Civil Justice Council

Consultation on general pre-action protocol and practice direction on pre-action protocols

A response by the Association of Personal Injury Lawyers

May 2008

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

Martin Bare, Immediate Past President, APIL
David Bott, APIL EC member
Stephen Lawson, Secretary, APIL
Frances McCarthy, Past President, APIL

Any enquiries in respect of this response should be addressed, in the first instance, to:

Helen Anthony
Legal Policy Officer
APIL
11 Castle Quay, Nottingham NG7 1FW
Tel: 0115 958 0585; Fax: 0115 958 0885
e-mail: helen.anthony@apil.org.uk

Executive summary

APIL is concerned about the proposals in this paper. The intention to use the general pre-action protocol as a template against which to review existing protocols means we are concerned that some of the provisions will have eventually have an impact on the personal injury, clinical negligence and disease and illness protocols.

We believe that the proposed general pre-action protocol seeks to be too many things to too many people and that the "one size fits all" approach will not work. In particular we think that the new protocol should not be applied to mesothelioma cases.

We argue that the language used in drafting the proposed general pre-action protocol and new practice direction should use the word "should" instead of "must" as the latter indicates compulsion, which is not appropriate. This is reflected in our concerns about the approach taken in the draft documents to alternative dispute resolution (ADR).

We believe that the proposed documents should not try to restrict parties to one expert per case, but one expert per issue, and that it is of crucial importance to retain jointly selected rather than jointly instructed expert. Jointly selected experts have been one of the major advances of recent years, and the move toward joint instruction is, quite simply, a step too far. In addition, we do not think that the general protocol should encourage claimants to rely on defendants' agreements not to raise a time bar defence where limitation is an issue.

Finally, we are concerned that many of the proposed provisions contained in the general protocol and the new practice direction would lead to uncertainty and subsequent unwanted and unproductive satellite litigation.

Introduction

APIL represents the interests of personal injury victims. The consultation paper on this issue sets out, at page 7, the Civil Justice Council's (CJC) intention to use an agreed general pre-action protocol "as a template against which to review and, if appropriate, rationalize and clarify existing pre-action protocols." It is because of the potential influence of the general protocol on existing protocols, which are relevant to personal injury law, that we believe it is appropriate for APIL to respond to this consultation.

Before answering the specific questions in the CJC's consultation paper, it is necessary to say that we have concerns about the principle of a new general pre-action protocol. APIL responded to the CJC's consultation about the previously proposed consolidated pre-action protocol in April 2007. We said then that we were concerned the consolidated protocol would apply to a huge range of cases and that such a "one size fits all" strategy would be unworkable. The proposed general pre-action protocol will also apply to an extremely wide range of cases and we are therefore just as concerned about the general protocol being unworkable as we were with the consolidated one.

1. **Do you agree with the proposed new structure of a shorter Practice Direction highlighting the court's case management powers and a General Pre-Action Protocol setting out the requirements on parties to a dispute?**

   Our objections to the proposed new general protocol apply more to the principle of the protocol, than the proposed new structure. We agree that the current practice direction on protocols does include a section that may be seen as a default protocol and recognise that the CJC is trying to provide a clearer structure with its proposed new documents. We question, however, whether this will make a significant difference to the clarity of the civil procedure rules, practice directions and protocols for the audience the CJC has in mind i.e. unrepresented potential litigants (see page 8 of the consultation paper).

2. **Are there particular classes of cases or types of circumstances where the General Pre-Action Protocol should not apply?**

We believe that it is imperative that the general protocol should not replace the existing protocols and welcome the CJC's proposal to retain these.

We also very strongly believe that the general protocol should not apply to mesothelioma claims. These claims are intentionally excluded from the time frame set out by the disease and illness protocol due to their urgency. Our concern is that because of their exclusion from the disease and illness protocol, there would be an expectation that the general protocol should be followed in mesothelioma cases but they are far too urgent and complex for the general protocol to apply.

In addition, specific work has been done, and continues to be done, with the Ministry of Justice and senior members of the judiciary on the area of mesothelioma claims.

3. **Do you have any comments on the language used and the drafting of the revised Practice Direction and General Pre-Action Protocol?**

We are concerned at one aspect of the drafting which has been highlighted in the consultation paper: that the word "must" has been used instead of the word "should". We find it particularly worrying that the consultation paper says the meaning of these words is the same when the first implies an absolute obligation and the second merely a desirable or expected state. There is clear legal authority that the two words have different meanings, in accordance with their ordinary English usage. See, for example, *Metcalfe* v. *Clipston* [2004] EWHC 9005 (Costs) where the judge said, at paragraph 49, "I … construe "should" as meaning "ought to" which is not the same as "has to" or "must"".

Paragraph 2.2 of the newly proposed practice direction says "Pre-action protocols outline the steps parties must take before starting a court claim". The use of "must" instead of "should" will be particularly confusing here. Practice directions themselves do not form part of the rules, but are only guidance which support the relevant rules. In *Goodwin* v. *Swindon Borough Council* [2002] C.P. Rep. 13 Lord Justice May said at paragraph 11 "Practice directions are subordinate to the rules — see paragraph 6 of Schedule 1 of the 1997 Act. They are, in my view, at best a weak aid to the interpretation of the rules themselves." Including an imperative within a practice direction is therefore inappropriate and potentially confusing which, of course, can lead to unwanted satellite litigation about the purpose and status of the relevant rules, protocols and practice directions.

Furthermore, paragraph 6.2 of the draft practice direction says that "where a party enters into a funding arrangement within the meaning of the CPR 43.2.1(k) that party must inform other parties to the dispute about this arrangement as soon as possible." This is in direct conflict with case law on this issue (see, for example, *Cullen* v. *Chopra* [2007] EWHC 90093 (Costs) which quite clearly sets out that there is currently not necessarily a penalty if pre- issue the party entering into the funding arrangement omits to serve a notice of funding. An attempt to overturn established case law in this way and to make such a significant rule change should not be included in a practice direction. Furthermore, conflict between established case law and new practice directions could again lead to unwanted satellite litigation.

4. Do you agree with the approach taken to ADR in the General Pre-Action Protocol?

It is APIL's firm view alternative dispute resolution mechanisms can be useful but that one size does not fit all when it comes to resolving any case.

Mediation, for example, could be useful in a personal injury case where an employee wishes to continue to working for an employer but is unlikely to be appropriate when a claimant who has been injured in a road traffic accident is deeply traumatised by the accident and is dealing with an insurer which just wants to keep the costs of the claim as low as possible.

We are concerned that the draft of the general pre-action protocol says, at paragraph 6.1 "The parties **must** consider whether some form of alternative dispute resolution might enable them to settle the dispute without starting a court claim" and that it does not include the express recognition that "no party can or should be forced to mediate or enter into any form of ADR". If the proposed practice direction is implemented, non-compliance with the ADR provisions of the protocol could result in sanctions and further satellite litigation as parties seek to limit liability based on that non-compliance.

We are concerned that sanctions may be sought for not considering ADR when in fact it was not appropriate, or not necessarily appropriate till a later stage, e.g. after exchange of evidence in it's final form. Part of the success of joint settlement meetings, which have become common place, is that these take place when the evidence is all available. Pre-action protocols seek to regulate behaviour in the very early stages of a dispute and in personal injury claims, ADR may not be appropriate until the much later stages of a claim when the parties have gathered all relevant information. Furthermore, to what extent "must" the parties "consider" ADR? Having the ability to impose sanctions for the failure to "consider" something is, we believe, unworkable. In our view, it is much more sensible to include a provision that parties "should" consider ADR, which gives guidance as to best practice but does not compel parties to act in a particular way if it is not appropriate in that case.

5. **Do you agree with the required steps set out in the General Pre-Action Protocol, and in particular the approach taken to time limits?**

   The required steps seem reasonable. The time limits seem very vague and amorphous, but given the wide range of disputes the general protocol is designed for, we can not see how the time limits can be made more specific.

6. **Would it be helpful to include a 'model' letter (non-mandatory) before claim (for a standard consumer claim) as an annex to the General Pre-Action Protocol?**

   Standard consumer claims fall outside of APIL's remit and so it is not appropriate for us to answer this question.

7. **Do you agree that the General Pre-Action Protocol should include the additional requirements in simple debt claims?**

   Debt claims fall outside of APIL's remit and so it is not appropriate for us to answer this question.

8. **Do you agree with the approach taken to experts in the General Pre-Action Protocol?**

   We welcome the fact that the general protocol continues to recognise the distinction between a single joint expert and an agreed expert but are concerned that proposed paragraph 8.5 seems to be encouraging parties to select the former, which is not always appropriate.

At the moment the personal injury protocol contemplates only joint selection of experts rather than joint instruction (see *Carlson* v. *Townsend* [2001] EWCA Civ 511). This is a process which works well and we would be concerned if, in an attempt to bring in uniformity across pre-action protocols, the CJC were to seek to bring the personal injury protocol in line with the general protocol.

Furthermore, both the proposed general protocol at paragraph 8.3 and the proposed practice direction at paragraph 6.3.3 refer to the parties appointing "only one expert". Given the broad range of claims to which these documents will apply, we believe it is far too stringent to try to limit parties to only one expert per claim. This might be appropriate in relatively straightforward cases where there is only one technical issue at stake, but is unfair when there are a series of complex issues involved. How can justice be done if, in a personal injury claim, parties have to choose between an engineer who would help resolve liability and a medical expert who would help on the issues of causation and damages? Surely one expert per issue would be more appropriate.

9. Do you agree that, where limitation is an issue, parties should be encouraged not to take the 'time bar' defence?

Whilst we agree that where limitation is an issue, parties should be encouraged not to take the 'time bar' defence, we do not believe that a claimant could rely on an agreement with the defendant that they would not raise a time bar defence, even if provision for such an agreement was made in a pre-action protocol. The recent case of *Telling* v. *OCS Group Limited* (7 April 2008, Sheffield County Court, unreported) is attached and is an example of a litigation in a case where a pre-action agreement was reached and later contested.

Experienced practitioners know that such pre-action agreements can lead to problems if the defendant changes his mind. Less experienced practitioners, or even litigants in person for whom the general pre-action protocol is at least partly designed, would not necessarily approach the issue with such caution.

This could result in disagreement over whether an agreement not to raise a time bar defence was reached, or whether the defendant could renege on an agreement if this was reached. Such disputes are often the basis for satellite litigation, which is in no-one's interests. It would be far better for the protocol to encourage people to issue cases where limitation is an issue and then urge parties to agree a stay to conduct protocol-like steps before the substantive court proceedings begin. We do not therefore agree with the proposals in relation to limitation.

Case No: 7DN012479

IN SHEFFIELD COUNTY COURT

50 West Bar
Sheffield, S3 8PH

Date: 7th April 2008

BEFORE:

HIS HONOUR JUDGE BULLIMORE

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BETWEEN:

AMANDA JULIE TELLING	Claimant
- and -	
OCS GROUP LIMITED	Defendant

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Approved Judgment

Compril Limited
14J Queensway House
Queensway
East Middlesbrough Industrial Estate
Middlesbrough
TS3 8TF
Telephone: 01642 232324
Facsimile: 01642 244001

No of Folios in transcript 51
No of words in transcript 3,696

CASE NO. 7DN01279

TELLING V OCS GROUP LTD

APPROVED JUDGMENT

1. **His Honour Judge Bullimore** : On 24th April 2006 a tragic accident occurred when the Claimant's husband, during the course of his employment with the Defendants, fell from a ladder in the course of his work as a window cleaner somewhere in the commercial area of Hull and suffered fatal injuries.

2. As a result of that, Mrs Telling approached Messrs Atherton Godfrey who acted on her behalf in bringing a claim against the Defendants to recover damages. Initially, the correspondence was with the firm of loss adjusters, Messrs Garwyns, and we find in the bundle the letter that was addressed under the protocol, asserting the claim that was being relied on and that pre-action protocol letter is dated 13th July of 2006.

3. There then followed correspondence which gives rise to the issues that I have to deal with, namely whether there was a binding agreement in relation to the liability for the accident which enables Mrs Telling simply to move on to the next stage, and seek to agree or have adjudicated the question of what damages are payable to her.

4. It is the contention of those advising her that there is such a binding agreement. The Defendants contend that there was nothing but a pure or mere or bare admission that they were entitled to withdraw, under the jurisprudence which includes the case of *Sowerby v Charlton* [2005] EWCA Civ 1610 which I think was decided in December 2005. The matter eventually came before Deputy District Judge Beevers and that was by way of an application for summary judgment. He dismissed that and ordered that the Claimant should pay the Defendants' costs of the application in the agreed sum of £900.

5. Apparently, permission to appeal that decision was sought at the time, at all events, the Deputy District Judge filled in one of the forms, an N460, setting out the reasons for the decision that he had made and he stated the issue to be decided was whether the correspondence in question constituted a compromise or a bare admission.

> "I found that it was a bare admission and as a result *Sowerby v Charlton* meant the Claimant could not obtain judgment on a summary basis. The distinction between a compromise and a bare admission seems sufficiently clear as a matter of law."

6. There is a transcript of his decision and also a further transcript setting out discussion that occurred between himself and Counsel representing the Defendants in which some further clarification of what he had decided was, I think, achieved.

7. But going back to the correspondence itself, I start on page 104. In response to the protocol letter of 13th July, Garwyns replied on 7th August and they say this,

> "Our enquiries into liability are complete and we confirm negligence is admitted in this case. It will not be our intention to raise arguments of contributory negligence."

8. On 18th August, Atherton Godfrey wrote in response saying,

> "We are pleased to note that liability is admitted. We indicated in the letter of claim we considered this matter would be suitable for allocation to the multi-track."

9. I pause to say it plainly would be because on any view, the damages recoverable would take us comfortably over the fast-track limit. The letter goes on:

> "In these circumstances we are concerned the Court may not regard the admission as binding, and that accordingly our client may be prejudiced if reliance is placed on that admission without further steps being taken to put the matter beyond any doubt."

10. I pause again to say, I am sure that that observation was made with the decision in *Sowerby* ringing in the Solicitors' ears. The letter goes on,

> "Obviously, we would like to narrow the issues and save costs..."

Which may be an important pointer to what was going on in the Solicitors' mind,

> "... but must do that in a way that adequately protects our client's interests. Accordingly, we invite you to confirm that in consideration of our client ceasing enquiries on liability, you will irrevocably undertake to consent to any judgment on the issue of liability in accordance with Part 14, forthwith upon issue of any proceedings.
>
> Unless we hear from you accordingly within the next 14 days with the confirmation requested, we must reserve the right to continue undertaking work in relation to liability and to issue proceedings so that formal application may be made for a judgment on that issue."

11. So, we have got important words like "consideration" there. We have got important words like "costs" and really wanting the matter to be put "beyond doubt". Whether Messrs Garwyns understood all that, I know not. But they responded on 21st August,

> "We do not consider there was any need for your letter of 18th August, we have made it perfectly clear that liability has been conceded regarding this claim and therefore it goes without saying that there is no need for you to incur additional costs in investigating liability further, when liability has been admitted.
>
> We have little doubt that if we attempted to withdraw this offer, not that we have any intention of doing so, that you would be successful in arguing that liability had been conceded and you would be successful in this argument. Therefore, once again, liability is conceded."

12. I take out of that letter the words "there is no need for you to incur additional costs in investigating liability further." That obviously concentrates attention on what further investigation would mean in real terms – additional costs. And when one stops to ask who would be paying those costs, if the matter proceeded, well it would appear to be the Defendants. And it seems to me plain, that Garwyns were anxious that there should be no additional costs incurred which would be visited on their clients, because as they said there was no need, we are admitting liability.

13. Well, Atherton and Godfrey were not minded to accept that and they wrote again on 21st September.

> "We note your comments. We don't see why you cannot give the specific assurance sought in our letter of 18th August. In the absence of that, we reserve our position in relation to further steps that may be necessary."

14. And Garwyns came back on 27th September,

> "We are satisfied that our admission of liability is precisely that, we have no intention of withdrawing this decision, we can confirm we will irrevocably undertake to consent that there be judgment on the issue of liability in accordance with Part 14 forthwith upon issue of any proceedings. On that basis, quite clearly, you do not need to undertake any further enquiries with regard to liability."

15. Following that, there was an inquest which I think was held on 30th and 31st October. On that occasion, Mr Wilson of Counsel attended on behalf of the Defendants, and addressed questions to the witnesses, relating to liability, and Miss Sutton of the Claimant's firm of Solicitors attended and also addressed similar questions to the witnesses. I think in general terms it would be right to observe that at the inquest it appeared that there was very little direct evidence as to why Mr Telling had fallen from the ladder and met his death as a result and I can only assume, there is no other reason put forward, that was why on 14th March of 2007

some four and a half or five months later, a very brief letter is sent from Garwyns to Atherton Godfrey saying,

> "From the evidence provided by K L Grundy [who was a witness who saw the deceased fall] your client was not in the process of cleaning windows at the time the accident took place, but simply fell from the ladder while he was half way up. Under the circumstances, the new evidence available would suggest your client was simply the author of his own misfortune and under the circumstances our admission of liability is withdrawn."

16. Well, the response from Atherton Godfrey was to refer to what they described as the irrevocable undertaking to consent that there be judgment on the issue of liability and they said this amounted to a binding compromise on the issue of liability. They also raised the question of estoppel, but I think it is fair to say that they have never, actually alleged that there was any prejudice suffered by them or by their client as a result of any action or lack of action that they took following the earlier correspondence.

17. I ought to observe, however, that it seems to me that in a case like this it would have been commonplace to and indeed probably negligent for Solicitors, in the absence of an admission, not to instruct an engineer to examine the ladder and the circumstances of the fall as they may well have appeared to an expert of that kind and probably to instruct an enquiry agent to see if any other witness could be found to the incident in question, which, as I have already indicated, took place over in Hull. So, it seems to me just as a matter of common sense that there were other steps which could and should properly have been taken and I think would have been taken in the absence of the earlier correspondence where an admission was intimated.

18. Now, the basis on which the District Judge came to his view is not supported, it has to be said, by Counsel for the Defendants today. Having gone through the matters that I have already referred to, he says in paragraph 10,

> "The parties both agreed today that if the letters from Garwyn are no more than a bare admission of liability, then the decision in *Sowerby v Charlton* means the Claimant cannot rely on that admission to secure a judgment under Part 14 of the Civil Procedure Rules."

19. He has then referred to the *Burden v Harrods* [2005] EWHC 410 (QB) decision in which it was accepted that there was good consideration in an agreement whereby the Claimant accepted some 25% by way of a deduction for contributory negligence, provided that the Defendants pay 75% of the claim. I find it difficult to believe an issue like that ever made its way to Court, but it plainly did, and maybe it was more complicated than it now appears to be.

20. But what the District Judge went on to do at paragraph 13 is to say that,

> "During the course of the hearing I referred the parties to a passage in Chitty on contracts, this is paragraph 22.0.13."

21. And he read that out:

> "Where a claim is asserted by one party which is disputed by the other, they may agree to compromise their dispute on terms mutually agreed between them. Once a valid compromise has been reached, it is not open to the party against whom the claim is made to avoid the compromise on the grounds the claim is in fact invalid, providing the claim was made in good faith and was reasonably believed to be valid by the party asserting it."

22. Well, there is no question and he made this express finding that Mrs Telling had brought her claim in good faith and in the belief it was valid. And he went on to read further from Chitty to say:

> "In order to establish a valid compromise, it must be shown there has been an agreement which is complete and certain in its terms."

And he interposed to say,

> "The admission of liability could not be clearer and that consideration (satisfaction) has been given or promised in return for the promise or actual forbearance to pursue the claim."

23. And then this is the real core of what he says and of the decision that he reached.

> "It seems to me the condition precedent to a compromise is the existence of a dispute of the claim. It is a dispute which has been compromised; there is no dispute in the correspondence; the claim is put; the claim is admitted. It seems to me that despite the best endeavours, the Claimant's Solicitors could achieve no more than their admission."

24. And he went on to express, not surprisingly, distaste for the withdrawal of what must have seemed the most clear, certain and serious admission of liability.

25. As I say, Mr Madan does not seek to support that proposition that there has to be a dispute or he accepts that there was a dispute. I think that in any ordinary sense there was. There is a claim which is asserted in the protocol letter. There is a dispute until either that is accepted or until the matter is resolved by the Court. I do not think anything more needs to be said about that, it just seems to me that is the position.

26. However, in looking further at the extra transcript we have, the Deputy District Judge said, and I am looking at page 159, paragraph 116,

27.

> "As a matter of law and not a compromise, because there is no dispute on liability to compromise."

28. That was the distinction he was making between an admission, presumably, and a compromise. A little later, in looking again at what had to be shown, he said:

> "There has to be an agreement which is complete."

29. Well, it is complete, it is certain in its terms, which is the next thing according to Chitty, but then addressing Mr Madan, he said:

> "But what you say is lacking is the consideration."

30. And that really is the point about which this argument today has concentrated. I have had the advantage of argument from Mr Madan about this matter. He contends that essentially a forbearance to investigate is really a very nebulous concept and one cannot say whether it has been followed through or not or really what advantage it could be, I think, to the Defendant's Solicitors.

31. Effectively, he seeks to uphold the District Judge's decision though not his line of reasoning by contending that what we have here really is only a bare admission. Well, I have listened carefully to what he has said. He said it very attractively, if I may say so without being patronising. He has argued the point very carefully. He has taken me to parts of Chitty, which I am not minded to trawl over yet again, all I can say is that it seems to me that the Claimant's Solicitors were giving something of value in return for the admission of liability. They were giving up their best opportunity to investigate the circumstances in which their client's husband had met his death. I have already indicated what other steps could and should properly have been taken. In the light of what was being said to them, I have no doubt they could properly have ceased to make those investigations. It is well known that, if you want to investigate something, the best time to do it is as soon as possible. To wait makes things much more difficult; memories fade, even the unhappy circumstances of seeing somebody fall from a ladder, but the detail and so on and so forth of what exactly happened is best investigated as soon as possible.

32. So, I think there was something being given up of value, and I think the decision not to investigate further or the promise not to investigate further, or the indication that they were not going to investigate any further, in the light of the admission that was going to be made, was of value to the Defendants, because any investigation, if the matter had stood thus, any further investigation and any costs which arose from that, could have been met with the answer, well why did you do that? Why do you expect us to pay, we have told you that we were admitting liability, why have you spent more money looking into something which you did not need to?

33. Now, I accept that Solicitors might have argued in the circumstances that existed at the time, well who is to say, despite the firmness with which they promised to admit things, Garwyns will not in fact go back on it? And of course the District Judge may have said, oh well that is merely fanciful, but of course he is not being faced with the totality of the correspondence I have seen. But, I think on the whole,

the Defendants' Solicitors would have had a good argument to say we should not have to pay for this or that step because we admitted liability.

34. So, I am satisfied there was good consideration here and that there was, therefore, an enforceable compromise of the Claimant's claim.

35. Now, the other issue that has been raised by Mr Madan is this; that, in fact, Atherton Godfrey did not cease to investigate and the one thing, actually, that is relied on as far as I am aware, in that regard, is the fact that Miss Sutton, the Claimant's Solicitor, attended at the inquest and asked questions which at least spilled over into the area of trying to clarify questions of legal liability. Well, what is said in response to that, I do not actually think there is any evidence about it, but what is said, and it is plausible and credible, is that Mrs Telling wanted Miss Sutton to go to the inquest and do what she could to find out what had happened.

36. Well, exactly what Mrs Telling wanted to know may not have been what Mrs Sutton thought it was wise to confine her questions to. After all, here was a wonderful opportunity to find out from those who were thought to be able to throw light on what had occurred, what they were saying and her questioning may have gone beyond what Mrs Telling was anxious to establish. I do not know why Miss Sutton went, really, as I say I do not have direct evidence about it, I am simply told by Counsel, on instructions, that that is why she attended and it makes perfect sense to me. But if that was the reason she was there, then it was not in order to forward the question of liability and therefore that would be something that the Defendants would not be liable to pay for. Of course, in the light of what has happened, I am not giving any indication of how that matter might be resolved as and when it falls to be considered by a costs Judge.

37. But what Mr Madan says is that there is at least an indication that there is a breach of the agreement; that the Claimant's Solicitors went on investigating the question of liability and so he suggests that whatever agreement had been reached is brought to an end by that. Well, I do not accept that argument. After all, the benefit to the Defendants was that in the light of the admissions they had made, they were not going to be taxed any more with the costs of investigations of liability which otherwise could and should properly be made on the Claimant's behalf. That is all the protection that they were obtaining under the agreement. They were not really seeking to limit the Claimant or her advisers in what steps they took, or thought were necessary, all they were seeking to do was to protect their lay-client, the Defendants and the insurers, doubtless, who stand behind them, from having to pay further sums in regard to the investigation of liability. Well, they are perfectly protected against that, or would have been had they not sought to go back on what had been agreed. As I say that is a complicating factor which now arises.

38. But I am quite satisfied that no breach occurred which would enable them to say, well we are no longer bound by the agreement on liability that we have made. What damage have they suffered as a result of that? Well, certainly nothing unless

they were required to be paying out some costs which otherwise they would not have to pay but I do not think there is any breach here. Certainly, none has been shown to my satisfaction. Attending at the inquest, at most, could be a pre-condition for some claim for costs and that matter would have to be argued out as and when it becomes necessary.

39. I do not think this was too nebulous. I think there was good consideration here. There was a clear agreement and the Defendant is going to have to be bound by it.

40. Now, Mr Madan, have I given you enough, there?

41. **Mr Madan** : Your Honour, yes.

42. **His Honour Judge Bullimore** : Alright, thank you very much for your help. So, how do you want this? The appeal is allowed, do you want a declaration? How do you want it; or just judgment?

43. **Mr Madan** : If judgment can be entered.

44. **His Honour Judge Bullimore** : So judgment for the Claimant. For damages to be assessed.

END OF TRANSCRIPTION

We hereby certify that this Judgment was approved by His Honour Judge Bullimore on 18th April 2008.

Compril Limited