims are not privileged from production to the TAG Claimants. Under paragraph 14.2, as I have already stated, TAG has not played any part in this hearing and has not asserted any privilege in documents that it holds. Neither the Panel Solicitors nor Rowe Cohen have argued that documents held by TAG are privileged from production to the TAG Claimants.

[84] *[1994] 2 Lloyd's Rep 325.*

141. So far as paragraph 14.3 is concerned, I hope that the parties will agree what consequential orders should be made as a result of my conclusions. But if there is to be argument, that will have to be dealt with at a further hearing.

142. I am very grateful for the written and oral submissions of all counsel. As will have been apparent from reading this judgment, I have found some of the issues raised at the hearing to be difficult.

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Mr B Patten (instructed by Henmans, Solicitors, Oxford) for the Second Defendants
Ms S Carr QC and Mr J Smith (instructed by Bond Pearce LLP, Solicitors, Exeter) for the Group Two Panel Solicitor Defendants
Mr J Fenwick QC, Mr T Lowe and Mr B Hubble (instructed by Kennedys, Solicitors, London) for the Group One Panel Solicitor Defendants
Mr C Phipps (instructed by Berrymans Lace Mawer, Solicitors, London) for the Group Four Panel Solicitor Defendants

SCHEDULE

SUMMARY of DOCUMENTS FOR WHICH PRIVILEGE CLAIM IS IN ISSUE

No.	Document	Claim to Privilege By Panel Solicitors
Documents created prior to inception of the ATE Policy		
1	TAG Application Form	Yes
2	TAG Service Agreement and Declaration	No
3	AIL Questionnaire	Yes
4	AIL Invoice	No
5	Rowe Cohen Vetting Confirmation Sheet	Yes
6	Appointed Representative Introduction Letter (SL OPS 5)	Yes
7	Client Care Letter	Yes
8	Conditional Fee Agreement	Yes
9	Fact Find and Oral Explanation Sheet	Yes
10	Consumer Credit Agreement	No
11	Certificate of Insurance	No
12	Contemporaneous documents (eg, employment records, inspection reports, inspection reports, photographs of the accident scene and records of prior complaint)	Requires individual analysis.
Documents created after inception of ATE Policy		
13	Inter partes correspondence	No (but some will be WP privilege)
14	Medical and other experts reports	Yes (unless served on/by opposing party on open basis).
15	Correspondence with experts	Yes (unless purely administrative or part of evidence served on open basis).
16	Solicitor-client correspondence	Yes (unless purely administrative).
17	All court documents (eg, statements of case)	No
18	Advices and other attendances on Counsel	Yes.
19	Witness statements and proofs of evidence	Yes (unless served on opposing party on an open basis. Raises collateral purpose issues – CPR 32.12).
20	Disclosure lists and documents	No (but raises collateral purpose issues – CPR 31.22).
21	Other documents gathered up for the case	Requires individual analysis.
22	Attendance notes and other memoranda prepared by the panel solicitor	Yes (unless recording conversation with opposing party as to which without prejudice issues may arise).

Documents relating to the administration and operation of the TAG Scheme i.e.:		
23	TAG File Checklist	Yes
24	SF OPS 1 – Solicitors Confirmation of Instruction Form	Yes
25	SF OPS 2 – Disbursement Funding Request Form	Yes
26	SF OPS 3 – Interim Payment Settlement Form	Yes
27	SF OPS 4 – Medical Authority Form	Yes
28	SF LEG 1 – Underwriting Assessment Form	Yes
29	SF LEG 2 – Failed Case Form	Yes
30	SF LIT 1 – Consent to Issue Part 8 Proceedings for Recovery of ATE Premium Form	Yes
31	SL LIT 2 – Acceptance of Offer (Reduced Premium) Form	Yes
32	SF LIT 3 – Client Confirmation of Reduced Premium Form	Yes
33	SF LIT 4 – Legal Expenses Insurance Letter	No
34	SF LIT 5 – Notification of Settlement Form	Yes
35	SF LIT 6 – Notification of Settlement Letter	Yes
Documents created prior to inception of the ATE Policy		
36	Claims Check List	No
37	Consolidation Check List	No
38	Standard acknowledgement letter from TAG to litigants	No
39	Standard acknowledgement letter from TAG to AIL	No
40	TAG Claims Bordereaux	Yes
41	Rowe Cohen Vetting Confirmation Sheets for claims that did not pass vetting by Rowe Cohen	Yes
Documents created after inception of the ATE Policy		
42	Other documents generated after the inception of the ATE Policy relating to TAG's monitoring of the Panel Solicitors	Probably not, but requires individual analysis.