

**European Commission
Internal Market and Services DG**

Review following *Eschig* - Legal Expenses Insurance



A response by the Association of Personal Injury Lawyers

Dated 12 October 2010

About APIL

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:

Stuart Kightley, Neil Sugarman, Jonathan Wheeler, Stephen Lawson, Nigel Tomkins, Muiris Lyons and David Bott.

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

Helen Blundell, Legal Information Manager

APIL, 11 Castle Quay, Nottingham NG7 1FW.

Tel: 0115 958 0585; Fax: 0115 958 0885. E-mail: *mail@apil.org.uk*

Thank you for allowing APIL the opportunity to take part in this process. We are unable to answer all of the questions posed, but set out below the detail of our responses to those where we have relevant evidence.

Responses

1. *According to French Law 2007-210 of 19.2.07, representation of an insured by a lawyer is required when other party in the procedure is represented by a lawyer. Is it a general principle laid down by French national law? Or does the Law 2007-210 of 19.2.07 play a role in the legal system and these rules only concern cases where risks are covered by legal expenses insurance policy? Do you consider that the objective of this rule is to respect 'equality of arms' as a general principle in law?*

Yes, we do consider that the objective of the rule is to respect 'equality of arms' as a general principle in law. In England and Wales in particular, there is a phenomenon known as 'third party capture' or 'third party assistance' in which the legal expenses insurer for the tortfeasor 'captures' the claimant's claim and represents both sides of the claim. This does not, in our view, respect an 'equality of arms' between the parties.

Quite often, in both third party capture situations, and those where the claimant is represented by his own legal expenses insurer, the claimant is not offered legal representation at all, and the claim is dealt with by unqualified non-legal staff in the employ of the insurer.

2. *Is there evidence that legal costs are substantially higher in cases where an insured is represented by a freely chosen lawyer compared to situations in which the claim is managed by the insurer or by the lawyer appointed by the insurer?*

We are alive to the fact that insurers will indicate that where a lawyer is appointed by the legal expenses insurer, it appears to be more expensive for the insurer to run the claim when the lawyer concerned is not on its approved 'panel' of advisors.

There are several reasons for this.

Legal expenses insurers in England and Wales will no doubt be able to demonstrate that their approved panel law firms cost them very little and do not make claims on their policies. It is our view that these insurers do not allow panel firms to make claims on the policy for unsuccessful claims. We doubt, however, that they will admit this.

We take the view that any data supplied by insurers in answer to this question will not compare like with like and will be skewed by the practices of panel firms being unable or unwilling to make claims on the LEI policies for unsuccessful claims, for fear of losing future work from the insurer. Panel law firms are often sent bulk work by the insurer and the quid pro quo for that is that they make no claims on the policies if the claim fails. Additionally, many panel firms conduct a number of different types of work for the same insurer –and in return for doing so, they are expected to 'balance out' the losing personal injury claims against the other types of work also being done within their firm.

Non-panel firms will no doubt appear to be expensive in the LEI data, and this is because while panel firms never claim their costs if they lose, non panel firms, relying on the written terms of the policy, will do so, as they are entitled to do for their insured clients.

We also believe that panel firms will, as a consequence of this arrangement with the insurer, be more risk-averse: limiting their exposure to potential costs liabilities by only taking on those claims which are bound to succeed and 'dropping' difficult cases – leaving the policyholder high and dry without representation under the policy.

The vast majority of clients who use these policies assume it is an indemnity and that their solicitors are paid for doing the job, come what may. But in England and Wales this is not the case. We attach copies of correspondence from DAS Legal Expenses, together with its DAS non-panel PI terms of appointment,¹ which show that DAS requires solicitors acting for its policy holders to conduct claim using a conditional fee (no win, no fee) agreement (page 11: clause 4.1.15 and clause 10.2); refusing to offer an indemnity for the insured's costs if the claim fails (clause 10.3.b); refusing even to indemnify the policyholder for disbursements incurred (clause 7.15).

Attached is an article by Mark Harvey², which appeared in the Journal of Personal Injury Litigation (JPIL), issue 2, 2010: *'Before the event legal expenses insurance – why do so many seek to close this access gate to justice?'*. In this article, Harvey says that in Germany for example, LEI policies are portable. The effect of this is that legal work is distributed among non panel firms in any event. (Harvey, page 98).

¹ Appendix 1

² Appendix 2: *'Before the event legal expenses insurance – why do so many seek to close this access gate to justice?'*, by Mark Harvey. Journal of Personal Injury Litigation (JPIL), issue 2, 2010.

In this article, Harvey confirms what APIL members know – that in England and Wales, “the LEI will indemnify clients’ adverse costs but would not expect to receive claims for costs from their panel firms.” (Harvey, page 100). The effect of this in the jurisdiction is that premiums for LEI policies remain very low, compared, for example, with Germany where portable policies have higher premiums.

This unwritten agreement, that panel firms will not make a claim for costs on the policy, keeps the business profitable for the insurer, but does not offer the policy holder a true indemnity. Something about which the client is never advised.

We contacted all of APIL’s 4,500 plus members and asked them to send in evidence of how legal expenses insurers deal with requests for the freedom to choose their own legal representative under the policy. The response has been overwhelmingly clear: the majority of legal expense insurers in this jurisdiction, even since the decision in *Eschig*, consistently refuse freedom of choice. There is also evidence of cartel behaviour, since many insurers use identical wording in their responses to their policy-holders’ requests. Sample correspondence is attached, which illustrates the following:

- Refusal to allow freedom of choice prior to issue of proceedings or at all;³
- Identical wording in letters from different insurers dealing with the issue of freedom of choice;⁴
- Evidence that while admitting they are aware of the *Eschig* decision, and the subsequent letter from Ken Hogg of the FSA, a refusal to allow freedom of choice as required by the decision and regulations.⁵

³ Appendix 3

⁴ Appendix 4

⁵ Appendix 5

3. *Is there evidence that the outcome of the cases is beneficial for the insured in cases where an insured is represented by a freely chosen lawyer compared to situations in which the claim is managed by the insurer or by the lawyer appointed by the insurer?*

Insurers have, in the past, produced evidence to suggest that the outcome of cases is more beneficial where an insured is represented by one of their own appointed staff, rather than a lawyer freely chosen by the insured.⁶(*The Frontier research*). The data to back up this claim has never been made available for independent verification. Based on a flawed and circular comparison, and relying on sometimes bewildering re-definitions of its original terms of reference, the Frontier research is an exercise in the use of statistics to make a point. To this end, the report fundamentally misrepresented findings: It presented calculations of one thing (how awards for represented and unrepresented claimants distribute in the £1k– £25k band), and suggests that these show another (whether represented claimants obtain higher awards). We are also concerned that many policy holders are forced to use lawyers who are geographically distant from their homes. For those who are old or infirm or otherwise subject to a disability (which often follows a personal injury claim) this is a form of discrimination, potentially in breach of the Disability Discrimination Act 1995.

APIL recommends that the EU commission an independent survey of the available data to examine this question in detail.

⁶ *Outcomes for legally represented and unrepresented claimants in personal Injury compensation: a report to the Association of British Insurers, July 2006.* Frontier Economics.

5. *How the requirements laid down in Article 7 of the Directive, as transposed into national legislation, are fulfilled by the insurers in your Member State i.e. whenever a conflict of interests arises or there is disagreement over the settlement of the dispute, the legal expenses insurer or, where appropriate, the claims settlement office shall inform the person insured of (a) the right referred to in Article 4 (freedom to choose his lawyer) and (b) the possibility of having recourse to the procedure referred to in Article 6 (arbitration procedure)?*

APIL's members have provided evidence of how legal expenses insurers deal with informing the insured of their Article 4 right and Article 6 procedures. Many insurers do not correctly inform their policyholders of their Article 4 rights. See for example the letter from MSL Legal Expenses Insurance to Snipelaw solicitors, dated 28 September 2009, (*appendix 3*) which simply refuses to acknowledge any freedom of choice issues at all. See also letter from Family Plus to Freeth Cartwright Solicitors LLP, dated 12 August 2010. (*appendix 3*).

DAS Legal Services is one of the worst offenders. Its latest letters indicate that despite the recent decision in *Eschig*, and advice from the Financial Services Authority, it maintains that its policyholders do not have freedom to instruct their own legal representatives until proceedings have been issued. In England and Wales, this could be up to three years after the claim arises and after the majority of the necessary legal work has been done for the policyholder. See two recent examples of DAS's responses, in *appendix 5*, along with a similar view sent by Tesco Insurance.

DAS's response is unsurprising – its own chief executive wrote to the Law Society Gazette to explain that in the 'absence of traditional premium income' it relies upon charging its own panel solicitors a referral fee for taking on the claim – it is for this reason – the lack of referral fee chargeable to non-panel law firms – that DAS refuses to allow its policy holders the freedom to choose their own (non-panel) legal representatives. The letter, (*Gearing up claims*, Law Society Gazette, 18 May 2006), is attached.⁷

8. *Could your association confirm that it is general and established practice that an insured person has a right to choose his own lawyer under a valid legal expenses insurance contract but only after the commencement of legal proceedings? If yes, please indicate the reasons.*

Yes, it is a generally established practice in England and Wales that the insured person only has a right to choose his own lawyer under a valid legal expenses insurance contract once legal proceedings have commenced. The main issue in England and Wales is the definition of when exactly 'proceedings' have started.

Since the introduction of the Civil Procedure Rules and the RTA Claims Process, the majority of personal injury claims have been conducted without the need to issue court proceedings. The legal expenses insurers in this jurisdiction interpret this to mean that claimants have no right to freedom of choice of representative until after *court* proceedings have begun. APIL has a substantial amount of correspondence from most the main LEIs which confirms this. The attached letters from various

⁷ Appendix 6 – relevant paragraph is indicated.

insurers in appendix 3 illustrate this. This view is currently given credence by the stance of the Financial Ombudsman's decision.⁸

APIL obtained advice from Counsel⁹, which confirms its view that the Personal Injuries Protocol, and the Protocols Practice Direction giving effect to all Protocols under the CPR, have a far-reaching effect. They form an essential element of the objective of the CPR in enabling access to justice in the true, wide sense of the term, which emphasise the importance of the resolution of disputes *without litigation*. As the majority of personal injury claims in this jurisdiction will never therefore require the issue of court proceedings, the majority of claimants are denied the use of their legal expenses insurance unless they renounce their freedom of choice of legal representative. APIL's view, and that of its Counsel, is that 'proceedings' commence *when the policy holder has recourse to a lawyer*.

9. *If the answers to the question 7 and 8 are affirmative, what steps have been or will be taken to ensure compliance with the Community law interpreted by the European Court of Justice in the recent Eschig case according to your information?*

APIL has been campaigning for insurers to comply with the Insurance Companies (Legal Expenses Insurance) Regulations 2010 for many years. Our interpretation of those regulations, which interpret and implement Community law in England and Wales accords with the decision in *Eschig*.

⁸ Appendix 8: at page 4: Mrs A and B Company, Final decision of Tony Boorman, Principle Ombudsman, 10 January 2003.

⁹ Appendix 7: Opinion of Toby Hooper QC, 30 January 2002.

The way in which APIL has approached this is to:

1. encourage APIL members' clients to complain to the Financial Ombudsman when they are unable to choose their own solicitor under their policy;
2. persuade the Ombudsman that his interpretation of the LEI regulations is wrong – Counsel's opinion was obtained (attached)¹⁰;
3. encourage the government to change the wording of the regulations;
4. Seek a meeting with the FSA to discuss consumer related issues, such as cold calling claimants, poaching them from non-panel firms and exaggerating the benefits of using the BTE panel firm.

Approaches 1 and 2 have failed so far. Clients who complain to the ombudsman are currently being met with an unhelpful stance, which favours the BTE insurers' position. The Ombudsman issued a generic decision Re company A, which is attached¹¹, which supported a different interpretation of the regulations.

Approach 3 has failed: APIL has been told a number of times by officials in government that this simply is not an issue which is being considered at present.

Approach 4 at last seems to be bearing some fruit with the arrival of the new Chief executive, Ken Hogg, who has written to all legal expense insurers detailing the effects of the Eschig decision. Unfortunately, so far, most legal expense insurers are ignoring his interpretation and continue to refuse their policy holders freedom to choose their own representative. (See the letters contained in appendices 3, 4 and 5).

¹⁰ Appendix 7: Opinion of Toby Hooper QC, 30 January 2002.

¹¹ Appendix 8: Mrs A and B Company, Final decision of Tony Boorman, Principle Ombudsman, 10 January 2003.

10. As discussed, we remain interested in your interpretation of the recent *Eschig* judgement, in particular as regards the borderlines between the options of insurers and barristers to provide legal advice in the pre-litigation phase and phase of court proceedings.

Please see our counsel's opinion, referred to above, attached.

As for the *Eschig* decision, our interpretation is as follows:

Paragraph 47 of the judgment in *Eschig* states: "Article 4(1) recognises the right of the insured person to choose a representative", this is followed by a 'but' – "other than in cases where a conflict of interest arises, restricts that right to inquiries and proceedings. It continues, "The use of the adjective 'any' as well as the tense of the verb 'to recognise' demonstrates the general application and *obligatory nature* of that rule." Then in paragraph 48 the judgment continues, "It should be noted, secondly, that that provision lays down the *minimum* level of freedom which must be granted" minimum being the key word.

If we then look at Article 3(2) it describes the different options. It says (see *Eschig* para 49) "the measures provided for in Article 3(2)(a) and (b) of Directive 87/344 retain their scope of application even where an independent right on the part of the person with legal expenses insurance to freely choose his representative is inferred from Article 4(1)(a) of that directive." In contrast, according to the solution provided for by Article 3(2)(c) "the insured person has the right to entrust the defence of his interests to a representative *from the moment that he has the right to claim* from his insurer under the insurance policy, therefore prior to any legal or administrative procedure."

Now, if you have the right to pick your representative from the moment you have the right to make a claim on the policy, that is the moment you say to the insurer, 'I've been injured - I want a lawyer.' The way it is worded, we say, is very interesting: it uses the wording 'protection of your interests.' The person instigating the claim, Mr Eschig for example, is taking steps to protect his interests. We take the view that the only common sense interpretation of the difference between articles 3 and 4 is that if you instigate the claim, then you are the person who is automatically allowed to choose your lawyer. But if you are the person against whom a claim is being made, where you have LEI and go to the LEI for help, the LEI is entitled to attempt to resolve the matter up to the point where the LEI can't resolve it and in those circumstances, you can choose your own lawyer at that point. There is, in our view, no other purpose for having the two routes within the legislation.

There has to be a reason for the two options provided for in the Directive: our view is the reason for that is there is one route for instigating the claim, and one for defending.

Association of Personal Injury Lawyers

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- W: www.apil.org.uk ● E: mail@apil.org.uk

APIL response

Eschig review – legal expenses insurance

APPENDIX 1





DAS Group
DAS House, Quay Side, Temple Back, Bristol BS1 6NH
Telephone: 0117 934 2000 Fax: 0117 934 2109 DX141841 Bristol 19 www.das.co.uk

A member of the international DAS organisation

Snipelaw
Thompson Road
Whitehills Business Park
Blackpool
FY4 SPN

Your Ref: **RW/072309**
Our Ref: **[REDACTED]**
Date: 25 August 2010
Email: cpcc@das.co.uk

Dear Sirs

Re: **[REDACTED]**

Thank you for your recent correspondence, which is returned herewith. Please note we have not retained a copy.

At this stage we are unable to confirm whether cover may be available under our Insured's legal expenses policy and will require our Insured to report the claim to us on the telephone number provided in their policy schedule.

Depending upon the circumstances of the claim, we are unlikely to be a position to appoint you until such time as legal proceedings are issued. We have enclosed a fact sheet which sets out our position in this regard and would refer you in particular to the section on freedom of choice.

Should your client wish you to act on their behalf at the point of issue, we would ask you to notify us at that stage, quoting the above reference. We will consider the validity of the claim and whether we are able to instruct you.

To ensure our Customer is treated fairly, please be aware that we will not enter into protracted and unnecessary correspondence with you in relation to your appointment in this matter because this will delay the progression of the case.

We look forward to hearing from you upon issue of proceedings.

Yours faithfully

Personal Injury Team
Claims Department

Enc: Fact Sheet

DAS Legal Expenses Insurance Company Limited is authorised and regulated by the Financial Services Authority and is a member of the Association of British Insurers.

Head and Registered Office:
DAS House, Quay Side, Temple Back, Bristol BS1 6NH
Registered in England and Wales. Company Number: 103274



1111 1 6608

If of course your client is prepared to instruct the panel solicitors to act for them in relation to their claim and therefore potentially receive the full benefit of their legal costs insurance prior to the issue of court proceedings, please advise us as soon as possible and we shall send the details to the panel firm.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Sarah Pye', written over a horizontal dashed line.

Sarah Pye
Claims Department

**DAS Non Panel PI Solicitor
Terms of Appointment**

- 2.10. You shall action all correspondence within five Business Days of receipt. Where correspondence requires a response, a reply will be communicated by, e-mail, telephone or letter.
- 2.11. You shall advise the Insured and DAS, in writing, as soon as is practicable once the total Estimated Costs (of all parties) reach:
- 2.11.1. £7,000 or 25% of the Limit of Indemnity, whichever is lesser;
 - 2.11.2. 50% of the Limit of Indemnity;
 - 2.11.3. 75% of the Limit of Indemnity;
 - 2.11.4. 100% of the Limit of Indemnity. and advise the Insured as to the consequences of the Limit of Indemnity being reached;

When assessing the above percentages You shall bear in mind that the other side may be acting under a conditional fee agreement with a success fee uplift.

- 2.12. You shall advise the Insured and DAS as soon as is practicable if it is likely that the Limit of Indemnity will be exceeded.
- 2.13. You shall process payments by cheque within seven Business Days and within two Business Days by BACS.
- 2.14. You shall provide DAS a fully particularised Standard Account Form and if appropriate, the Lost Case Report within three months of the Conclusion of the Claim, judgment or withdrawal/exhaustion of the Limit of Indemnity.
- 2.15. You shall ensure that the Insured is treated fairly at all times. The Insured is to be spoken to in a polite and professional manner by any of Your employees.
- 2.16. You shall ensure that any Counsel and/or Expert instructed by You under this Agreement will adhere to the Service Levels outlined in this Agreement wherever that is reasonably practicable.
- 2.17. You shall handle the Claim in accordance with the terms of this Agreement.

3. Audits

- 3.1. DAS reserve the right to audit the Claim appointed to You.
- 3.2. Audits shall be conducted in accordance with Clause 13.

4. Complaints

**DAS Non Panel PI Solicitor
Terms of Appointment**

- 2.2. You shall provide the Insured with updates in respect of their Claim or any proposed settlement at maximum intervals of four week periods, unless You communicate to the Insured a more appropriate arrangement for updating as the particular circumstances of their Claim may dictate.
- 2.3. You shall establish the merits of the Claim as soon as practicable. If You determine that there are not reasonable prospects of successfully pursuing or defending the Claim You shall send a letter to the Insured declining the Claim with a full explanation setting out the reasons for the declination and You shall notify DAS of the same.
- 2.4. You shall report to DAS and the Insured as soon as practicable as to the overall merits of the proposed Claim, its Prospects of Success, including whether or not the Estimated Costs becomes disproportionate to the Estimated Quantum in respect of the Insured's Claim and/or all other matters likely to impact upon the availability, continuation or the extent of the indemnity to be provided under the terms of the Policy.
- 2.5. Save and insofar as it is in the Insured's best interest and with their prior consent, You shall handle the Claim through to settlement if reasonable prospects of success exist, and continue to exist.
- 2.6. In the event that the Estimated Costs becomes disproportionate to the Estimated Quantum, in respect of the Insured's Claim You shall:
 - 2.6.1. immediately advise both DAS and the Insured in writing of the same;
 - 2.6.2. recommend whether any settlement or Bagatelle Payment is appropriate in the circumstances;
 - 2.6.3. provide Your opinion as to whether there is Prospects of Success; and
 - 2.6.4. seek further instructions and approval from DAS in writing.
- 2.7. You shall provide DAS with settlement details including whether or not it is reasonable in the circumstances to settle when seeking written authority and approval from DAS to negotiate settlements, including accepting and making Part 36 Offers or the equivalent or when recommending whether a Bagatelle Payment is appropriate.
- 2.8. You shall provide DAS with settlement details within seven Business Days of Your receipt of the settlement monies.
- 2.9. You shall return all telephone calls You receive from the Insured and DAS within twenty four hours of receipt, or earlier if agreed.

**DAS Non Panel PI Solicitor
Terms of Appointment**

SCHEDULE 1

SERVICE LEVELS

Service Levels

1. Communications

1.1. All communications between the Parties shall be via e-mail unless not reasonably practicable.

1.2. You shall contact DAS as follows:

Email: Clinical Negligence
Ruth Brown (Team Leader): ruth.brown@das.co.uk

Personal Injury
Dawn Harris (Team Leader): dawn.harris@das.co.uk

High Net Worth Team
Jem Quemper (Team Leader): jem.quemper@das.co.uk

Tel: 0117 927 1953 QM Clinical Negligence
0117 927 1955 QM Non Panel Personal Injury
0292 0 85 7234 High Net Worth

Post: At the above address.

1.3. DAS shall contact You as follows:

Email:

Telephone:

Post:

2. Claims Handling

2.1. You shall inform the Insured of the steps You will take to investigate the Claim or any proposed settlement, and provide the Insured with an anticipated timescale for completion of the matter.

**DAS Non Panel PI Solicitor
Terms of Appointment**

34. WARRANTIES

You warrant and undertake that You are not aware as at the date of this Agreement of anything within Your reasonable control which might or will adversely affect Your ability to fulfil Your obligations under this Agreement.

SIGNED

..... by.....
(Signature)

Duly authorised for and on behalf of DAS Date
Legal Expenses Insurance Company
Limited

SIGNED

Ian Snipe by *IAN SNIPES*
.....
(Signature)

Duly authorised for and on behalf of The Date *20.08.10*
Firm

DAS Non Panel PI Solicitor
Terms of Appointment

34. WARRANTIES

You warrant and undertake that You are not aware as at the date of this Agreement of anything within Your reasonable control which might or will adversely affect Your ability to fulfil Your obligations under this Agreement.

SIGNED

..... by.....
(Signature)

Duly authorised for and on behalf of DAS Date
Legal Expenses Insurance Company
Limited

SIGNED

Ian Swire by *IAN SWIRE*
.....
(Signature)

Duly authorised for and on behalf of The Date *20.08.10*
Firm

**DAS Non Panel PI Solicitor
Terms of Appointment**

29. NOTICES

Any notice given pursuant to this Agreement shall be in writing and shall be sufficiently given to any Party if sent in a letter by first class or air mail prepaid post addressed to that Party at the address of that Party outlined at the head of this Agreement (or any alternative address notified by that Party in accordance with this Clause) and any notice so given shall be deemed unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

30. DISASTER RECOVERY PLAN

30.1 You shall ensure that You have adequate business continuity plans in place to ensure compliance with the terms of this Agreement and shall:

30.1.1 ensure that such plans are regularly reviewed; and

30.1.2 provide DAS with copies of such plans upon request and in any event shall supply DAS forthwith with updates of any such plans.

30.2 You shall ensure that back-up arrangements exists for all Confidential Information and Personal Data which, if of data loss, will enable any such data to be reconstructed from Your records accurately and without delay. If any Confidential Information or Personal Data is lost, destroyed, or corrupted whilst it is in Your possession or control, You shall at Your own expense reconstruct that data without delay.

30.3 DAS shall be entitled to periodically review Your business continuity plans and shall immediately terminate this Agreement if in its view You fail to comply at any time with any part of this Clause 30.

31. SURVIVAL RIGHTS

Either Party shall be entitled to exercise any one or more of the rights and remedies given to it under the terms of this Agreement and the termination of this Agreement shall not affect or prejudice such rights and remedies and each Party shall be and remain liable to perform all outstanding liabilities under this Agreement notwithstanding that the other may have exercised one or more of the rights and remedies against it.

32. THIRD PARTIES

Apart from a member of the DAS Group a person who is not Party to this Agreement has no right under the Contract (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

33. GOVERNING LAW AND JURISDICTION

This Agreement shall be interpreted in accordance with the law in England and the Parties hereby submit to the exclusive jurisdiction of the courts of England.

**DAS Non Panel PI Solicitor
Terms of Appointment**

in breach of this Agreement but the Party unable to fulfil its obligations shall immediately give notice of this to the other Party and shall do everything in its power to resume full performance of this Agreement and shall meet as soon as possible, and in any event within a period of five days from the date of notice of any force majeure, to agree upon any action to avoid delays including any action under the Disaster Recovery Plan.

23.2 If and when the period of such incapacity exceeds one month then this Agreement shall automatically terminate unless the Parties first agree otherwise in writing.

23.3 Nothing in this Clause shall be construed so as to absolve any of the Parties from procuring due performance of relevant obligations as from time to time set out in the Disaster Recovery Plan.

24. OFFSET

You shall pay all sums due under this Agreement without any discount, deduction, set-off or counterclaim whatsoever.

25. ANNOUNCEMENTS

Neither Party shall make any press or other public announcement concerning any aspect of this Agreement, or make any use of the name of the other Party in connection with or in consequence of this Agreement, without the prior written consent of the other Party.

26. SEVERABILITY

If any term or provision in this Agreement shall in whole or in part be held to any extent to be illegal or unenforceable under any enactment or rule of law that term or provision or part shall to that extent be deemed not to form part of this Agreement and the enforceability of the remainder of this Agreement shall not be affected.

27. WAIVER

27.1 The failure by either Party to enforce at any time or for any period any one or more of the terms or conditions of this Agreement shall not be a waiver of them or of the right at any time subsequently to enforce all terms and conditions of this Agreement.

27.2 All rights granted to either of the Parties shall be cumulative and no exercise by either of the Parties of any right under this Agreement shall restrict or prejudice the exercise of any other right granted by this Agreement or otherwise available to it.

28. VARIATION

This Agreement may not be varied except by an instrument in writing validly signed by the authorised representatives of all of the Parties to this Agreement.

**DAS Non Panel PI Solicitor
Terms of Appointment**

- 22.2 Each Party agrees that the Confidential Information will not at any time for any reason be disclosed or be permitted to be disclosed or communicated to any person or persons other than the employees of each Party or the Party's permitted agents, representatives to include legal advisors appointed by You and or Your insurers or brokers, or subcontractors, and then only to the extent that these persons need to know the Confidential Information.
- 22.3 Each Party may disclose Confidential Information to their legal advisors only for the purposes of contemplated legal action or advice thereon in the event of a suspected breach of this Agreement or for advice on the content construction and or implications of this Agreement.
- 22.4 Each Party will ensure that its employees and any third party to whom information is sent are aware prior to receiving the Confidential Information in question of the relevant Party's obligations pursuant to this Clause.
- 22.5 Any Claims or other information supplied by DAS to You will remain the property of DAS even in the event of the Agreement being terminated.
- 22.6 The obligations of each of the Parties contained in this Clause 22 shall continue without limit in point of time but shall cease to apply to any information coming into the public domain otherwise than by breach by any such Party of its obligations contained in this Agreement.
- 22.7 Nothing contained in this Clause shall prevent any Party from disclosing any such information to the extent required in or in connection with legal proceedings arising out of this Agreement as may be required by due process of law, order of a Court or competent jurisdiction, or as is necessary to discharge legal or professional obligations.
- 22.8 If a Party or its representatives are requested or required by applicable law, rule or regulation or by legal process to disclose any Confidential Information, the one so required will promptly inform the other Party in writing of such a requirement in order that the other may seek any required protective order.
- 22.9 Each Party shall operate reasonably adequate procedures designed to ensure compliance with this Clause.

23. FORCE MAJEURE

- 23.1 If either Party is prevented from fulfilling its obligations under this Agreement by reason of any supervening event beyond its control including but not by way of limitation; war, national emergency, flood, earthquake, strike or lockout (other than a strike or lockout induced by the Party so incapacitated), neither Party shall thereby be deemed to be

**DAS Non Panel PI Solicitor
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18.1.2 Public Liability Insurance cover up to £5,000,000; and

18.1.3 Professional Indemnity Liability cover up to:

- a) £2,000,000 if a sole practitioner or partnership firm; and
- b) £3,000,000 if a limited liability partnership or other recognised body.

18.2 You agree to promptly supply DAS with certified copies of the Certificates of Insurance prior to the Commencement Date and throughout the term of this Agreement upon written request.

18.3 Without prejudice to Sub-clause 18.2 You shall at any time at DAS's request provide DAS with such evidence as DAS shall reasonably require to show that the policies required by Sub-clauses 18.1 are in force, and shall immediately notify DAS in writing if any circumstances arise or are likely to arise which would lead to Your being in breach of Your obligations under Sub-clauses 18.1.

18.4 You shall give written notice to DAS of the fact and circumstance of any incident, accident or damage which may be subject to a claim against You or DAS within 2 Business Days of its occurrence and shall promptly provide any information to DAS which its requests in relation thereto.

19. INTELLECTUAL PROPERTY

You shall not and shall not cause or permit anything which may damage or endanger the Intellectual Property of DAS or DAS's title to such Intellectual Property or assist or allow others to do so.

20. NO PARTNERSHIP

Nothing in this Agreement shall be deemed to constitute a partnership between the Parties.

21. ASSIGNMENT AND SUB-CONTRACTING

This Agreement shall be and remain personal to the Parties and shall not be capable of assignment without the prior written consent of DAS. The Parties have the right, at their absolute discretion, to immediately terminate this Agreement if there is, for any reason, an assignment (or purported assignment) or transfer of the Agreement or of any of the duties or obligations under this Agreement.

22. CONFIDENTIALITY

22.1 Each Party agrees to treat as secret:

22.1.1 the content of this Agreement; and

22.1.2 Confidential Information.

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17. INDEMNITIES

- 17.1 You shall indemnify DAS and its Commercial Customers and keep DAS and its Commercial Customers indemnified on demand from and against any and all damage, loss, demand, expense (including legal and professional expenses), costs, liability and fines which DAS and/ or its Commercial Customers at any time incurs as a result of any and of all breaches by You of this Agreement including:
- 17.1.1 any breach of good faith, act, neglect or default by You, Your employees or agents;
 - 17.1.2 any act carried out outside the scope of the authorities conferred under this Agreement; and
 - 17.1.3 any breaches in respect of any matter arising from the supply of the Services resulting in any successful claim by any third party.
- 17.2 This indemnity includes any awards made or sums payable to Statutory or Non Statutory bodies (including, but not limited to, the FSA, the Financial Ombudsman Service and the Information Commissioner).
- 17.3 This indemnity is of a continuing application and shall survive the termination of this Agreement.
- 17.4 The indemnity provisions contained in Clauses 11, 12 and 17 shall at all times be subject to an event, act or omission of negligence or wilful default by You. Insofar as any such indemnity is relied on then such indemnity shall at all times be capped in accordance with those sums set out in Clause 18.1 for any relevant head of liability and such caps will apply for any claim or series of claims
- 17.5 In the event of a third party taking legal action against one of the Parties arising out of or in connection with this Agreement the other Party shall provide all reasonable assistance in connection with the defence of that legal action.

18. INSURANCE

- 18.1 You shall maintain at Your own cost comprehensive policies of insurance with insurers of a credit rating of at least A- measured by reference to Standard & Poor's measurement of financial strength or an equivalent index to cover Your liabilities in respect of any act, omission, advice, neglect or default for which You may become liable whether to indemnify DAS and/or an Insured and/or a Commercial Customers or otherwise under the terms of this Agreement. You shall arrange for the minimum cover for the Claim to the following insurance levels:
- 18.1.1 Employer's liability insurance for a minimum of £10,000,000;

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Services, the Insured.

16. DISPUTE RESOLUTION

- 16.1 The Parties agree to discuss in good faith with a view to resolving any dispute, controversy or claim arising out of or in connection with this Agreement amicably and promptly by negotiation between the Parties. Any dispute under this Agreement shall be referred for resolution in the first instance to the following representatives of the Parties:

DAS: – Claims Manager

You: – Account Manager (or such person in each case as may replace them in the equivalent capacity and whose identity is notified to the other Party).

- 16.2 Any dispute that cannot be resolved in this manner by the relevant representatives shall be escalated to the appropriate member of senior management for resolution.
- 16.3 If such dispute is not resolved by such negotiations outlined in Clause 16.1 either Party may give the other Party a written notice of dispute. Within five (5) Business Days after delivery of such notice, a senior management representative nominated by each Party with the authority to settle such dispute shall meet at a mutually acceptable time and place and thereafter as long as they deem reasonably necessary to attempt to resolve the dispute.
- 16.4 If the dispute cannot be resolved in the fashion set out in Clause 16.2 and if both Parties agree, the dispute will be referred to mediation. The mediator shall be appointed by the Centre for Dispute Resolution subject to approval by each of the Parties and shall be appropriately experienced and qualified in matters relating to insurance.
- 16.5 Each Party shall bear its own costs for the procedures set out in this Clause 16 and such costs will not be recoverable in any action except that the Parties agree to share equally in the costs incurred by the mediator and CEDR.
- 16.6 Except where and to the extent clearly prevented by the dispute, both Parties agree to continue performing their respective obligations under this Agreement while such dispute is being resolved.
- 16.7 Notwithstanding the provisions of this Clause 16 either Party shall be entitled to commence proceedings for injunctive relief where appropriate for a breach by the other of its obligations under this Agreement.
- 16.8 If the matter has not been resolved by the mediation procedure outlined above within ninety (90) days' of the dispute arising either Party may refer the dispute to the courts.

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remedied), such breach has not been remedied within 30 days of receipt of a written request to remedy the breach; or

14.1.12 there is a change in control of The Firm for this purpose "control" shall have the meaning ascribed to it in 840 Income and Corporation Taxes Act 1988; or

14.1.13 You fail to comply with the provisions outlined at Clause 12.

14.2 Either Party may terminate this Agreement immediately in writing at any time if the other Party:

14.2.1 expressly or impliedly repudiates this Agreement by refusing or threatening to refuse to comply with any of the provisions of this Agreement; or

14.2.2 goes into liquidation either compulsory or voluntary (save for the purpose of reconstruction or amalgamation); or

14.2.3 convenes any meeting of creditors or passes a resolution for winding up or suffers a petition for winding up; or

14.2.4 has an administrative receiver or receiver appointed over the whole or part of its assets or suffers the appointment of an administrator; or

14.2.5 is wound up or a court of competent jurisdiction makes an order to that effect; or

14.2.6 is directed to do so by any regulatory authority.

14.3 A material breach of this Agreement shall include but not be limited to:

14.3.1 any failure by You to comply with the Service Levels; and

14.3.2 any failure by You to comply with the terms of this Agreement.

15. CONSEQUENCES OF TERMINATION

15.1 Following termination of this Agreement, save as otherwise expressly provided and to any rights or obligations which have accrued prior to termination, neither Party shall have any further obligation to the other under this Agreement.

15.2 Save as is necessary to perform any obligations under this Agreement or to comply with any legal or regulatory requirement, You shall, at the request of DAS, promptly return (or destroy as the case may be) all unused documentation or materials to DAS as appropriate.

15.3 You shall not within twelve months of the termination of this Agreement solicit, in respect of any policy of insurance relating to the

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- 13.9 You shall retain the Claim record for a minimum period of six years following closure of the Claim.
- 13.10 You hereby grant to each of HM Revenue and Customs, the FSA and any other relevant taxation or regulatory body the same rights as those granted to DAS under this Clause. You shall co-operate with DAS and assist DAS in any of DAS's dealings with any regulatory or taxation authority.
- 13.11 This Clause 13 shall survive the termination or expiry of this Agreement and shall remain enforceable until such time as all Your obligations arising under this Agreement are fully concluded to the satisfaction of DAS.

14. TERMINATION

- 14.1 DAS may terminate this Agreement immediately in writing at any time if:
- 14.1.1 the Solicitors Regulation Authority intervene in Your practice; or
 - 14.1.2 any Partner in Your firm is the subject of a bankruptcy petition or bankruptcy order; or
 - 14.1.3 any Partner in Your firm is the subject of an application or order or appointment under the Insolvency Act 1986 Section 253 or Section 273 or Section 286; or
 - 14.1.4 any Partner in Your firm is unable to pay or has no reasonable prospect of being able to pay his debts within the meaning of the Insolvency Act 1986 Sections 267 and 268; or
 - 14.1.5 any Partner in Your firm practices without, or has conditions imposed on, his practising certificate; or
 - 14.1.6 the partnership of Your firm is dissolved or notice is given or an application is made to the Court for dissolution; or
 - 14.1.7 any of the events which are required under Clause 11 to be notified occurs; or
 - 14.1.8 You have not complied with the provisions of the DPA; or
 - 14.1.9 You purport to assign this Agreement or the benefit of this Agreement; or
 - 14.1.10 in DAS's reasonable opinion Your business continuity plan is inadequate or insufficient; or
 - 14.1.11 You commit a material breach of any term of this Agreement (and, except in the case of a breach not capable of being

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DAS to respond to the Insured accordingly. You shall provide DAS with the information within five Business Days of receipt of the request from DAS for that information.

- 12.3 You shall indemnify DAS against all claims proceedings, liability, loss, costs and expenses reasonably incurred in connection therewith by DAS as a result of any claim made or brought by any individual or other legal person in respect of any loss, damage or distress caused to that individual or any other legal person as a result of Your unauthorised Processing, unlawful Processing, destruction of and/or damage to any Personal Data Processed by You, Your employees or agents in the performance of this Agreement. This sub-clause shall survive the termination of this Agreement and shall remain enforceable until such time as all of Your obligations arising under this Agreement are fully concluded to the satisfaction of DAS.

13. RECORDS AND AUDIT

- 13.1 You shall prepare and maintain full and proper accounts, books and records which present and reflect in all material respects all transactions, matters and things relating to this Agreement.
- 13.2 DAS, as well as its Regulator, agents, representatives and Commercial Customers (provided that the agents, representatives and Commercial Customers enter a confidentiality agreement no less stringent than the confidentiality term in this Agreement) shall be entitled to audit the Claim and service records as well as records of training, Complaints, measurement of service standards and enforcement by any regulator.
- 13.3 You shall use Your best endeavours to obtain specific informed consent from the Insured to enable DAS as well as its agents, Regulators and/or Commercial Customers to audit the Claim.
- 13.4 DAS reserve the right to require You to send copies of the Claim file to a nominated DAS service provider for periodic auditing purposes.
- 13.5 DAS its agents, representative or Commercial Customers shall be entitled to audit the Claim or service records at least twice per annum. Consent for additional audits shall not unreasonably be withheld.
- 13.6 You shall, on reasonable notice, make available reasonable facilities to the party carrying out the audit and if necessary will provide facility/access to distant audit via PC terminal.
- 13.7 You shall, at the expense of the party requiring it, make a copy of records and documents in a format readable to the receiving party. Alternatively You may be required to facilitate remote access to Your system for audit purposes.
- 13.8 Any audit will be conducted reasonably.

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(including adequate back up procedures and disaster recovery systems);

- 12.1.3 obtain any necessary consent to enable Personal Data to be passed to any member of the DAS Group;
 - 12.1.4 not use the Personal Data for any purposes which may be inconsistent with those notified to the Insured;
 - 12.1.5 ensure that only such of Your employees who may be required to assist You in meeting Your obligations under this Agreement shall have access to the Personal Data;
 - 12.1.6 ensure that all employees used by You to provide the Services have undergone training in the law of data protection and in the care and handling of Personal Data;
 - 12.1.7 Process the Personal Data only in accordance with the laws of England;
 - 12.1.8 not disclose the Personal Data to a third party in any circumstances other than at the specific request of DAS or as otherwise specified in this Agreement;
 - 12.1.9 promptly carry out any request from DAS requiring You to amend, transfer or delete all or any part of the Personal Data; save and insofar as this is in the Insured's best interest and with their prior consent;
 - 12.1.10 notify DAS immediately upon receiving any notice or communication from any supervisory or government body which relates directly or indirectly to the Processing of the Personal Data;
 - 12.1.11 if requested in writing by DAS from time to time, provide to DAS a copy of the Personal Data in the format and on the media reasonably specified by DAS; save and insofar as this is in the Insured's best interest and with their prior consent;
 - 12.1.12 if any Personal Data in Your possession or control becomes lost, corrupted or rendered unusable for any reason, promptly restore such Personal Data using Your back up or disaster recovery procedures at no cost to DAS; and
 - 12.1.13 not transfer any Personal Data or any copy of Personal Data outside the United Kingdom unless authorised to do so by DAS.
- 12.2 If DAS receives a Subject Access Request from the Insured under the DPA, You shall, at no further cost to DAS, provide DAS with full details of all the information You hold about the Insured to enable

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pursuant to the terms of the CFA, whether in whole or in part, DAS's and the Insured's liability to You in respect of Your Costs, Your Disbursements and Success Fee shall be nil.

11. COMPLIANCE

- 11.1 Nothing in the entirety of the contractual arrangements between the Parties shall require You to do anything which interferes with Your professional duties and obligations to the Insured. Moreover nothing in the entirety of the contractual arrangements between the Parties shall require You to do anything which interferes with all other requirements of Your professional conduct, or indeed all other regulations with which You must comply. Nothing in the entirety of the contractual arrangements between the Parties shall require You to do anything which interferes with Your professional integrity or independence nor shall they influence or constrain the exercise of Your professional judgement in relation to the advice provide by You to the Insured.
- 11.2 In Your dealings with the Insured You shall be solely responsible for ensuring compliance with all applicable regulatory and other legal requirements.
- 11.3 You shall notify DAS forthwith of any developments which may affect Your ability to perform Your obligations under this Agreement.
- 11.4 You shall indemnify DAS and its Commercial Customers and keep DAS and its Commercial Customers indemnified on demand from and against any loss, cost, liability, fines, claim or damage which DAS and/or its Commercial Customers might reasonably suffer or incur as a direct result of:
 - 11.4.1 any default by You in respect of any of Your obligations express or implied arising under or in connection with this Agreement; and
 - 11.4.2 any act carried out by You outside the scope of the authorities conferred under this Agreement.
- 11.5 This Clause is of a continuing application and shall survive the termination of this Agreement.

12. DATA PROTECTION

- 12.1 You agree to comply with the DPA and in particular You shall:
 - 12.1.1 Process the Personal Data strictly in accordance with the terms of this Agreement and DAS's lawful instructions from time to time;
 - 12.1.2 take appropriate technical and organisational measures to safeguard the Personal Data against the unauthorised or unlawful Processing or accidental loss, destruction or damage

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amounts involved in each of the Transferred Claim such total sum as You shall by then have paid out in respect of disbursements in respect of the prosecution (and, if applicable the defence) of the Transferred Claim; and

9.9.2 upon the Conclusion of the Claim, whether by settlement or by order of the court, diligently and professionally pursue the recovery of Your total profit costs and VAT thereon as notified by You in respect of the work done by You on the Transferred Claim. Such costs to be agreed on a pro rata basis under the Standard Basis or Predictable Costs Regime under the CPR following reasonable consultation between the parties.

9.10 For the avoidance of doubt a breach of this Clause 9 shall entitle DAS to immediately terminate this Agreement.

10. COSTS - PAYMENT OF SOLICITOR'S ACCOUNT

10.1 In respect of the Claim, You shall enter into a CFA with the Insured that complies with section 58 of the Courts and Legal Services Act 1990 as amended from time to time.

10.2 The relevant financial terms under which You shall be retained to act on behalf of Insured in respect of the Claim shall be governed by the terms of the CFA entered into between You and the Insured.

10.3 Your Costs are payable by DAS (by way of indemnity of the Insured) as follows:

- a. Where there is a Successful Outcome, You shall be paid basic charges, Success Fee and Your Disbursements limited to those sums recovered from the Opponent.
- b. Where there is an Unsuccessful Outcome, You will not be paid Your Costs or the Success Fee.
- c. Where interest is recovered on costs from the Opponent, it is payable to You.

10.4 For the avoidance of doubt, DAS's liability under the CFA shall be restricted to adverse costs and Your Disbursements in the event of an Unsuccessful Outcome.

10.5 You acknowledge that You are taking a substantial commercial risk and should enter into a CFA with a Success Fee uplift. You acknowledge that where the Success Fee is set by law then this shall be the maximum uplift.

10.6 In the event that the CFA is found to be unlawful and/or unenforceable against an Opponent in any matter upon which You are instructed

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- 9.2.2 the Insured must co-operate fully with DAS and You; and
- 9.2.3 the Insured must give You any instructions DAS require.
- 9.3 You shall at the commencement of Your retainer with the Insured obtain such written consent from the Insured as is required to ensure Your compliance with the obligations outlined in this Agreement.
- 9.4 It is agreed and acknowledged that:
- 9.4.1 In the event of the Insured terminating their retainer with You and DAS withdrawing indemnity in respect of Your appointment in relation to the Claim, in these circumstances You shall:
- a) make application to come off the Court record as soon as possible; and
 - b) cooperate with the Insured and DAS in the event the Insured instructs You to:
 - 1) return the Claim to DAS who will appoint a replacement solicitor of its choosing; or
 - 2) pass the Claim to another solicitor of DAS's choosing.
- 9.5 Subject to the consent of the Insured DAS and its duly appointed agent shall on reasonable notice be entitled to attend upon You and inspect and copy the Insured's file created for the purpose of pursuing or defending the Claim.
- 9.6 You shall within five Business Days of any request made for or on behalf of DAS in connection with the conduct of a Claim or proceedings and any matter incidental thereto, provide DAS with full details of the information requested together with such other information as may be relevant to the matters forming the subject matter of the enquiry.
- 9.7 In respect of the Transferred Claim, You shall transfer the file upon Your receipt of an acceptable undertaking from the firm or company taking over the Transferred Claim.
- 9.8 You shall accept an undertaking by the firm or company taking over the Transferred Claim to pay to You any applicable accrued costs on a pro rata basis if and when recovery of costs is made.
- 9.9 Prior to You being obliged to hand over any files under this Clause 9, DAS will procure that the firm or company taking over the Transferred Claim to which such files relate give You an undertaking that it will:
- 9.9.1 pay to You within ten Business Days of recovering the

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statements of the client ledger available to DAS on request.

- 7.10 When instructing Experts You shall ascertain that those instructed have adequate data protection, security and confidentiality procedures in place.
- 7.11 When instructing an Expert under this sub-clause You shall at all times bear in mind that fixed and maximum costs apply pursuant to CPR Part 45 and 46.

Instructing Agents

- 7.12 You shall only instruct an Agent if any matter arising or incidental to the Claim renders it impractical or disproportionate for You to take any step without the appointment of an Agent by virtue of the location of the Insured, any witness or the venue of the proceedings conducted on behalf of the Insured.
- 7.13 When instructing an Agent You shall utilise the services of a solicitor or other expert from the DAS Panel unless agreed otherwise.
- 7.14 When instructing Agents You shall ascertain that those instructed have adequate data protection, security and confidentiality procedures in place.

Interim Disbursements

- 7.15 DAS shall not pay You any disbursements until the Conclusion of the Claim.

8. EXTENSION OF AUTHORITY

- 8.1 If the Insured wishes to extend Your appointment outside the terms of the Policy or if You consider it should be extended due to any change in the circumstances of the Claim You shall advise DAS immediately and obtain prior written authority from DAS to continue to act under the Policy.
- 8.2 You shall throughout Your appointment under this Agreement use Your best endeavours to ensure that You are conversant with the restrictions imposed under the Policy.
- 8.3 DAS accept no liability for actions undertaken by You in breach of this Clause 8.

9. PASSING OF INFORMATION (SOLICITOR/CLIENT PRIVILEGE)

- 9.1 DAS acknowledge that solicitor client privilege exists when dealing with the Claim.
- 9.2 It is a term of the Policy that:
 - 9.2.1 DAS will have direct contact with You;

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- 7.3.5 if Counsel agrees that in the event of their fees being reduced on Detailed Assessment or by negotiation they will consider acceptance of the reduced payment; and
- 7.3.6 unless otherwise agreed, Counsel is to be selected from one of the Recommended Suppliers. DAS shall not unreasonably refuse the appointment of Counsel from alternative chambers.
- 7.4 When instructing Counsel You shall ascertain that those instructed have adequate data protection, security and confidentiality procedures in place.
- 7.5 DAS shall be liable for Counsel's fees where:
 - 7.5.1 Counsel is a Recommended Supplier; or
 - 7.5.2 Counsel is not a Recommended Supplier and is instructed on a private client basis; or
 - 7.5.3 Counsel is not a Recommended Supplier and is instructed under a conditional fee agreement and the Insured's liability is limited to sums recovered from the Opponent.
- 7.6 DAS shall not be liable for Counsel's fees where Counsel is not a Recommended Supplier and is instructed under a conditional fee agreement where the Insured's liability is not limited to sums recovered from the Opponent.
- 7.7 When instructing or briefing Counsel under this sub-clause You shall at all times bear in mind that fixed and maximum costs apply pursuant to CPR Part 45 and 46.

Instructing Experts

- 7.8 You shall only instruct Experts in the following situations:
 - 7.8.1 if the Expert's fees are reduced on Detailed Assessment or by negotiation, the Expert will consider acceptance of the reduced rate;
 - 7.8.2 if, where appropriate, the Expert is a Recommended Supplier; and
 - 7.8.3 where the choice of Expert and conduct of the Claim is such that the Experts' fees will be;
 - a) recoverable as the jurisdiction allows; and
 - b) in principle recoverable from the losing party.
- 7.9 You shall hold all DAS monies received in respect of disbursement payments due to Experts on a separate client ledger. You shall make

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- 6.7.1 immediately advise both DAS and the Insured in writing of the same;
 - 6.7.2 recommend whether any settlement or Bagatelle Payment is appropriate in the circumstances;
 - 6.7.3 provide Your opinion as to whether there is Prospects of Success and
 - 6.7.4 seek further instructions from DAS in writing.
- 6.8 A breach of this Clause 6 shall constitute a material breach of this Agreement.

7. AUTHORITY GRANTED

- 7.1 You must seek written authority from DAS before undertaking the following:
 - 7.1.1 issuing, defending or pursuing proceedings;
 - 7.1.2 negotiating settlements, including accepting and making Part 36 Offers or the equivalent;
 - 7.1.3 recommending whether a Bagatelle Payment is appropriate;
 - 7.1.4 instructing and briefing Counsel;
 - 7.1.5 instructing Experts;
 - 7.1.6 instructing Agents; and
 - 7.1.7 proceeding to mediation.
- 7.2 You shall not extend the authority outlined in this Agreement without the prior written agreement of DAS.

Instructing Counsel

- 7.3 You shall only instruct and brief Counsel in the following situations, by written agreement:
 - 7.3.1 if the jurisdiction of the Court or track allows the use of Counsel;
 - 7.3.2 if Counsel's fees are potentially recoverable in full from the Opponent;
 - 7.3.3 if the jurisdiction of the Court allows such costs to be recovered;
 - 7.3.4 if Counsel agrees that their fees be payable at Conclusion of the Claim following an assessment of the fees if applicable;

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6.1.4 a completed DAS Checklist, together with supporting documentation.

6.2 In the event that You are not able to provide a full analysis of Estimated Costs within the timescale outlined above, You shall provide DAS with an interim analysis within one month of Your appointment, together with details of when a full analysis will be available. The full analysis should follow as soon as possible.

Ongoing Obligation

6.3 You shall advise the Insured and DAS immediately when it is considered likely that the Estimated Costs will exceed the Limit of Indemnity

6.3.1 £7,000 or 25% of the Limit of Indemnity, whichever is lesser;

6.3.2 50% of the Limit of Indemnity;

6.3.3 75% of the Limit of Indemnity;

6.3.4 100% of the Limit of Indemnity, and advise the Insured as to the consequences of the Limit of Indemnity being reached;

6.4 You shall advise the Insured and DAS immediately when it is considered likely that the Estimated Costs will become disproportionate to the Estimated Quantum

6.5 In respect of the Claim, You shall advise DAS immediately of the following:

6.5.1 if the Prospects of Success change in any way which affects Your initial Estimated Costs either for the better or for the worse;

6.5.2 if the Prospects of Success change, if and how the other side's Costs will be met e.g. insurance;

6.5.3 if the Prospects of Success change in any way which affects Your initial Estimated Quantum;

6.5.4 if the Estimated Costs change in any way which affects Your initial Estimated Costs; and

6.5.5 if Counsel gives an opinion which affects Your view of the Prospects of Success.

6.6 You shall at all times keep in mind the Estimated Costs likely to apply to the Claim.

6.7 In the event that the Estimated Costs becomes disproportionate to the Estimated Quantum, You shall:

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- 5.3.4 an exclusion under the Policy becomes applicable;
 - 5.3.5 save where You are prevented from doing so by statute or other regulation, any element of fraud has been identified in respect of the Claim;
 - 5.3.6 the Estimated Costs will exceed Limit of Indemnity;
 - 5.3.7 the Estimated Costs becomes disproportionate to the Estimated Quantum; and/or
 - 5.3.8 the Opponent is legally aided.
- 5.4 You shall conduct all litigation in accordance with the spirit and the letter of the CPR Pre Action Protocol.
- 5.5 You shall advise both DAS and the Insured in writing when the total Estimated Costs in the event of an Unsuccessful Outcome reach:
- 5.5.1 £7,000 or 25% of the Limit of Indemnity, whichever is lesser;
 - 5.5.2 50% of the Limit of Indemnity;
 - 5.5.3 75% of the Limit of Indemnity;
 - 5.5.4 100% of the Limit of Indemnity. and advise the Insured as to the consequences of the Limit of Indemnity being reached;
- 5.6 When assessing the percentages outlined in Clause 5.5 You shall take into consideration the fact that the Opponent may be acting under a conditional fee agreement with a success fee uplift.
- 5.7 For the avoidance of doubt a breach of this Clause 5 shall constitute a material breach of this Agreement.

6. ESTIMATING

- 6.1 Following Your appointment under this Agreement and in any event within 20 Business Days of the same, You shall provide DAS with:
- 6.1.1 a schedule of Estimated Costs in respect of the Claim being handled by You under the terms of this Agreement;
 - 6.1.2 a schedule of Estimated Quantum and Your opinion as to whether the Estimated Quantum will become disproportionate to the Estimated Costs in respect of the Claim;
 - 6.1.3 a completed DAS Quality Management Report in respect of the Claim; and

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where the Insured has been fully advised as to the consequences of doing so;

4.1.24 take no steps in relation to any Insured in respect of the provision of the Services other than as pursuant to Your appointment in accordance with this Agreement;

4.1.25 at no time during the provision of the Services pursuant to this Agreement do any act which might bring DAS and/or any Commercial Customer into public disrepute or make any derogatory or defamatory statement about DAS and/or any Commercial Customer; and

4.1.26 in respect of the Services, not solicit the Insured in respect of any insurance products unless necessary for the pursuance of the Claim where the Limit of Indemnity has been or is likely to be exceeded and prior written approval has been obtained from DAS.

4.2 Notwithstanding the above, nothing in the entirety of the contractual arrangements between the Parties shall require You to do anything which interferes with Your professional duties and obligations to the Insured. Moreover nothing in the entirety of the contractual arrangements between the Parties shall require You to do anything which interferes with all other requirements of Your professional conduct, or indeed all other regulations with which You must comply. Nothing in the entirety of the contractual arrangements between the Parties shall require You to do anything which interferes with Your professional integrity or independence.

5. INSURANCE COVER

5.1 You shall throughout the conduct of Your retainer with the Insured notify DAS of all or any matters likely to affect the availability, continuation or scope of indemnity available under the Policy including but not limited to the Prospects of Success in connection with the whole or any part of the Claim.

5.2 You shall advise DAS of any changes in the basis of the Claim including any changes in respect of the law or the facts applicable to the Claim which might result in the Claim not being covered by the Policy either in whole or in part.

5.3 In respect of the Claim You shall advise DAS immediately if:

5.3.1 the Prospects of Success are no longer reasonable, that is in the event those prospects are assessed by You as being 51% or less;

5.3.2 there is no cover under the Policy;

5.3.3 the terms of the Policy have been breached;

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interests of the Insured to do so;

- 4.1.10 to settle or conclude the Claim promptly;
- 4.1.11 to reimburse DAS promptly following a costs order;
- 4.1.12 at all times comply with the requirements imposed upon You by the Solicitors Regulation Authority or any other body that regulates Your conduct;
- 4.1.13 take all necessary action required to diligently and promptly progress the Claim to settlement or Conclusion;
- 4.1.14 unless agreed otherwise in advance between the Parties only instruct, where appropriate, the Recommended Suppliers;
- 4.1.15 enter into a CFA with the Insured the terms of which shall govern the financial arrangements between You and the Insured;
- 4.1.16 take appropriate steps to safeguard information, money and property held on behalf of DAS and its Insured;
- 4.1.17 save for Costs where indemnity is not provided under the Policy, not recover any fees from the relevant Insured in respect of the provision of the Services until the Limit of Indemnity has been exceeded;
- 4.1.18 comply with all relevant laws and regulations, and the requirements of any Regulator of the Parties, any ombudsman, arbitrator or court to which either Party is subject;
- 4.1.19 render to DAS and/or the FSA on reasonable notice all required assistance to comply with DAS's regulatory obligations under the FSMA;
- 4.1.20 handle all Complaints fairly and promptly in accordance with the Solicitors Regulation Authority guidelines and the Service Levels and cooperate with DAS and the Financial Ombudsman Service in doing so;
- 4.1.21 regularly monitor the provision of the Services in accordance with the Service Levels and produce records of that monitoring to DAS on demand on reasonable notice;
- 4.1.22 comply with the Solicitors Regulation Authority guidelines with regard to conflicts of interest;
- 4.1.23 only take such steps as are reasonably necessary to preserve the Insured's and DAS's position in relation to the Claim where the Limit of Indemnity is likely to be exceeded and

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to expiry of this Agreement.

2. FREEDOM TO CONTRACT

You represent and warrant to DAS that You have full power and authority to execute, deliver and perform Your obligations under this Agreement and there are no existing agreements or arrangements with third parties the terms of which prevent You from entering into this Agreement or would impede the substantial performance of Your obligations under it other than as disclosed.

3. TERM OF THE AGREEMENT

3.1 This Agreement together with the schedules shall govern the terms upon which You shall be appointed in respect of the Claim.

3.2 This Agreement shall commence on the Commencement Date and shall continue in full force and effect unless terminated in accordance with the terms of this Agreement.

4. SERVICES

4.1 You shall:

4.1.1 provide the Services in accordance with the Service Levels, the terms of this Agreement and the reasonable instructions of DAS;

4.1.2 manage the quality of the Services to the Insured, the Commercial Customer and to any member of the DAS Group;

4.1.3 ensure that the Services are at all times adequately staffed with staff who are qualified by appropriate professional qualification, training and/or experience;

4.1.4 perform the Services with due care, skill and diligence to be expected of a reasonably competent solicitor exercising reasonable care, skill and diligence;

4.1.5 provide the Services in accordance with the terms of the Policy;

4.1.6 keep the Insured and DAS regularly updated with the progress of the Claim, having obtained the prior written consent of the Insured to do so;

4.1.7 observe high standards of integrity and deal openly and fairly with the Insured and DAS;

4.1.8 treat all Insured fairly in accordance with the FSA regulations as amended from time to time;

4.1.9 only issue proceedings in circumstances where it is in the best

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Customs);

“You/ Your” means The Firm;

“Your Costs” means Your basic charges reasonably and proportionately incurred in the conduct of the Claim at the County Court rate as applicable based on the Insured’s residence;

“Your Disbursements” means costs reasonably and proportionately incurred by You in the conduct of the Claim including but not limited to Counsel’s fees, Expert fees, Agent’s fees and court fees.

1.2 In this Agreement;

1.2.1 words importing any gender include every gender;

1.2.2 words importing the singular number include the plural number and vice versa;

1.2.3 words importing persons include legal personalities, firms, Limited Liability Partnerships, companies and corporations and vice versa;

1.2.4 references to numbered clauses and Schedules are references to the relevant clause in or Schedule to this Agreement;

1.2.5 references to “including” and “include” shall be deemed to mean “including without limitation” and “include without limitation” respectively;

1.2.6 references to any individual include his personal representatives and successors by operation of law;

1.2.7 references in any Schedule to this Agreement to numbered paragraphs relate to the numbered paragraphs of that Schedule;

1.2.8 the headings to the clauses, schedules and paragraphs of this Agreement shall not affect the interpretation;

1.2.9 references to each Party herein include references to its agents, successors in title, permitted assignees and novatees;

1.2.10 references to an enactment includes reference to that enactment as amended or replaced from time to time and to any subordinate legislation or byelaw made under that enactment; and

1.2.11 references to termination of this Agreement include references

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“Services”	means the provision of legal advice and representation by You to an Insured in accordance with the requirements outlined at Clause 4;
“Service Levels”	means the service levels outlined at Schedule 1 as amended from time to time;
“Solicitors Regulation Authority”	means the Law Society of England and Wales, the Solicitors Regulation Authority and/or any successor body, their officers and agents; and/or other regulatory body and their officers and agents which regulates the conduct of solicitors;
“Standard Basis”	means as defined by Rule 44.4 of the CPR;
“Subject Access Request”	means any data subject access request as defined under the DPA;
“Success Fee”	means the percentage increase which is allowed by the Court in respect of Your Costs;
“Successful Outcome”	means a final decision in favour of the Insured whether by a decision of a court or tribunal or by an agreement or by the payment of Your Costs or agreement to pay (including where an order for Your Costs is made on an interim application) by the Opponent. For the purposes of decisions of a court or a tribunal, a final decision is one where the Opponent has no right of appeal, or is denied permission to appeal, or does not appeal in time, or loses its appeal. In a defence or a claim or counterclaim for damages or other compensation, a decision in favour of the Insured includes any award of Your Costs, damages or agreement to pay Your Costs, damages, irrespective of the amount of the Your Costs or damages or the incidence of any CPR Part 36 Offer or equivalent, or the maintaining of a position for the Insured;
“Transferred Claim”	means the Claim which, on written request, DAS has requested that You transfer either to DAS or an alternative firm or company;
“Unsuccessful Outcome”	means whenever at the Conclusion of the Claim (after all orders relating to entitlement to costs have been made and an appeal against any such order has not been made and may no longer be made) the definition of Successful Outcome is not satisfied;
“VAT”	means Value Added Tax for the time being in force (as may be varied from time to time by HM Revenue and

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“Limit of Indemnity”	means the maximum amount DAS will pay in respect of the Claim resulting from one or more events arising at the same time from the same originating cause as stated in the relevant Policy;
“Opponent”	means any opposing party to the Claim;
“Opponent Costs”	means Opponent profit costs and disbursements;
“Partner”	means any partner, director, member, shareholder, registered European lawyer (registered with the Solicitors Regulation Authority under regulation 17 of the European Communities (Lawyer’s Practise) Regulations 2000) or registered foreign lawyer (registered under section 89 of the Courts and Legal Services Act 1990), of You, as the case may be;
“Personal Data”	means any personal data including sensitive personal data as defined under the DPA processed by You on behalf of DAS in the provision of the Services;
“Policy”	means the terms and conditions applicable to the legal expenses insurance cover purchased by and issued to an Insured;
“Proceedings”	means any sort of proceedings for resolving the Claim whether commenced or contemplated;
“Processing”	means as defined by the DPA;
“Prospects of Success”	means the Insured’s Claim (or where they are defending, the defence) is more likely than not to succeed. That is that the prospects of achieving a Successful Outcome are assessed by You as being better than 51%. This assessment applies not only to considering the prospects of obtaining judgment, but also means assessing that the Opponent has the ability to satisfy any judgment (including costs order) obtained;
“Recommended Suppliers”	means the suppliers outlined in Schedule 2 or as notified by DAS from time to time;
“Regulator”	means the FSA and such other body, organisation, person or entity as is authorised, charged with regulatory duties within a business, profession or industry as specified by law or required under the voluntary or obligatory membership of a business, profession, or industry;

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	Electronic Communications (EC Directive) Regulations 2003 and all applicable laws and regulations relating to processing of personal data and privacy, including where applicable, and to the extent having the force of law, the Guidance Notes and Codes of Practice issued by the Information Commissioner;
"Estimated Costs"	means the total potential financial liability of the Insured under the terms of the Policy in respect of the Claim being handled by You under the terms of this Agreement;
"Estimated Quantum"	means the total damages likely to be recoverable by the Insured in respect of the Claim being handled by You under the terms of this Agreement;
"Expert"	means an individual, firm or company with sufficient skill, expertise and qualifications to provide expert opinion necessary in Court proceedings. Approval from DAS must be obtained prior to the instruction of any Expert under this Agreement;
"FSA"	means the Financial Services Authority and/or any successor body and their officers and agents;
"FSMA"	means the Financial Services and Markets Act 2000 and the rules and regulations made or having effect under it;
"Insured"	means the policyholder or any other person covered by the Policy to whom DAS has extended indemnity under the Policy;
"Intellectual Property"	means the following in any part of the world: (a) patents, trademarks, registered designs and all applications for registration of them; (b) copyrights or design rights; (c) any moral right; (d) any know how; (e) any trade or business name; (f) any licence, right or interest of any kind arising out of or granted or created in respect of the items referred to in (a) to (e) above; and (g) any right to bring an action for passing off; or any right which is similar or analogous to any of these;
"Lost Case Report"	means a report detailing a lost case in a form as prescribed by DAS from time to time, a copy of which is attached in Schedule 6;

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- any court or Tribunal decision; or
- the Opponent has not appealed in time; or
- the Opponent has lost any appeal; or
- You withdraw from or cease to act on behalf of the Insured (irrespective of whether the Insured continues to pursue the Claim on its own account); or
- a settlement of the Claim has been achieved to the satisfaction of the Insured or indemnity is withdrawn;

“Confidential Information”	means information and/or material relating to the business, affairs, finances, systems, processes, and/or methods of operation of either Party (other than information and Personal Data about an Insured, held by either Party or supplied by either Party to the other in connection with the operation of this Agreement) which is disclosed by one Party to the other in connection with the operation of this Agreement (whether oral or in writing and whether or not such information is expressly stated to be confidential or marked as such);
“Counsel”	means barristers instructed by You under this Agreement. Approval from DAS must be obtained prior to the instruction of any Counsel under this Agreement;
“CPR”	means the Civil Procedure Rules;
“DAS Checklist”	means the checklist set out at Schedule 4;
“DAS Group”	means DAS Legal Expenses Insurance Company Limited and any other company which is for the time being its subsidiary or holding company or a subsidiary of any such holding company and, where the context so permits, any of those companies;
“DAS Quality Management Report”	means the form located at Schedule 3;
“DAS Standard Account Form”	means the prescribed standard account form in a format as agreed with DAS from time to time, a copy of which is located at Schedule 5;
“Detailed Assessment”	means the assessment of Costs in accordance with the CPR;
“Disaster Recovery Plan”	means the disaster recovery plan You are required to provide to DAS under Clause 30;
“DPA”	means the Data Protection Act 1998 the Privacy and

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	to act for and on behalf of You in the provision of the Services under this Agreement;
“Agreement”	means this agreement including any Schedule;
“Bagatelle Payment”	means a payment made to the Insured under the terms of the Policy the sum of which will adequately compensate the Insured in respect of their Claim as an alternative to issuing proceedings;
“Business Day”	means a calendar day other than a Saturday, Sunday, Bank Holiday, or other statutory holiday in England and Wales;
“Certificates of Insurance”	means the insurance certificates evidencing the insurance policies that You are obliged to take out and maintain pursuant to Clause 18;
“CFA”	means a legally enforceable conditional fee agreement that complies with section 58 of the Courts and Legal Services Act 1990, as amended from time to time, entered into between You and the Insured;
“Claim”	means the claim which DAS has agreed for You to be appointed to act on behalf of the Insured in accordance with the terms of this Agreement where indemnity is provided under the terms of the Policy to the Insured who has suffered a personal injury arising from a road traffic accident, employers’ liability, public liability, clinical negligence or such other personal injury suffered by the Insured as may be agreed between the Parties;
“Claims Manager”	means the person within DAS allocated to manage the relationship between the Parties with sufficient authority to make decisions in relation to this Agreement, or as delegated by them;
“Commencement Date”	means the date that this Agreement is made;
“Commercial Customer/Insurer”	means DAS business partner who are the Insured’s primary insurers, the legal expenses provision of which is administered or underwritten by DAS;
“Complaint”	means any oral or written expression of dissatisfaction received by You from an Insured arising from the provision of the Services;
“Conclusion”	means the Claim is finally determined. Finally means that: - the Opponent is not allowed to appeal against

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THIS AGREEMENT is made theday of 2010.

BETWEEN:

1) **DAS LEGAL EXPENSES INSURANCE COMPANY LIMITED** (registered number 103274) whose registered office is at DAS House, Quay Side Temple Back, Bristol. BS1 6NH ("DAS")

And

2) **SOLICITORS**, a firm of Solicitors of :

and registered with the Solicitors Regulation Authority under registration number ("The Firm")

(together referred to as "the Parties")

RECITALS:

- A. DAS is an insurance company authorised to underwrite legal expenses insurance.
- B. You are solicitors with a specialist personal injury department who provide legal services.
- C. DAS has agreed to appoint You to handle the Claim under the terms of this Agreement.
- D. DAS wishes to be assured of the overall quality of service delivered to the DAS policyholder.
- E. The Parties have agreed the arrangements for the quality and standard of service provided and the conditions under which You will be retained by DAS.
- F. The Parties have agreed to record in writing the terms and conditions of their agreement.

NOW IT IS HEREBY AGREED as follows:

1. DEFINITIONS AND INTERPRETATIONS

1.1 In this Agreement the following words and phrases shall have the meanings set out below, unless the context requires otherwise:

"Account Manager" means the person within Your firm/company allocated to manage the relationship between the Parties with sufficient authority to make decisions in relation to this Agreement;

"Agent" means a firm, company or individual authorised by You

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DAS Legal Expenses Insurance Company Limited

And

Solicitors

**DAS NON PANEL PI
TERMS OF APPOINTMENT**

122832800A

Snipe Law
Thompson Road
Whitehills Business Park
BLACKPOOL
FY4 5PN

Your Ref: [REDACTED]
Our Ref: [REDACTED]
Tel No: 01179271955 Ext: 11158
Date: 12 August 2010

Dear Sirs,

Our Insured/Your Client: [REDACTED]

We have now completed our review of our above Insured's claim and can confirm we are prepared to appoint your firm in this matter.

We have enclosed our Terms of Appointment which we require you to sign, date and return to us as quickly as possible. Indemnity under the policy will not commence until we have received the signed Terms of Appointment and any delay may prejudice our Insured's/your Client's position.

We would reiterate that costs should not be incurred under the policy until you have received our confirmation of appointment.

Please note we have written separately to our Insured confirming the above action. To avoid any prejudice to our Insured's position, we would ask you to return the Terms of Appointment within the next 7 days.

Yours faithfully

Lydia Blackman
Claims Department

e-mail : L_Blackman@das.co.uk

CLWB

Enc: Terms of Appointment



DAS Group
DAS House, Quay Side, Temple Back, Bristol BS1 6NH
Telephone: 0117 934 2000 Fax: 0117 934 2109 DX141841 Bristol 19 www.das.co.uk

A member of the international DAS organisation

Snipelaw Solicitors
Thompson Road
Whitehills Business Park
Blackpool
FY4 5PN

Your Ref: [REDACTED]
Our Ref: [REDACTED]
Tel: 0117 927 1955
Email: CPCC@DAS.CO.UK
Date: 25 June 2010

Dear Sirs

Re: Personal Injury Claim – [REDACTED]

I write with reference to your recent correspondence dated the 29th March 2010.

We acknowledge receipt of the completed Quality Management Report. In order for us to consider your request for indemnity further we request that you approach one of our recommended chambers (details attached) and obtain advice confirming that this claim has adequate prospects of success to qualify for funding under the policy.

Per your client's policy wording, we will be unable to pay for this advice in the first instance. If it is supportive of your client's claim we will reimburse the associated cost at the conclusion of the claim if you are unable to recover it from the defendant.

Yours faithfully


Lydia Blackman
Senior Claims Handler
Claims Department

7. DAS Preferred Firms

DAS uses the services of a number of firms to assist with the investigation and handling of claims. We have sufficient coverage and expertise on a nationwide basis to facilitate this. If the Policyholder makes a claim under the policy then we will be happy to discuss details of any firms we may recommend be appointed to investigate & negotiate the claim on our behalf. Until a claim is made, and we have assessed its individual characteristics, it is not appropriate for us to decide which firm is the most suitable firm to conduct the case. Consequently we will not provide details of panel firms unless and until a claim is made.

8. Pre-inception Notification of Policy Restrictions

DAS complies fully with the requirement of the Financial Services Authority to supply the Insured with relevant information prior to the inception of the policy.

The Ombudsman's decision states that whether or not the details of the cover are explained to the customer before or at the point-of-sale is not a determinative factor. The fact that the details of the legal expenses cover may not have been explained before the sale does not in itself prejudice the insured because any alternative BTE legal expenses cover would be sold in the same way.

9. Referral Fees

DAS has in place a number of commercial agreements with a whole range of service providers, the details of which must remain confidential for business reasons. DAS are not required under the terms of the policy to disclose details of these arrangements. However, should we decide to appoint one of our preferred firms our initial instruction letter to our insured carries the following wording:

"A referral fee may be payable by your appointed solicitor for this claim. You are not responsible in any way for the payment of any referral fee and it will have no effect on the compensation you may receive".

Whilst DAS is not regulated by the Solicitors Regulation Authority we are able to reassure our policyholders that our Preferred solicitors fully comply with the Solicitors Regulation Authority Rules and Guidance on referral fees and all other regulatory issues.

Irrespective of any arrangements we might have in place, DAS can assure a bespoke high quality of service for all our Policyholders.

10. Conclusion

The above represents DAS' policy in relation to personal injury claims reported by an insured's representative. No exceptions are made. In order to prevent an escalation of costs, for which our insured is ultimately responsible, we will not enter into further communication on the matters covered in this Fact sheet.

Personal Injury Team
Claims Department
April 2010

In the event that there are exceptional circumstances which you believe require us to consider your appointment at this stage, or Proceedings are about to be or have been issued, then we will consider the cover for the claim, alongside your appointment, upon receipt of the following information:

- A) Full details of the circumstances of the claim
- B) Details of the policy / A copy of the policy schedule
- C) Completed Quality Management Form
- D) Completed Contingency Arrangements Form
- E) Where the matter is not complex, a copy of the Notice of Issue or Sealed Claim Form as proof that the matter is issued upon

If the above criteria are not met then we will not be prepared to enter into any further verbal or written communication with you in relation to your appointment.

Please note that if we have concerns over the likely prospects of a claim succeeding, we may ask for an **opinion from a barrister** as to the merits of the claim before we can consider your instruction. This cost will initially need to be funded by the Policyholder, although subject to your client's policy wording, we may reimburse the reasonable cost of the opinion upon conclusion of the claim, should they not be recoverable.

4. Issue of Proceedings

We will consider your appointment upon the issue of Proceedings once we are in receipt of all the completed documents listed in Section 3 above and providing that all policy conditions have been satisfied. If upon consideration we believe that you have issued Proceedings prematurely we will consider that our position has been prejudiced and accordingly any cover under the policy will be invalidated. We refer you to sections 9 to 12 of the DAS Quality Management Report Form.

Please note that our Terms of Agreement are a confidential business document and therefore will not be issued to you until such time that we are prepared to provide indemnity in respect of our Policyholder's claim. Until the Terms of Agreement have been counter-signed by us and we have formally instructed you to act in the matter, indemnity will not be provided.

5. When We Send You Our Terms of Agreement

Your instruction will be subject to the agreed Terms of Agreement between us. When the Terms are sent to you, please read the document carefully and note our requirements with regards to reporting to us and providing us with a regular update as to the likely costs of the claim. For the avoidance of doubt, our Terms of Agreement are non negotiable.

6. Validating Cover

DAS does not sell policies direct to individuals. Consequently we have to validate claims with the co-operation of the seller of the policy. This is why we need the seller's details. DAS receives a number of queries from solicitors which generates a significant volume of correspondence. Please note that we are not prepared to respond to any queries unless we are satisfied that they are genuinely relevant to the matter of policy cover.

PERSONAL INJURY CLAIMS FACTSHEET

We set out below DAS' policy concerning personal injury matters reported by a Policyholder's representative.

1. Claims Under the Insurance Policy

We do not accept notifications of potential claims as being claims under the policy.

Where you have provided us with sufficient information to determine that a potential claim is or is likely to be covered by the policy, we will contact you and/or our Policyholder to advise our position.

We would remind you that as an Insurer, DAS has every right to contact our Policyholders directly so as to ensure that they fully understand the scope and operation of their insurance cover.

If we have not been provided with enough information to determine that a potential claim is, or is likely to be covered, we will ask our Policyholder to report the claim directly to us on the telephone number provided in their policy schedule.

2. Freedom of Choice

In accordance with the Insurance Companies (Legal Expenses Insurance) Regulations 1990 we recognise that we have an obligation to our Policyholders to allow them to instruct a solicitor of their choice upon the issue of Proceedings. **We do, however, reserve the right in our policy to deal with any claims until the point that Proceedings are necessary.**

The Financial Ombudsman Service considered the issue of freedom of choice prior to the issue of Proceedings in some detail in a decision in 2003. The decision can be found on their website, www.financial-ombudsman.org.uk. The decision can be found under "Publications", 26 March 2003. DAS fully adheres to this decision, and subsequent adjudications. The decision states that where the case does not involve complex issues or special features, DAS is within its rights to rely on the policy terms.

3. Exceptional Circumstances

In our experience there are very few exceptional cases which require us to consider the appointment of a non-preferred solicitor prior to the issue of Proceedings.

Where a claim is of high value (multi-track matters assessed against general damages only) we will consider whether or not the claim is complex enough to warrant your instruction before the issue of proceedings. However, we would stress that simply by being a multi-track claim we will not automatically consider the claim to be complex.

We will also consider whether or not it is appropriate to allow freedom of choice in matters that involve a fatality, serious injury (such as paralysis, loss of limb(s), serious head/back injury) or where our Policyholder is disabled.

Accordingly it is most unlikely that we will be prepared to consider your appointment in this matter until Proceedings are issued. We confirm that we will not decline a personal injury claim because Proceedings have been issued without our consent, providing DAS' position has not been prejudiced.

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- 4.1. You shall contact the relevant Insured within twenty four hours of You receiving the Complaint.
- 4.2. You shall acknowledge receipt of all Complaints to the Insured and to DAS within two Business Days of receipt confirming the course of action which will be taken to achieve resolution.
- 4.3. You shall communicate a substantive response to the Insured and to DAS within ten Business Days of the date of Your initial contact with the Insured, advising the outcome of Your investigations. Where the investigation of the Complaint is likely to be protracted You shall provide periodic progress reports to the Insured and DAS.
- 4.4. You shall record and report all Complaints to DAS on a monthly basis.

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SCHEDULE 2

RECOMMENDED SUPPLIERS

Medical Reports

Medreport Limited of:
Tickton Lodge
8 Bellevue Road
Clevedon
North Somerset
BS21 7NR

Physiotherapy and Rehabilitation

Medcare Treatment Limited of:
Tickton Lodge
8 Bellevue Road
Clevedon
North Somerset
BS21 7NR

St Johns Buildings Chambers
24a-28 St John Street
Manchester M3 4DJ
DX 728861 Manchester 4
Tel: 0161 214 1500
Fax: 0161 835 3929

Queen Square Chambers
56 Queen Square
Bristol BS1 4PR
DX 7870 Bristol
Tel: 0117 9211 966
Fax: 0117 9276 493

3 Paper Buildings
Temple
London
EC4Y 7EU
DX LDE 1024
Tel: 0207 583 8055
Fax: 0207 353 6271

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SCHEDULE 3

QUALITY MANAGEMENT REPORT

SECRET



QUALITY MANAGEMENT REPORT

Name of Solicitor:

Name of Our Insured:

Claim Against:

DAS Reference:

Solicitor Reference:

Date of Incident:

Date of issue:

1. Provide a summary of the facts and an outline of the legal issues

a) Summary

b) Legal Issues

2. Confirm the current status of the case.

3. If proceedings have not been issued, what is the limitation date?

4. Prospects Assessment:

a) What is your assessment of the prospects of success in percentage terms?

b) Confirm how this has been arrived at and the criteria used.

c) Does the other side have the ability to pay any damages/costs awarded

5. Remedy

a) What remedy is our Insured seeking?

b) What remedy have you advised is reasonable and appropriate?

6. Case Weaknesses

a) What weaknesses do you perceive in the case?

b) What elements, if any, are you unable to advise on in relation to prospects?

7. Quantum

a) What is your assessment of quantum?

b) Provide details of how you have arrived at this conclusion



8. Settlement Offers

- a) What offers of settlement have been received on the case, formal or informal?
- b) Provide full details of the offer, outcome and, where rejected, the criteria used to assess
- c) What would you consider to be a reasonable offer?

9. Mediation

- a) Is mediation being considered as a cost effective way of resolving this matter?
- b) If not, why not?

10. What are your costs to date?

- a) Profit Costs: £
- b) Counsel's Fees: £
- c) Expert's Fees: £
- d) General Disbursements: £

11. What estimate do you place on your costs to conclusion?

- a) Profit Costs £
- b) Counsel's Fees £
- c) Expert's Fees £
- d) General Disbursements £

12. What estimate do you place on the other side's profit costs?

- a) Profit Costs £
- b) Counsel's Fees £
- c) Expert's Fees £
- d) General Disbursements £

13. Do you anticipate any additional costs? If so, please specify:

14. What are the key stages of the case and anticipated timescales?

15. What stages of the claim may alter your assessment of the prospects of success?

16. How long do you think it will take to conclude the case?



17. Enclose with this Report, a copy of all Pleadings, Orders, Reports and Opinions you have not already sent to us

18. If you are handling a commercial employment case, what is the potential compensation award?

19. Issue of Proceedings

a) Have proceedings been issued?

b) Has a hearing date been confirmed and how long has it been set down for?

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SCHEDULE 4

DAS CHECKLIST/ CONTINGENCY ARRANGEMENT FORM

SPRINGFIELD



CONTINGENCY ARRANGEMENTS FORM

Name of Solicitor:

Name of Our Insured:

DAS Reference:

Solicitor Reference:

Is your firm approved by the SRA?
Y/N

BUSINESS CONTINUITY

1. Does your firm have a documented business continuity or disaster recovery plan?

2. How often is your plan tested?

3. How often is your plan updated?

4. In the event of a significant loss of resources how would you protect our Insured's interests?

SECURITY

5. What access controls are in place to secure your premises?

6. How are DAS policyholders' records stored and protected?

7. How long are DAS policyholders' records retained and how are they disposed of?

INSURANCE

8. What level of employers' liability insurance do you hold?

9. What level of public liability insurance do you hold?

10. What level of professional liability insurance do you hold?

I confirm that the information given in response to the questions raised in this document are, to the best of my knowledge and belief, a true and accurate reflection of the procedures, systems, measures, activities and intentions of.....and that if there be any material change to the details provided I will notify DAS of the change as soon as is reasonably possible.

Signed..... Print name.....

Position..... Date.....

**DAS Non Panel PI Solicitor
Terms of Appointment**

SCHEDULE 5

STANDARD ACCOUNT FORM

CONFIDENTIAL



DAS STANDARD ACCOUNT FORM

Please complete the form below in an electronic format ('Microsoft Word' or 'Excel'), which will enable the form to be annotated accordingly in the same order as your file is presented; i.e. contemporaneously. We also require the file to be presented chronologically. We are unable to accept your final invoice unless it is supported by the standard account form completed in the following format and is accompanied by your complete file of papers.

When we have received the correctly completed standard account form your firm will be notified which costs drafting organisation has been appointed together with details of where to send your file.

Name of firm:

Your ref:

Name of insured:

Hourly rate applied:

Is the insured VAT registered? YES/NO*

Period of accounts: From:...../...../..... To:...../...../.....

** If this is incomplete we will assume that the insured is VAT registered.*

Please provide a brief description of the case and the outcome (including, but not limited to; when was the case settled e.g. before proceedings, which track was the claim litigated e.g. small, fast or multi and what was the outcome of the claim e.g. lost or won):

Type of claim (e.g. Employment/Property Dispute etc...):

Total amount recovered for insured: £

Total costs paid to opponent: £

Total costs recovered by you from the opponent: £



Please complete in chronological order providing specific details and attaching a copy of the disbursement voucher.

Date:	Work Undertaken: (By whom)	Detail:	Subtotal: (£)	Total inc. VAT: (£)	DAS USE ONLY: (Proposed reduction) Example
01/01/2010	GP Report - (Collage Medical Centre; Richmond)	Evidence required to support DDA Claim. Requested by E.F.	42.55	50.00	Example

Total of disbursement costs:
(above) £

Standard Basis Costs/Counsel's Fees

Please complete in chronological order providing specific details and attaching a copy of counsel's invoice.

Date:	Work Undertaken: (By whom)	Detail:	Subtotal: (£)	Total inc. VAT: (£)	DAS USE ONLY: (Proposed reduction) Example
01/01/2010	Counsel's Opinion - (Mark Williams- Queen Sq. Chambers)	Required to complete a report on prospects of success as fee earner considered below 51%	150.00	176.25	Example

Total of counsel's fees:
(above) £

Total of all the above: £

Payments made on account: £



Grand total claimed: (less payments on account) £

In order to process your payment as soon as possible, please provide your firm's bank account details below to enable a BACS transfer.

Account number:

Sort code:

Bank details:

Please provide the name and contact details of the person whom we can contact in respect of any queries relating to your final invoice:

Name:

Address:

Telephone number:

Email address:

Thank you for your assistance. If you have any further queries or require another copy of the Standard Account Form please contact: npcosts@das.co.uk

**DAS Non Panel PI Solicitor
Terms of Appointment**

SCHEDULE 6

LOST CASE REPORT

CONFIDENTIAL

APIL response

Eschig review – legal expenses insurance

APPENDIX 2



Before the Event Legal Expenses Insurance—Why Do So Many Seek to Close this Access Gate to Justice?

Mark Harvey*

Head of Litigation, Hugh James, Cardiff

⊕ Austria ; Class actions; EU law; Insurance policies; Legal expenses insurance; Legal representation

Abstract

Mark Harvey analyses the decision of the Court of Justice of the European Union (ECJ) in *Erhard Eschig v UNIQA Sachversicherung AG*¹ and looks at the implications of the decision for before-the-event (BTE) legal expenses insurance.

ML

Introduction

As seems so often to be the case, a judgment of the ECJ has slipped quietly into our legal system, burning with a slow fuse that is now producing a significant explosion. A case known as *Eschig* is the cause.

This decision followed a reference for a preliminary ruling by the Oberster Gerichtshof from Austria in the case of *Erhard Eschig v UNIQA Sachversicherung AG*. In this case the European Court overrode a condition in a BTE legal expenses insurance policy issued by an Austrian company in favour of an interpretation of a European Directive granting free choice of lawyers to a policy holder.

Mr Eschig was an Austrian citizen who had taken out legal expenses insurance with the defendant company, UNIQA. He wished to join what was effectively a group action in Austria involving many Austrian citizens who had invested money with investment companies which had become insolvent. Mr Eschig had instructed his own law firm to represent him in several proceedings, including bankruptcy proceedings against the respective investment companies, criminal proceedings against those same companies, as well as proceedings against the Austrian Government for alleged failures in the supervision of their financial markets. He required an assurance from UNIQA that it would cover the legal expenses, not only for the action already taken by his own law firm but for those to be taken in the future. UNIQA refused. It relied on a condition of its insurance that permitted it to select the law firm itself in the case of a group action. As a result Mr Eschig brought an action in Austria for a declaration. First that UNIQA was liable to meet his lawyer's costs for the work carried out, but also in relation to any future work and secondly that the insurance condition on which UNIQA was relying was invalid and did not form part of the insurance policy.

The reference concerned the interpretation of Directive 87/344 art.4(1) [1987] OJ L185/77.² The court considered the 11th and 12th recitals in the preamble to Directive 87/344 which were worded as follows:

* The writer is also the partner in charge of the Harmful Products and Overseas Accidents team. He is a member of the Civil Justice Council and past secretary of the Association of Personal Injury Law (APIL) and is also a JPIL Board member. He can be contacted mark.harvey@hughjames.com.

¹ *Erhard Eschig v UNIQA Sachversicherung AG* (C-199/08) [2010] 1 All E.R. (Comm) 576.

² Directive 87/344 on the Co-ordination of Laws, Regulations and Administrative Provisions relating to Legal Expenses Insurance [1987] OJ L185/77. This ruling was incorporated into the law of England and Wales by the Insurance Companies (Legal Expenses Insurance) Regulations (SI 1990/1159) which came into force on July 1, 1990.

“Whereas the interests of the persons having legal expenses cover means that the insured person must be able to choose a lawyer or other person appropriately qualified according to national law in any inquiry or proceedings and whenever a conflict of interests arises;

Whereas Member States should be given the option of exempting undertakings for the obligation to give the insured person his free choice of lawyer if the legal expenses insurance is limited to cases arising from the use of road vehicles on their territory and if other restrictive conditions are met.”

Article 3 of Directive 87/344 provided:

- “(1) Legal expenses cover shall be the subject of a contract separate from that drawn up for the other classes of insurance or shall be dealt with in a separate section of a single policy in which the nature of the legal expenses cover and, should the Member State so request, the amount of the relevant premium are specified.
- (2) Each Member State shall take the necessary measures to ensure that the undertakings established within its territory adopt, in accordance with the option imposed by the Member State, or at their own choice, if the Member State so agrees, at least one of the following solutions, which are alternatives:
- (a) the undertaking shall ensure that no member of the staff who is concerned with the management of legal expenses claims or with legal advice in respect thereof carries on at the same time a similar activity:
- (i) if the undertaking is a composite one, for another class transacted by it,
- (ii) irrespective of whether the undertaking is a composite or a specialised one, in another having financial, commercial or administrative links with the first undertaking and carrying on one or more of the other classes of insurance set out in Directive 73/239/EEC;
- (b) the undertaking shall entrust the management of claims in respect of legal expenses insurance to an undertaking having separate legal personality. That undertaking shall be mentioned in the separate contract or separate section referred to in paragraph 1. If the undertaking having separate legal personality has links with an undertaking which carries on one or more of the other classes of insurance referred to in point A of the Annex to Directive 73/239, members of the staff of the undertaking who are concerned with the processing of claims or with legal advice connected with such processing may not pursue the same or a similar activity in the other undertaking at the same time. In addition, Member States may impose the same requirements on the members of the management body;
- (c) the undertaking shall, in the contract, afford the insured person the right to entrust the defence of his interests, from the moment that he has the right to claim from his insurer under the policy, to a lawyer of his choice or, to the extent that national law so permits, any other appropriately qualified person.
- (3) Whichever solution is adopted, the interest of persons having legal expenses cover shall be regarded as safeguarded in an equivalent manner under this Directive.”

Article 4 of Directive 87/344 is worded as follows:

- “(1) Any contract of legal expenses insurance shall expressly recognise that:
- (a) where recourse is had to a lawyer or other person appropriately qualified according to national law in order to defend, represent or serve the interests of the insured person in any inquiry or proceedings, that insured person shall be free to choose such lawyer or other person;

- (b) the insured person shall be free to choose a lawyer or, if he so prefers and to the extent that national law so permits, any other appropriately qualified person, to serve his interests whenever a conflict of interests arises.
- (2) Lawyer means any person entitled to pursue his professional activities under one of the denominations laid down in Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.”

It is important to note that by definition, this decision of the ECJ focused upon the interpretation of that Directive of the Austrian law which incorporated that Directive into English law.³ Paragraph 158 provided:

- “(1) Insured persons have the right to choose a person professionally qualified in the representation of parties to represent them in any judicial or administrative proceedings. In addition insured persons have the right to choose a lawyer to serve their legal interests in other ways, if a conflict of interests with the insurer has arisen.
- (2) It may be stipulated in the insurance contract that the insured person may select to represent him in judicial or administrative proceedings only persons professionally authorised to represent parties who have their chambers at the place of the court or administrative authority before which the proceedings at first instance are to be conducted. Where in such place at least four such persons do not have chambers the right to choose must extend to persons in the district of the court of first instance in which the authority concerned is situated.
- (3) The right conferred on the insured person under the first sentence of subparagraph 1 must be mentioned if the insured person requests the attendance of a legal representative in judicial or administrative proceedings; attention is to be drawn to the aforementioned right on the occurrence of a conflict of interests. If the insurer has instructed another undertaking in connection with the settlement of losses, the duty to provide such information passes to that undertaking.”

The legal expenses insurance with UNIQA specifically provided for a restriction on the freedom to choose one's own lawyer in group actions, art.6.7.3 of the insurance policy provided:

“Where several insured persons enjoy insurance cover under one or more contracts of insurance in order to assert their legal interests and where their interests are directed against the same opposing party or parties, on the basis of the same or a similar cause, the insurer is entitled initially, in the performance of its contractual bargain, merely to assert the legal interests of the insured persons extra-judicially and to have test cases brought as necessary by legal representatives selected by it.

If or as soon as the insured persons are not adequately protected by those measures against a loss of their claims, in particular as a result of an impending time-bar, the insurer shall in addition be liable for the costs of class actions or other ways of asserting legal interests by means of joint extra-judicial and judicial action taken by legal representatives selected by it.”

It is important to note that the specific questions that the ECJ was required to determine were as follows:

- “(1) Is Article 4(1) of Council Directive 87/344 ... to be interpreted to the effect that it precludes a clause, contained in the standard terms and conditions of insurance of a legal expenses insurer, which entitles the insurer, in respect of insurance claims concerning losses suffered by a large number of insured persons as a result of the same event (for example the insolvency of an investment services undertaking), to select a legal representative and which thereby restricts the right of the individual insured person to choose his own lawyer (so-called ‘mass torts clause’)?

³ Paragraph 158 k of the Austrian law of December 2, 1958, as amended by the *Versicherungsgesetz* (Law on Insurance Contracts).

- (2) If the first question is answered in the negative: What are the requirements for the existence of a 'mass tort' which, in accordance with (or as a complement to) Directive 87/344 ..., confers on the insurer instead of the insured person the right to select the legal representative?"

Essentially, therefore, the court was determining this interpretation of Directive 87/344 in the context of a specific legal expense insurance contract and within the application of the Directive by Austrian law. Moreover, but as importantly, specifically within the context of a group action. However it is noted that some observers have sought to argue that this decision removes the ability of legal expense insurers providing indemnity to restrict freedom of choice to the issue of proceedings or in those areas as presently guided by the Financial Services Ombudsman.⁴ In fact the legal expense insurance contract that was being examined here provided first that the freedom to choose arose in proceedings (properly reflecting Directive 87/344) but in addition if a conflict of interest with the insurer had arisen. UNIQA were effectively suggesting that in the absence of a conflict of interest there was no right to freely choose one's lawyer.

The court noted from the preamble that Directive 87/344 sought to encourage the use of legal expense insurance to assist in resolving disputes so that the Directive creates organisational and contractual measures and then guarantees in favour of the insured public. The court noted that Directive 87/344 art.3(2) gave insurers the ability to set up a separate claims handling facility to manage claims to avoid a conflict and further provided for freedom to choose by reason of art.3(2)(c). The court further noted that Directive 87/344 gives the insured the right to freely choose a representative in the circumstances set out in art.4(1)(a), or where a conflict of interest arises (art.4(1)(b)). The court noted the contrasting positions between art.3(2)(c) and art.4(1)(a). The latter meant that one can only choose a representative when an inquiry or proceedings have been commenced, whereas under the earlier article they had the right to entrust the defence of their interests to represent from the moment they have the right to make the claim and therefore prior to proceedings.

The court noted⁵:

"... the drafting history of that directive supports the conclusion that the original objective of guaranteeing the freedom to choose one's legal representative in all legal expenses insurance contracts, which is not dependent on the occurrence of a conflict of interests, has been maintained, although restricted to legal and administrative procedures."

One further important paragraph within the judgment is at [65]:

"It is useful to point out, finally, that Directive 87/344 does not seek to completely harmonise the Member States' legal expenses insurance contracts and that, as Community law currently stands, those States remain free to determine the body of rules applicable to those contracts."

Also at [66]:

"However, the Member States must exercise their powers in this field in compliance with Community law and, in particular, with Article 4 of Directive 87/344."

On this basis, the Insurance Companies (Legal Expense Insurance) Regulations⁶ remain the determining authority for legal expense insurance contracts and their application, in particular reg.6, which provides that where recourse is had to another lawyer to ("defend, represent or serve the interests of the insured in any inquiry or proceedings, the insured shall be free to choose that person").

⁴ *Mrs A v B (a company)* 2003 decision of Tony Boorman, Principal Ombudsman.

⁵ *Eschig* [2010] 1 All E.R. (Comm) 576 at [58].

⁶ *Eschig* [2010] 1 All E.R. (Comm) 576 at [58].

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These Regulations have never been interpreted by the courts of England and Wales but are the subject of at least two reviews by the Financial Services Ombudsman. In 1993,⁷ the then Insurance Ombudsman took the view that the Regulations did allow litigants to have freedom of choice of lawyer, but that such freedom could only take effect from when proceedings are issued. However, the Ombudsman at that time also added that the litigant should have been made aware of the restriction of choice when taking out the policy:

“... if the freedom to choose a lawyer to be limited in this way, it is crucial that it is made clear to policy holders prior to proposal.”

However, in January 2003 the insurance regulator, the Financial Services Ombudsman, ruled in the case known as *Mrs A v B (a company)*.⁸

“... I would expect insurers to agree the appointment of the policyholder's preferred solicitors in cases of large Personal injury claims and claims that are necessarily complex (such as those involving allegations of medical negligence). Outside the field of cases involving bodily injury, I think cases involving significant boundary or employment disputes (especially if there is considerable history to investigate and assess) might also be regarded as non-routine.”

It is noteworthy that this guidance would probably have been sufficient in this jurisdiction for Mr Eschig to have demanded his own choice of solicitor both by reason of the complexity of the claim and significant prior involvement.

However, this issue does lead to the question of why there continued to be so many challenges to the decisions of legal expense insurance companies to insist upon the appointment of their own panelled solicitors. This has perhaps been shown up most starkly within what has been known colloquially as the “CFA wars” that began in or around 2000 and still appear to date where the paying party has sought to exploit the Conditional Fee Agreements Regulations 2000 (CFA Regulations)⁹ and to argue that inadequate searches for legal expense insurance policies have meant a breach of the regulations and therefore invalid CFAs. Of course to the extent that solicitors have not searched appropriately for pre-existing legal expense insurance (and in breach of the relevant Law Society Codes of Conduct), this has been because of the fear that the solicitor would lose the client to the panel solicitor for the legal expense insurance company concerned. This was compounded when that solicitor had paid a referral fee to a claims management company only to find the client had pre-existing insurance cover and so that solicitor was not needed in the claims process.

This in turn has led to solicitors arguing breaches of their client's human rights and the denial of proper access to justice because the legal expense insurance company concerned insists upon the appointment of its panel firm. In reality, of course, this is more the economic pleading of lawyers and there is little or no evidence of any denial of access to justice. Organisations such as the Association of Personal Injury Lawyers (APIL) have continually been the mouth piece to such objections, notwithstanding that they rarely, if ever, can produce any evidence that requiring an accident victim to go to the panel firm is in any way not in the interests of the victim themselves. Indeed the cynic would comment that having seen what personal injury solicitors did to the after-the-event (ATE) market from its inception in 1995 is it any wonder that legal expense insurance companies would prefer their cases to be in the hands of their panel lawyers? It was possible for the original ATE providers to offer premiums at less than £100. Unfortunately the unhappy experience of so many solicitors making poor judgement calls not only in terms of winning

⁷ Insurance Ombudsman's annual review 1993, reference: AR (93) para.6.56–6.65, p.31.

⁸ Insurance Ombudsman's annual review 1993, reference: AR (93) para.6.56–6.65, p.31.

⁹ Conditional Fee Agreement Regulations 2000 (SI 2000/262).

and losing cases, but also recklessly rejecting Civil Procedure Rules (CPR) Pt 36 offers that lead to such significant claims upon the ATE providers that there was a steady growth of premiums to the levels that we have today.

In fact one leading BTE insurer has said that on average a panel solicitor will make savings on the claims handling of approximately 50 per cent, depending upon the type of case involved. This is because the economies of scale and related efficiencies are much easier to accommodate with a reliable source of work and guaranteed volume. The quality of service supplied by BTE panel solicitors was examined in a paper commissioned by the Nuffield Foundation and authored by Pamela Abram of the University of Westminster.¹⁰ The paper noted the growth of legal expense insurance (LEI) from its introduction in the United Kingdom in 1974, such that by 1998 the then Lord Chancellor's Department estimated over 17 million people were paying premiums for LEI cover. However, it was noted that then, as indeed now, LEI was still not as widely established in the United Kingdom as it was in other jurisdictions. For example, it was noted in Germany in 1996 that the premium income was £1,927 million compared to only £96 million for the United Kingdom. As an aside however it should also be noted that the policies are portable in Germany so that the work is distributed amongst non-panel firms. The effect has been to increase the outlay to the insurers and hence to increase premiums.

The paper's aims were to evaluate the operation of legal expense insurance from the perspectives of insurers, solicitors and policyholders and by focusing on four areas. These included how LEI insurers and solicitors manage those cases and what is the relationship between the insurer, solicitor and policyholder; what are the perceptions and experiences of those taking legal action using LEI and how do the experiences of CFA clients and LEI clients compare. A detailed picture was obtained of the use of LEI in personal injury claims.

The overall conclusion of the study was that LEI was working well and there was satisfaction from the policyholders who used that cover. It was recognised that even then legal expense insurers were really acting as a referral service where they were accepting payment for their work and only expecting to indemnify their policyholder for adverse costs orders. Significantly, however, the standard of service that they received contrasted favourably with that of non-panel cases:

"However, LEI insurers offer more to policy holders than other referral schemes such as the imposition and monitoring of service standards and a point of contact for complaints if solicitor's claims handling causes satisfaction. LEI is also preferable to CFAs in that the policy holder is referred to a specialist firm without the difficulties of selecting one, they had no concerns about funding after the event insurance premiums or of meeting upfront disbursements. LEI also provides coverage for a wider range of disputes than CFAs and even covers those with no monetary value. Given these benefits, the advantages of LEI are clear..."¹¹

So the mystery remains as to why the views of personal injury solicitors generally towards those who are on the panels of legal expense insurers should be so adverse beyond, of course, the purely monetary reasons. Indeed it is akin to the celebrated 1960s television sketch¹²:

"I look down on him because I am upper class. I look up to him because he is upper class. But I look down on him because he is lower class. I am middle class."

There appears to have developed this hierarchy of the trade union panel personal injury solicitor looking down on the CFA solicitor and together the two categories of solicitors both looking down upon the LEI panel solicitor!

¹⁰ Pamela Abram, "Insure Hands? Funding Litigation by Legal Expenses Insurance: the Views of Insurers, Solicitors and Policyholders" (London: University of Westminster, 2002).

¹¹ Abram, "Insure Hands?", 2002, p.22.

¹² *The Frost Report* (BBC TV, 1967).

Of course, trades unions have been requiring their panel firms to work on arrangements which can be said to be no more than a claims referral service since the late 1990s. During the early 1990s, trades unions regularly rebuffed the approaches of non-panel solicitor firms to represent them where they were offering the so-called "no win no fee" arrangement. The unions were concerned that to make that arrangement work would involve their solicitors rejecting claims with less than very good prospects of success and then exposing the rejected member to the services of a non-panel firm who inevitably secures some form of compensation for them. In turn this could provide that member with the feeling that he or she was wasting their time with union membership. That changed once the unions realised that they could not only seek to recover a notional premium as a proper reward for their undoubted risk-taking in indemnifying their member but also to charge for referring the case to their panel firm as well.

With those two incentives to themselves and their panel firms came the advent of their "no win no fee" scheme. Those panel firms, that for so long had hoped to recover some costs in the event the claims failed, would now operate a true "no win no fee" arrangement for its union and indeed, in time, even began to pay for small claims work with limited costs recovery. This however was generally treated as being an acceptable business arrangement for all concerned, and indeed why not? The union members were being referred to experienced and competent lawyers who were properly able to represent the members with risk and reward.

The high street CFA client who reached their local solicitor more often by coming through a claims referral company, but on the rare occasion through the reputation of the solicitor concerned, would become involved in an arrangement which to the outsider would appear identical to the arrangement offered between the trades union, their solicitors and their members. The solicitor purchased the case; the solicitor risk-assessed and took on the cases that they saw the most potential in and the client's case was prosecuted. However, that work most usually had no service standard protection required by the claims referrer, in contrast to the often limited standards required by the trades union firms and certainly in deep contrast to the standards required by the LEI insurers.

During that time and to this day the clients provided by the claims referral companies will be referred to the solicitors with the largest cheque books to pay for those referral fees with no real inspection by the claims referrer as to the level of competence of the solicitor concerned in some, or indeed, of any of the areas of personal injury work.

It was originally hoped and indeed argued by the supporters of removing the ban on advertising in the 1980s that it would enable accident victims to go to the solicitor most specialised in their area of work. Of course what actually happened was that the accident victim would go to the solicitor with the largest cheque book and the most productive referral arrangement with the claims referral agency. This did not assure competence in all areas of work.

With the growth of those referral agencies and these arrangements came a much broader geographical spread of clients for solicitors firms. It was now increasingly common for solicitors to act for clients who they never saw in person throughout the life of the case by reason primarily of geography. Clients rarely complained about this as in the true nature of the "no win no fee" arrangement, they had no financial investment in the case and were content to accept what they were given.

Similarly as described in Ms Abram's paper, the LEI insurers began to reduce their panels to concentrate their work in a smaller group of well resourced, appropriately specialised solicitors firms who could provide appropriate service standards to their consumers. The reduction of legal costs, through careful management of panel solicitor arrangements, is a vital element of the legal expenses insurers' responsibilities. Only expert and efficient firms are appointed and then carefully monitored to ensure that in particular no unnecessary legal work is carried out, whilst quality is maintained. Those solicitors with the right experience are used to handle claims with strict service level agreements in place and regular

and rigorous audits of their work carried out. In addition, some LEI insurers have independent audits of the cases that are rejected on risk assessment and the reasons for the refusal examined; thus ensuring a consistency of approach to risk.

The low annual premiums for this cover have historically been achieved by the claims handling efficiencies of LEI insurers and the use of carefully selected panels of specialist personal injury solicitors in order to contain costs. In more recent years, income from referral fees on personal injury cases has been available to LEI insurers, but in the main this has been passed to retailers as additional commission income; in many cases such retailers are liability insurers.

It is important to remember of course that access to justice is important in all areas and not just personal injury. So the LEI insurers indemnify many areas of litigation including consumer and employment disputes. Often, these are categories and types of work that are unattractive to law firms. The personal injury arrangements are an important element of the complexity of BTE insurance that enables so many to have access to justice who would otherwise find it inaccessible.

The premiums for the LEI remain very low, partly because of the similar arrangements that exist between the LEI insurer and their panel solicitors to those demonstrated by the trades unions. The LEI will indemnify their client's adverse costs but would not expect to receive claims for costs from their panel firms. From in or around 2005 there was a much greater use by panel firms and their insurers of collective conditional fee agreements (CCFAs) where the arrangement was properly recorded that the solicitor will be content to accept their remuneration from the losing party with no claims to be made against the policy.

It is against this background that it seems surprising that Sir Rupert Jackson reached the views that he did on the use of BTE funding in litigation,¹³ despite the fact that his report is littered with areas where he believes BTE should have a role, and indeed not limited to personal injury litigation¹⁴:

"In my view, BTE insurance as an add-on to household insurance is a beneficial product at an affordable price, established on the basis that the many pay for the few. If the reforms advocated in chapter 9 below are implemented, BTE insurance will have an increasingly important role in promoting access to justice. Therefore the uptake of BTE insurance by householders should be actively encouraged."

Sadly, however, he does not perhaps recognise the flaw in the business model that his principle recommendations cause. Sir Rupert acknowledges that if all his reforms are implemented,

"... then the world in which BTE insurers operate in the future will be very different from the present world."¹⁵

However, Sir Rupert is not daunted and comments:

"BTE insurers will no doubt adapt their products to suit that new world."¹⁶

He then went on to advocate:

¹³ Jackson L.J., "Review of Civil Litigation Costs: Final Report" (The Stationery Office, January 2010) http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf [Accessed April 27, 2010].

¹⁴ Jackson, "Review of Civil Litigation Costs: Final Report", http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf [Accessed April 27, 2010], ch.8, para.5.6

¹⁵ Jackson, "Review of Civil Litigation Costs: Final Report", http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf [Accessed April 27, 2010], ch.8, para.3.8.

¹⁶ Jackson, "Review of Civil Litigation Costs: Final Report", http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf [Accessed April 27, 2010], ch.8, para.3.9.

“A substantial extension of BTE cover for small businesses, in respect of litigation costs as well as tribunal costs, would in my view be highly beneficial. On the basis that the many pay for the few and that most small businesses do not get embroiled in litigation in any given year, the premiums ought to be affordable at least by some small businesses, if they are prepared to attach sufficient priority to LEI.”¹⁷

Having banned referral fees and moved to one-way costs shifting in personal injury litigation, the largest user and funds generator for BTE insurance, he encourages the greater use of such cover in other forms of litigation. Unfortunately, the likely loss of take-up of BTE for personal injury in a one-way costs shifting world, coupled with the loss of the referral fee revenue, make the prospects of expanding BTE to help other areas of litigation remote. The final nail in the coffin is then Sir Rupert's rejection of the insurer's ability to restrict the freedom of choice of lawyer by amending regulation of the 1990 Regulations so that the freedom to choose one's own lawyer runs from the letter of claim; hence opening the door to the many lawyers who ruined the ATE market.

The writer's own firm has represented clients referred from all sources of work. It is noteworthy that whilst there are very limited service standard requirements from claims referral companies and little more from the trades unions, the highest degree of service standards are prescribed by the legal expense insurers. This includes, for example, an independent audit of those cases rejected to ensure the rejection is reasonable. Imagine if that was applied to law firms throughout the country!

These service level agreements ensure that the firm does its best to provide equality of service to all its clients from wherever they may come. Indeed representation of clients from all three categories of referrer involves those who are not geographically local, but for whom regular customer quality research shows are very satisfied with the level of client care and representation that they receive.

Yet, one reads constantly of dissatisfaction from solicitors that they are required to refer their client to the panel firms for the LEI providers. So if one wants to join the debate at the level set by the non-panel solicitors, namely their client's access to justice and to obtain proper compensation efficiently, then even a cursory examination of the services provided by the LEI panel firms and the service standards that they are required to adhere to offer compelling evidence that in the overwhelming majority of cases they facilitate true and efficient access to justice and without cost to the clients.

This compares favourably with the services offered by many non-panel firms, as evidenced in the aftermath of the Claims Direct and Accident Group collapses. They have often worked to no service standards; with no control on work loads; this has led to delay and frequent charges to their clients whether by way of disbursements, interest on disbursement borrowings or indeed the invidious subsidy element of the percentage increase charged by many firms. Many of the solicitors who complain that the LEI insurer has required their potential client to go to the panel firm where the client will face no charges wish to contract with that individual to be responsible for their time charges; their disbursements, a success fee for the (often negligible) risk in the case; and then worst of all an additional element that can only be charged to the client and which will be deducted from their damages to reflect the fact that that solicitor will not get paid until the case is concluded! Thus, this gives rise to the irony that the longer that they take to prosecute the case, the fewer damages the client receives and the greater the payment to the solicitor! All of this contrasts with the LEI panel firm whose business model requires expeditious progress of the cases; a maximising of the compensation; penalties for slow prosecution, failures to respond promptly to telephone calls or letters or other enquiries and ultimately loss of business for persistent client dissatisfaction. All of which is at no charge to the client.

¹⁷ Jackson, “Review of Civil Litigation Costs: Final Report”, http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf [Accessed April 27, 2010], ch.8, para.4.5.

There can be little doubt that in this second decade of the Millennium, legal expense insurance represents an important and particularly efficient route to justice for those consumers who have made a modest investment in it. It serves the personal injury victim well because it puts them in touch with specialist and experienced lawyers whose efficiency matches their proficiency as lawyers. At no cost and minimal risk to the consumer they receive a fast and thorough service. Moreover, the modern arrangements are also at lower cost to the liability insurers than both trades union and claims referred arrangements. Finally, this type of insurance also serves to fill a gap in consumer access in other areas of litigation where many lawyers fear to tread or only do so at cost to the clients.

Maybe the class tree should be reversed and the BTE lawyers should look down on all the others!

PROCEDURE

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APIL response

Eschig review – legal expenses insurance

APPENDIX 3



Your ref: [REDACTED]
Our ref: [REDACTED]

13 November 2009

Messrs SnipeLaw Solicitors
Thompson Road,
Whitehills Business Park,
Blackpool
FY4 5PN



direct line

Direct Line Insurance plc
Direct Line House
1 Cathedral Square
Trinity Street
Bristol BS1 5DL
Telephone 0117 984 3313
Facsimile 0117 930 4938
DX 122110 Bristol 12

Dear Sirs

Legal Expenses Claim - [REDACTED]

Thank you for returning the completed claim form and from the information provided, our customer's policy does provide cover for this type of dispute.

However, the policy terms and conditions must be adhered to if the policyholder wishes to be indemnified and have their legal costs paid by us. The policy provides that we are entitled to restrict freedom of choice of solicitor pre issue in certain circumstances.

The issue regarding freedom of choice of solicitor has been debated for some time now and the Financial Ombudsman Service (FOS) gave guidance to the industry on this point in their bulletin in March 2003.

As a result of their guidance we will allow freedom of choice of solicitor only on the following types of claim: -

- Personal injury cases where general damages exceed £10,000 and where the case is non-routine
- Clinical negligence claims
- Significant boundary, employment or contract disputes (where there is a considerable history or high value).

Any decision we make regarding legal representation is made with these guidance points in mind, where we consider that the FOS would support our position.

From the information provided to us regarding our customer's dispute, we do not consider their case to be one where we would be expected to allow freedom of choice.

We would, therefore, not allow for your appointment and would insist on appointing one of our nominated solicitors to handle this claim up to the point of issue.



28th September 2009

Snipelaw Solicitors
Thompson Road
Whitehills Business Park
Blackpool
FY4 5PN

Dear Sirs,

Re : - Claimant:
Accident Date:
Our Ref:
Registration:
Your Ref:

[REDACTED]

We refer to the above matter.

Under the terms of the policy the insured would normally be referred to one of our panel solicitors.

The client does not have freedom of choice regarding legal representation prior to the issue of proceedings. This is supported by section 7 of the Insurance Companies (Legal Expense) Regulations.

If the client wishes for you to continue then we are unable to offer indemnity and we trust you will discuss alternative arrangements with them.

We trust you note our position.

Yours faithfully

Personal Injury Department.

FAMILYPLUS

KIRCAM HOUSE
5 WHIFFLER ROAD
NORWICH
NR3 2AL

TELEPHONE: 01603 420080
FAX: 01603 420010
email: fpclaims@ulr.co.uk

Freeth Cartwright Llp
Cumberland Court
80 Mount Street
Nottingham
NG1 6HH

Our Ref: FP0239511/OS/003

12th August 2010

Dear Sirs,

Re : Our Mutual Client
: Your Ref

: [REDACTED]
: [REDACTED]

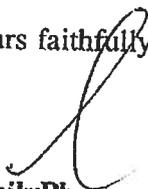
Thank you for your recent correspondence the contents of which we note.

As you are not on our panel of solicitors, there will be no cover for your costs under the policy.

If your client wishes to utilise their legal expenses insurance with us, please have them contact us directly and we will consider the position further. If we do not hear from you, we assume that you will continue to deal under some other method of funding. Should your client wish to retain your services then we would ask that you recontact us at the point where it becomes necessary to issue whereby we will consider the matter further.

We trust this explains our position. However should you wish to take the matter further then please write to our Chief Executive at the address above or alternatively direct your correspondence to Lloyds of London claims department.

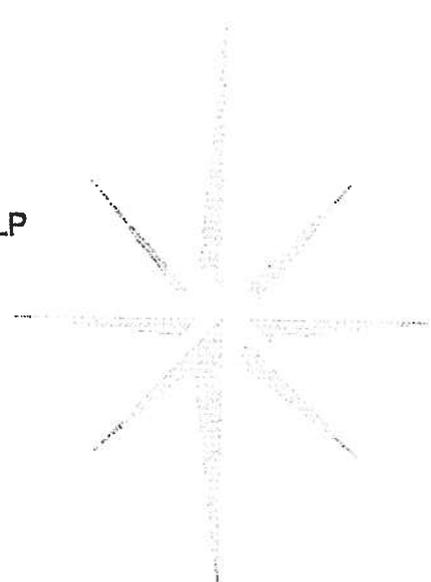
Yours faithfully,



FamilyPlus.

Freethcartwright LLP

16 AUG 2010



Allianz Insurance plc

Legal Protection

Our Reference: [REDACTED]
Your Reference: [REDACTED]
Date: 14th July 2010

Snipelaw Solicitors
Thompson Road
Whitehills Business Park
Blackpool
FY4 5PN

Dear Sirs,

Claimant : [REDACTED]
Accident Date: [REDACTED]

Thank you for your letter dated 8th July 2010.

Unfortunately we are unable to confirm your appointment to act under the terms of the policy at this stage.

The policy states that the insured is free to choose a legal representative of their choice when there is a need to start legal proceedings. Up until that stage we will only agree to indemnify the costs of solicitor representation through the use of an approved panel solicitor.

When considering our decision we have taken into account whether this claim has exceptional circumstances.

We understand that this is not the response you had hoped for and that you will need to discuss the position further with your client. If the insured wishes to proceed we would be happy to appoint an approved panel firm to act.

If we do not hear from you within 14 days we will assume our assistance is no longer required.

Yours faithfully



Sue Powell
Claims Handler

Direct Dial: 01454 455651
Email: susan.powell@allianz.co.uk

Helen Blundell

From: Paul Balen [Paul.Balen@freethcartwright.co.uk]
Sent: 23 September 2010 17:23
To: Helen Blundell
Subject: LEI

Further response as below!

ACROMAS

INSURANCE COMPANY LTD

Freeth Cartwright LLP Solicitors

DX: 10039 Nottingham 1

Direct Dial:

Your Ref:

Our Ref:

0845 366 1100

PB/0601

Always quote our reference

Dear Sirs:

Policyholder:

Claim:

Medical Negligence

21 st September 2010

Thank you for advising us of the work done on the file which was forwarded on to the underwriters for their considerations.

The underwriters have stated that at this stage they still uphold their decision to refuse funding Freeth Cartwright in representing Mrs. in her claim. It is their belief that given the recent guidance, prior to the point when attempts to negotiate have been exhausted and proceedings have to be issued they can refuse a policyholders freedom of choice. As you have advised us that you are not at the point of issue and are still following the pre-action protocol stages, the underwriters are only agreed to funding panel solicitors.

We have written to Mrs. to advise her of the underwriters decision and again put forward to her the opportunity to utilise upon the offer of panel solicitors. Should Mrs. indicate her intention is to continue to instruct you in this claim, we invite you to revert back to us if a settlement cannot be reached and proceedings have to be issued when we will be happy to refer your request for funding subject to reasonable prospects continuing to exist.

Yours faithfully,



Acromas

All correspondence to be sent to

Saga Legal Expenses 8 Bedford Park Croydon eRG 2AP

DX: 144482 Croydon 25

info@sagalegal.co.uk

Paul Balen

Partner
Litigation
Direct Dial: 0845 050 3289
Direct Fax: 0845 050 3249

www.freethcartwright.co.uk



Freeth Cartwright LLP
Solicitors
Cumberland Court
80 Mount Street
Nottingham
NG1 6HH
United Kingdom



2nd Floor
Aztec Centre
Aztec West
Almondsbury
Bristol
BS32 4TD

Telephone:
01454 466910
Facsimile:
01454 466090

[REDACTED]
Solicitors

[REDACTED]
Brighton
East Sussex
[REDACTED]

Our Reference: [REDACTED]
Your Reference: [REDACTED]

8th September 2010

Dear Sirs

Re: Notification of Claim under the Legal Expenses Section of [REDACTED] Co-operative Insurance Popular Buildings/Contents Insurance Policy Number [REDACTED]

Thank you for your letter dated 20th August 2010.

Appointment of your firm under the terms of the insurance policy is not covered at this point in time.

The Legal Expenses Section of our Policyholder's Co-operative Insurance Household Insurance Policy, which we administer, only provides a freedom for the policyholder to choose a solicitor to pursue their claim when it becomes necessary to issue proceedings in order for the claim to progress.

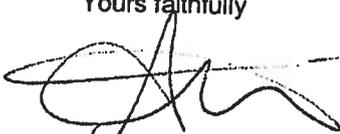
Where there remains an opportunity for the claim to be settled by negotiation, the Policy-wording allows us to appoint a member of our panel to conduct the claim through negotiation until such a time that it is clear that no remedy can be obtained without the issue of proceedings at which point we would be pleased to endorse appointment of your firm to deal with the case if our policyholder so wishes subject to the claim meeting the criteria for success required under the policy.

As we are presently unwilling to appoint your firm under the policy, we will be unable to consider payment of any costs incurred by your firm on our policyholder's behalf. You should also note that we have not yet agreed that the claim meets the prospects of success required under the policy and, as a result, if you wish to apply for appointment for us to support the issue of proceedings, please contact us once all pre-action steps have been carried out, but before proceedings are actually issued. We will make consideration of the claim's merits at that point.

We attach a copy of the relevant section of our Policyholder's Policy for your information.

Please note that we have recorded your application as a notification of claim under the Policy.

Yours faithfully



Alexandria Wainwright
LEI Administrative Assistant
Co-operative Legal Services
Direct Dial: 01454 466474



[REDACTED]
[REDACTED]
Brighton
East Sussex
BN1 1AZ

HOWLETT CLARKE
25 AUG 2010
[REDACTED]

Address	Barclays Insurance Legal Expenses and Claims Administration PO Box 417 Bristol, BS32 4WW
Telephone number	0800 051 1712
Fax number	0844 8911119
E-mail	advice@legal-services-advisor.co.uk
Our reference	LEI/10077687
Your reference	FAO: [REDACTED]

24 August 2010

Dear Sirs

Re: [REDACTED] - Incident Date 20/10/2009

We write having received recent communication requesting your appointment under the terms of the legal expenses insurance policy held by our policyholder.

It would appear from the information provided that the claim may fall within this policy.

We would like to inform you, however, that this legal expenses policy held by our policyholder does not provide for freedom of choice of solicitor. As per the terms and conditions of the policy, we are only obliged to consider the policyholder's request to use their own solicitor when it becomes necessary to start court proceedings.

We will not consider payment of any costs incurred by the policyholder or yourselves whilst pursuing this claim, until commencement of proceedings (and only then if authorised by our claims-handling agents).

To protect our policyholder's interests, however, we have referred this matter to our claims handling agents.

The claims-handling agents are:

DAS
DAS House
Quay Side
Temple Back
Bristol
BS1 6NH

Telephone 0117 934 2000

Our claims handlers will be in touch with you shortly to confirm how best to proceed in line with the terms and conditions of your policy. If appropriate, they will also be able to inform you of their terms of engagement.



Address	Barclays Insurance Legal Expenses and Claims Administration PO Box 417 Bristol, BS32 4WW
Telephone number	0800 051 1712
Fax number	01454 208857
E-mail	advice@legal-services-advisor.co.uk
Our reference	LEI/10061840

25 March 2010

Dear [REDACTED]

We are writing further to being contacted with regards to your Legal Expenses Insurance Policy. We understand that you may have been injured as a result of an accident and hope that in the circumstances your recovery is going well.

Based upon the information we have been provided, it appears that another party may be responsible for the accident and as a result you may be entitled to compensation for your injuries.

We would like to ensure that you fully understand how your policy works and the implication of any decisions that you make, or may be encouraged to make.

Your Legal Expenses Policy provides cover for a lawyer to handle a possible claim that you may wish to make for injury or financial loss, on your behalf.

Once we have been notified of the incident, we would normally appoint a specialist lawyer to handle this matter for you, so that you can take full advantage of your Legal Expenses Insurance. Our lawyers are nationally recognised personal injury specialists, ensuring the highest level of service.

An additional benefit of using our lawyers is that you will not be required to pay, or be responsible for, any costs during the lifetime of your claim, subject to the terms and conditions of the policy. You will also receive all the compensation to which you are entitled without deduction.

You may have either appointed or been encouraged to appoint, your own lawyer already. Unfortunately, your Legal Expenses policy does not provide cover for you to appoint your own solicitor at this stage of the claim. As such, any costs incurred in the pursuit of your claim prior to the stage court proceedings need to be issued, will not be covered. In addition we would advise that issuing legal proceedings is normally only required where it has not been possible to negotiate the resolution of your claim with the other party.

If it becomes necessary to issue proceedings, you will, at that time, be entitled to choose your own solicitors to act on your behalf, in accordance with The Insurance Companies (Legal Expenses Insurance) Regulations 1990. To do this, please contact us as soon as you are aware that legal proceedings need to be issued. Our claims handlers will, at this stage, assess your claim and advise whether your policy can assist you. It is worth noting, however, that given the quality of service offered by our solicitors, this option is very rarely used.

If you wish to use one of our lawyers, or indeed have any other questions regarding this letter, please contact us. We will be delighted to expand on how this service, which you have already paid for, operates.

we look forward helping you in resolving this matter.

Yours sincerely

A handwritten signature in black ink, consisting of a stylized, somewhat abstract scribble that appears to be a name or initials.

Barclays Insurance Services Company Limited



Our Reference: [REDACTED]
Your Reference: [REDACTED]

Snipelaw Solicitors
Thompson Road,
Whitehills Business Park,
FY4 5PN

30 June 2010

Dear Sirs

AXA Insurance - Direct Home Legal Expenses Insurance Claim

Insured: [REDACTED]
Incident Date: 18 June 2010

Thank you for your recent letter.

Please note that Arc Legal Assistance have been passed this letter as the Legal Expenses Insurance cover is arranged by Arc Legal Assistance Ltd (Arc Legal). Arc Legal are authorised by the insurers, Inter Partner Assistance, to handle any claims made by policyholders. Inter Partner Assistance are part of the AXA Insurance Group.

We would advise that the legal costs insurance policy will only cover legal fees incurred by panel solicitors prior to the issue of court proceedings. If you require a copy of the policy wording, please let us know and a copy will be forwarded to you.

If your client wishes for you to continue to act for them in this matter, we confirm that, subject to our final assessment of the claim and agreement with you as to costs, we will only be able to indemnify costs that you or the third party incur after court proceedings are issued.

Therefore, in the event that it does become necessary for you to issue proceedings please write to us quoting the reference [REDACTED] and providing the following:

1. Why proceedings are necessary
2. An update of the case
3. All supporting documentation

We will then consider this claim in further detail. Until such time, Underwriters are not liable for any costs incurred in this case.



Our Reference: ARC/025/007669/RAC
Your Reference: NM [REDACTED]

Neil Millar & Company solicitors
No 2 Universal Square,
Devonshire Street,
Manchester,
M12 6JH

RECEIVED
10 DEC 2009

7 December 2009

Dear Sirs

Motor - LV= - Legal Expenses Insurance
Your Client: [REDACTED]
Incident Date: 8 August 2009

Thank you for your recent enquiry.

Please note that LV= have appointed Arc Legal Assistance to administer claims made under their Legal Expenses Insurance contracts.

Whilst your client does have the benefit of Legal Expenses, the policy states that the insurance only covers legal costs incurred by one of LV= panel solicitors, appointed by us, until court proceedings are issued. If you require a copy of the policy wording, please contact us.

On this basis, if the indemnity is to be used, we will need to refer it to our panel Solicitor.

If your client wishes for you to continue to act for him in this matter, we confirm that, subject to our final assessment of the claim and agreement with you as to costs, we will only be able to consider indemnifying costs that you or the third party incur after our agreement that court proceedings need to be issued.

Therefore, in the event that it does become necessary for you to issue proceedings, please contact us again so that we may consider this claim in further detail. Until such time, underwriters are not liable for any costs incurred in this case.

If of course your client is prepared to instruct a panel firm to act for him and therefore potentially receive the full benefit of his legal costs insurance prior to the issue of court proceedings, please advise us as soon as possible and we shall send his details to the appropriate firm.

24 December 2008

Your Ref:

Our Ref: 20081224 -ck-hi36653953- [REDACTED]

FirstAssist Legal Protection
Marshall's Court, Marshall's Road
Sutton, Surrey SM1 4DU
T 020 8652 1313
F 020 8661 7604
www.firstassistlegal.co.uk

[REDACTED]
Neil Millar & Co
Barlow House
Minshull Street
Manchester
M1 3DZ



Dear Mr Kennedy

[REDACTED]
Policy Number: HI36653953

We write further to this matter and your telephone call of 18 December 2008.

We can confirm that the insured's policy does have the benefit of legal expenses cover. However, with regards to the issue of legal representation we would advise that this policy does not give the policyholder the freedom to appoint their own legal representative in the period before it is necessary to issue legal proceedings.

In the period before we agree it is necessary to issue we do refer claims of this nature to our panel solicitors, Irwin Mitchell, in accordance with the policy terms and conditions. Should they be unable to settle this matter, and we agree it is necessary to issue, our insured is then free to instruct your firm to act in the legal proceedings. In the intervening period we regret to advise we cannot consider your firm acting before it is necessary to issue.

Therefore, should the insured wish to continue to instruct Neil Millar & Co we would kindly request you revert to us should it become necessary to issue legal proceedings.

For your information please note that the policy does not cover any costs incurred before we have given our express written consent to incur the same. We trust you will advise the insured accordingly.

In the meantime, we reserve our position in accordance with all policy terms and conditions.

Yours sincerely



Chanda Kaluba

Claims Negotiator

FirstAssist Insurance Services Limited

Direct Dial No: 020 8652 1397

Email: chanda.kaluba@firstassistlegal.co.uk

1/1/2019

APIL response

Eschig review – legal expenses insurance

APPENDIX 4



Your ref

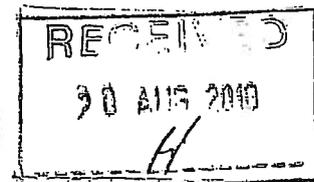
Our ref:

19 August 2010

Express Solicitors
DX: 29390
Northenden

Dear Sirs,

Legal Expenses Claim –



Thank you for returning the completed claim form and from the information provided, our customer's policy does provide cover for this type of dispute.

However, the policy terms and conditions must be adhered to if the policyholder wishes to be indemnified and have their legal costs paid by us. The policy provides that we are entitled to restrict freedom of choice of solicitor pre issue in certain circumstances.

The issue regarding freedom of choice of solicitor has been debated for some time now and the Financial Ombudsman Service (FOS) gave guidance to the industry on this point in their bulletin in March 2003.

As a result of their guidance we will allow freedom of choice of solicitor only on the following types of claim: -

- Personal injury cases where general damages exceed £10,000 and where the case is non-routine
- Clinical negligence claims
- Significant boundary, employment or contract disputes (where there is a considerable history or high value).

Any decision we make regarding legal representation is made with these guidance points in mind, where we consider that the FOS would support our position.

From the information provided to us regarding our customer's dispute, we do not consider their case to be one where we would be expected to allow freedom of choice.

Correspondence Address: Prudential Home Legal Expenses, PO Box 2624, Bristol,
BS1 9BN

Prudential Home Insurance is underwritten by Churchill Insurance Company Limited, Churchill Court, Westmoreland Road, Bromley, Kent BR1 1DP. Registered in England No: 2258947. Churchill Insurance Company Limited is authorised and regulated by the Financial Services Authority. Calls may be recorded.

We would, therefore, not allow for your appointment and would insist on appointing one of our nominated solicitors to handle this claim up to the point of issue.

If, however, there is some material information that we have not been provided with or that you consider requires further clarification which would result in this being a case where the FOS would expect us to allow freedom of choice now, please advise us by telephone if possible.

If the customer wishes to utilise the benefits provided by their insurance policy, please have them contact us and we will make the necessary arrangements. We would ask you to remind the customer that we are not liable for any legal costs they incur without our agreement, however, I am confident that the nominated solicitor will provide you with an undertaking in relation to your costs (on appropriate cases).

We trust you will advise our customer appropriately.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'A' followed by a long horizontal stroke.

Legal Expenses Claims Department

Your contact: Anna Winter

Direct Dial: 0845 878 1724

(Mon-Fri 9am-5pm)

Correspondence Address: Prudential Home Legal Expenses, PO Box 2624, Bristol,
BS1 9BN

Prudential Home Insurance is underwritten by Churchill Insurance Company Limited, Churchill Court, Westmoreland Road, Bromley, Kent BR1 1DP. Registered in England No: 2258947. Churchill Insurance Company Limited is authorised and regulated by the Financial Services Authority. Calls may be recorded.

privilege

Your ref: PRS/KS CG [REDACTED] 024.1

Our ref: FLP/41694190/ACAM

11 August 2010

Quality Solicitors Howlett Clarke
DX: 36656
Brighton 2

IRKE
3 AUG 2010

Dear Sirs,

Legal Expenses Claim - [REDACTED]

Thank you for returning the completed claim form and from the information provided, our customer's policy does provide cover for this type of dispute.

However, the policy terms and conditions must be adhered to if the policyholder wishes to be indemnified and have their legal costs paid by us. The policy provides that we are entitled to restrict freedom of choice of solicitor pre issue in certain circumstances.

The issue regarding freedom of choice of solicitor has been debated for some time now and the Financial Ombudsman Service (FOS) gave guidance to the industry on this point in their bulletin in March 2003.

As a result of their guidance we will allow freedom of choice of solicitor only on the following types of claim: -

- Personal injury cases where general damages exceed £10,000 and where the case is non-routine
- Clinical negligence claims
- Significant boundary, employment or contract disputes (where there is a considerable history or high value).

Any decision we make regarding legal representation is made with these guidance points in mind, where we consider that the FOS would support our position.

From the information provided to us regarding our customer's dispute, we do not consider their case to be one where we would be expected to allow freedom of choice.

Correspondence Address: Privilege Insurance, Home Legal Expenses, PO Box 2624, Bristol, BS1 9BN
Privilege Insurance is a trading name of Direct Line Insurance Plc, a member of the General Insurance Standards Council. Registered Office: 3 Edridge Road, Croydon, Surrey CR9 1AG. Registered in England No. 1810801. Direct Line Insurance Plc is authorised and regulated by the Financial Services Authority. Calls may be recorded.

Your ref: ~~CTO-Jew-20788/1~~

Our ref: ~~PL177043010/KB10~~

26 August 2010

Wansbroughs Solicitors
DX: 43900 Melksham



Dear Sirs,

Legal Expenses Claim – M [REDACTED]

Thank you for returning the completed claim form and from the information provided, our customer's policy does provide cover for this type of dispute.

However, the policy terms and conditions must be adhered to if the policyholder wishes to be indemnified and have their legal costs paid by us. The policy provides that we are entitled to restrict freedom of choice of solicitor pre issue in certain circumstances.

The issue regarding freedom of choice of solicitor has been debated for some time now and the Financial Ombudsman Service (FOS) gave guidance to the industry on this point in their bulletin in March 2003.

As a result of their guidance we will allow freedom of choice of solicitor only on the following types of claim: -

- Personal injury cases where general damages exceed £10,000 and where the case is non-routine
- Clinical negligence claims
- Significant boundary, employment or contract disputes (where there is a considerable history or high value).

Any decision we make regarding legal representation is made with these guidance points in mind, where we consider that the FOS would support our position.

From the information provided to us regarding our customer's dispute, we do not consider their case to be one where we would be expected to allow freedom of choice.

**Correspondence Address: NatWest Home Legal Expenses, PO Box 2624, Bristol,
BS1 9BN**

NatWest Home Insurance is underwritten by UK Insurance Limited, The Wharf, Neville Street, Leeds, LS1 4AZ.
Registered in England No. 1179980. UK Insurance Limited is authorised and regulated by the Financial Services
Authority. Calls may be recorded.

We would, therefore, not allow for your appointment and would insist on appointing one of our nominated solicitors to handle this claim up to the point of issue.

If, however, there is some material information that we have not been provided with or that you consider requires further clarification which would result in this being a case where the FOS would expect us to allow freedom of choice now, please advise us by telephone if possible.

If the customer wishes to utilise the benefits provided by their insurance policy, please have them contact us and we will make the necessary arrangements. We would ask you to remind the customer that we are not liable for any legal costs they incur without our agreement, however, I am confident that the nominated solicitor will provide you with an undertaking in relation to your costs (on appropriate cases).

Please note our view is that we comply with national legislation which queries freedom of choice and are fully compliant with the requirements of the EC Directive 87/344

We trust you will advise our customer appropriately.

Yours faithfully,

A handwritten signature in black ink, consisting of a series of connected loops and curves, positioned below the text 'Yours faithfully,'.

Legal Expenses Claims Department

Your contact: **Kate Blythman**

Direct Dial: **0845 878 1706**

(Mon-Fri 9am-5pm)

**Correspondence Address: NatWest Home Legal Expenses, PO Box 2624, Bristol,
BS1 9BN**

NatWest Home Insurance is underwritten by UK Insurance Limited, The Wharf, Neville Street, Leeds, LS1 4AZ.
Registered in England No. 1179980. UK Insurance Limited is authorised and regulated by the Financial Services
Authority. Calls may be recorded.

Our ref: [REDACTED]
Your ref: [REDACTED]

05 October 2009

Snipe Law Solicitors
Thompson Road
Whitehills Business Park
Blackpool
FY4 5PN

Dear Sirs

Legal Expenses Claim – [REDACTED]

Thank you for returning the completed claim form and from the information provided, our customer's policy does provide cover for this type of dispute.

However, the policy terms and conditions must be adhered to if the policyholder wishes to be indemnified and have their legal costs paid by us. The policy provides that we are entitled to restrict freedom of choice of solicitor pre issue in certain circumstances.

The issue regarding freedom of choice of solicitor has been debated for some time now and the Financial Ombudsman Service (FOS) gave guidance to the industry on this point in their bulletin in March 2003.

As a result of their guidance we will allow freedom of choice of solicitor only on the following types of claim: -

- Personal injury cases where general damages exceed £10,000 and where the case is non-routine
- Clinical negligence claims
- Significant boundary, employment or contract disputes (where there is a considerable history or high value).

Any decision we make regarding legal representation is made with these guidance points in mind, where we consider that the FOS would support our position.

From the information provided to us regarding our customer's dispute, we do not consider their case to be one where we would be expected to allow freedom of choice.

Your ref: **RE/8767**

Our ref: **FLP/12500022/MRDU**

01 September 2010

Foster & Partners Solicitors
DX: 7867
Bristol 1



direct line

Direct Line Insurance plc
Direct Line House
1 Cathedral Square
Trinity Street
Bristol BS1 5DL
Telephone 0117 984 3313
Facsimile 0117 930 4938
DX 122110 Bristol 12

- 3 SEP 2010

Dear Sirs,

Legal Expenses Claim -

Thank you for returning the completed claim form and from the information provided, our customer's policy does provide cover for this type of dispute.

However, the policy terms and conditions must be adhered to if the policyholder wishes to be indemnified and have their legal costs paid by us. The policy provides that we are entitled to restrict freedom of choice of solicitor pre issue in certain circumstances.

The issue regarding freedom of choice of solicitor has been debated for some time now and the Financial Ombudsman Service (FOS) gave guidance to the industry on this point in their bulletin in March 2003.

As a result of their guidance we will allow freedom of choice of solicitor only on the following types of claim: -

- Personal injury cases where general damages exceed £10,000 and where the case is non-routine
- Clinical negligence claims
- Significant boundary, employment or contract disputes (where there is a considerable history or high value).

Any decision we make regarding legal representation is made with these guidance points in mind, where we consider that the FOS would support our position.

From the information provided to us regarding our customer's dispute, we do not consider their case to be one where we would be expected to allow freedom of choice.

We would, therefore, not allow for your appointment and would insist on appointing one of our nominated solicitors to handle this claim up to the point of issue.

If, however, there is some material information that we have not been provided with or that you consider requires further clarification which would result in this being a case where the FOS would expect us to allow freedom of choice now, please advise us by telephone if possible.

If the customer wishes to utilise the benefits provided by their insurance policy, please have them contact us and we will make the necessary arrangements. We would ask you to remind the customer that we are not liable for any legal costs they incur without our agreement, however, I am confident that the nominated solicitor will provide you with an undertaking in relation to your costs (on appropriate cases).

We trust you will advise our customer appropriately.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'Kamil Mackow', written over a horizontal line.

Legal Expenses Claims Department

Your contact: Kamil Mackow

Direct Dial: 0845 878 1895

(Mon-Fri 9am-5pm)

APIL response

Eschig review – legal expenses insurance

APPENDIX 5



Our Ref: FLP/T/85634410/BIAE
Your Ref: DLG.PH.54367.87984

27 August 2010

Parkinson Solicitors
DX 716257
Worcester

- 1 SEP 2010

Dear Sirs

Re: Home Emergency Legal Protection Claim – Mrs T Rose

We acknowledge receipt of your letter dated 13th August.

Our view is that as we comply with national legislation which governs the restriction of freedom of choice, we are in fact fully compliant with the requirements of EC Directive 87/344. We are aware of the letter from Mr Hogg.

As a result of the above, we are unable to agree to your appointment in this matter at this stage. For the avoidance of doubt, we would not seek to restrict freedom of choice at the point of issue.

Yours faithfully,



Legal Expenses Claims Department

Your Contact: Amanda Bishop
Direct dial: 0845 878 1817 (*Mon-Fri 9.00-5.00*)

Direct Line : [01905] 721587
Direct Fax : [01905] 617378
E-mail : ph@parkinsonwright.co.uk

DLG.PH.54367.87984

FLP/85634410/BIAE

02 September 2010

TESCO HOME INSURANCE
THE WHARF
NEVILLE STREET
LEEDS LS1 4AZ

Dear Sirs

Legal Expenses Claim

Our Client: Mrs Tina Louise Rose
Accident at Work: 10 May 2010

We thank you for your letter dated 27th August.

We assume by '*national legislation*' you are referring to the Insurance Company's [Legal Expenses Insurance] Regulations 1990. As is clear from the Financial Services Agency's letter under those regulations the freedom to chose a solicitor arises [inter alia] **before** the commencement of any enquiry or proceedings and that that freedom of choice under the Policy cannot be curtailed. You are not therefore fully compliant with those regulations and cannot therefore by definition be compliant with the requirements of the EC Directive 87/344.

The fact that you chose to interpret the regulations differently does not mean that you are compliant.

We do not therefore accept your refusal to agree to our appointment in this matter at this stage. We will continue to act for Mrs Rose and will claim indemnity under the Policy should the need for this arise. Without prejudice to this position, we reserve our client's right to commence proceedings for Judicial Review unless you are prepared to reconsider.

Yours faithfully,

PARKINSON WRIGHT LLP



Your Ref:
Our Ref:
Please ask for:
E-Mail:
Date:

RLT/DLD/Misc
Miss R L Turner
rlt@pengillys.co.uk
14 September 2010

PENGILLYS

SOLICITORS & MEDIATORS

Post Office Chambers, 67 St Thomas Street
Weymouth, Dorset DT4 8HB

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Tel: 01305 768888 Fax: 01305 768777

Mediation Line: 01305 763210

www.pengillys.co.uk

APIL
DX 716208 Nottingham 42

For the attention of Helen Blundell



Dear Sirs

FREEDOM OF CHOICE

Further to the APIL weekly newsletter, sent at the end of August, we are writing to enclose a copy letter received from a BeforeThe Event insurance supplier restricting the freedom of choice of our client.

We have previously referred to the *Eschig* case, but, as can be seen from the enclosed letter, DAS are refusing to accept the position.

We hope that this matter will be raised and that DAS's, and other BTE providers, position is challenged.

Yours faithfully

A stylized, handwritten signature of "Pengillys" in a cursive font, with "PENGILLYS LLP" printed in a bold, sans-serif font below it.



PRINCIPALS: C.F. Lousley MA (Oxon) T. Guppy C.M. Berry LLB E.J. Lilley LLB G.P. Meakins LLM S. Jones LLB J.T.P.W. Walkington LLB M.J. Edmonds LLB

Also at Challacombe House, Beechwood Square, Poundbury, Dorchester, Dorset DT1 3SS

Members of The SRA Children's Panel Accreditation Scheme.
The SRA Family Law Accreditation Scheme and the Society of Trust & Estate Practitioners

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Pengillys do not accept the service of documents by e-mail



Pengillys Solicitors
DX 8756 Weymouth 1

Your Ref: RLT/SJK/31906/001
Our Ref: 10/2091526 CLWB
Date: 09 September 2010
Email: cpec@das.co.uk
Tel: 0117 927 1955
Ext: 11158

Email: rlt@pengillys.co.uk

Dear Sirs

Personal Injury: Mr G Clifford

Thank you for your letter of 18th August 2010.

DAS is fully aware of the decision in the recent Eschig case. The Eschig case addressed freedom of choice only in mass claims and quite rightly concluded that mass claims were not exempt from freedom of choice when proceedings had been issued. Freedom of choice in any other respect was not addressed by this case and as such the requirements of the Insurance Company (Legal Expenses) Regulations 1990 and the EC Directive 87/344/EEC 1987 continue to apply.

DAS fully supports freedom of choice in accordance with the regulations and the directive. These regulations and the European Directive (87/344/EEC) set out clearly the circumstances in which freedom of choice of solicitor is allowed. Freedom of choice arises immediately prior to, at, or after issue of proceedings *unless* there is a conflict of interest. In addition to this DAS will also consider own solicitor appointment for very complex cases.

Our interpretation and application of freedom of choice has been agreed and accepted by the Association of British Insurers and the European Commission, of whom we have regular contact with. As such DAS are not prepared to agree to your appointment as the solicitor and we will be contacting our insured to advise them accordingly.

Yours Faithfully

Lydia Blackman
Senior Claims Handler
Claims Department



DAS Group
DAS House, Quay Side, Temple Back, Bristol BS1 6NH
Telephone: 0117 934 2000 Fax: 0117 934 2109 OX141841 Bristol 19 www.das.co.uk

A member of the international DAS organisation

Horwich Farrelly Solicitors
DX 743020
Old Trafford 5

Your Ref GMO/AMC/149288/1
Our Ref 10/2173661
D/Dial 0117 927 1955
Date 03 September 2010
E-mail cpcc@das.co.uk

Dear Sirs

Re: Personal Injury Claim – Mr S Gallop

Thank you for your recent correspondence forwarded to us by Halifax.

We note your comments in relation to the letter from Ken Hogg of the FSA in relation to the provision of LEI and the Eschig v Uniqa case. DAS is in direct communication with the FSA regarding the content of the letter and fundamentally disagrees with the stance taken. Therefore, please note that DAS maintains its position on the interpretation of the aforementioned case and Regulations and will not be appointing you at this juncture.

Yours faithfully

Neil Burris
Senior Claims Handler
Claims Department

DAS Legal Expenses Insurance Company Limited is authorised and regulated by the Financial Services Authority and is a member of the Association of British Insurers

Head and Registered Office:
DAS House, Quay Side, Temple Back, Bristol BS1 6NH
Registered in England and Wales. Company Number: 103274



LEI 1 0808

APIL response

Eschig review – legal expenses insurance

APPENDIX 6



The Law Gazette

Gearing up claims

Created 18/05/2006 - 00.00

With regards to the comments from the Accident Relief Campaign, supported by Kerry Underwood (see [\[2006\] Gazette, 4 May, 1](#) [1]), it is extremely misleading to criticise the role of legal expenses insurance on the basis, as stated by Mr Underwood, that 'with any RTA [road traffic accident], any lawyer in the country will do it on a "no win, no fee" basis'.

This seems highly unlikely, keeping in mind the fact that 80% of RTA no-fault claims fall below the relevant small-claims limit and do not attract profit costs. Without such cover, therefore, innocent motorists would be left to fend for themselves in the vast majority of RTA cases.

In addition, Mr Underwood has not given credit to insurers for the wide cover offered for minimal premiums, which usually includes cover for foreign claims, other sides' costs in lost cases, and other expenses, such as replacement car hire.

I suspect that the whinge about legal expenses cover has more to do with the use of panels and the payment of referral fees, but both of these can be easily justified by insurers which will point to the higher success rates and faster recovery times achieved by panel firms in typical cases.

Referral fees are, of course, merely a fact of economics, representing the acquisition cost of business to the solicitor, and reflecting the high level of profits achieved on RTA and other personal injury cases in the current environment.

The impression that referral fee income represents some kind of windfall profit for insurers demonstrates a lack of knowledge of the market, where insurers have to rely on commission and referral payments to cover expenses, in the absence of traditional premium income.

In calling for Financial Services Authority involvement, the Accident Relief Campaign would do well to keep in mind that, unlike solicitors, legal expenses insurers are already regulated by the authority.

Paul Asplin, chief executive, DAS Group, Bristol

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The Law Society

Source URL: <http://www.lawgazette.co.uk/opinion/letters/gearing-claims>

Links:

[1] <http://www.lawgazette.co.uk/news/breaking/view=newsarticle.law?GAZETTENEWSID=280044>

APIL response

Eschig review – legal expenses insurance

APPENDIX 7



RE: LEGAL EXPENSES INSURANCE

OPINION

1. I am instructed to give my Opinion on (in summary) the following issues:
 - (1) Whether under conventional forms of “Before The Event” Legal Expenses Insurance (“LEI”) an Insured who has notified to the Insurer a personal injury claim within its cover has freedom of choice of a lawyer to pursue the claim.
 - (2) If so, from what time, and:
 - (a) with what (if any) restriction of that choice to objectively accredited personal injury Solicitors;
 - (b) on what (if any) terms of the retainer permitting the Solicitors’ remuneration to be “no win, no fee; if win, no uplift”.

2. For the reasons and to the extent which I describe below my opinion is:

(1) Under conventional forms of LEI an Insured who has notified to the Insurer a personal injuries claim within its cover is, to the extent to which I describe in (2) below, entitled to freedom of choice of a lawyer to pursue the claim after the Insurer has had reasonable time to process notification of the claim.

(2) In such circumstances the Insured's freedom of choice

(i) is restricted to a lawyer who is a member of the Law Society's or some other reputable panel of approved personal injury Solicitors, and

(ii) requires this Solicitor to be retained by the Insurers on terms that he will be paid reasonable prevailing professional rates for work on the claim whether or not the claim succeeds.

It is not necessary for the purposes of this Opinion that I address the precise machinery by which this entitlement can be compelled.

3. The issues which arise require consideration of (among other matters to which I refer below) the conventional LEI policy wording, the Insurance Companies (Legal Expenses Insurance) Regulations 1990 ("the Regulations"), the judgment of the Court

of Appeal in Sarwar v. Alam (19 September 2001), and CPR's Practice Direction on Protocols and Pre-Action Protocol for Personal Injury Claims.

4. As its name and marketing suggest, conventional LEI policy wording indemnifies the Insured against the legal costs of access to justice. Justice need not require litigation, but CPR recognises the close affinity between efficient pre-action procedure, as enjoined by the Personal Injury Protocol, and the efficient conduct of proceedings if commenced, and that efficient pre-action procedure may avoid proceedings. An LEI premium-paying Insured, of reasonably fair mind, would reasonably regard himself as insured by LEI against his own legal costs preparatory to and, if necessary of, bringing a claim, and against the opponent's legal costs of the claim should the Insured become liable for the opponent's costs. He would not regard himself as committed by this cover either to the handling of his claim by a non-lawyer or to the conflict of interest which may arise if any lawyer whom the Insurers instruct on his behalf may go unpaid if legal costs are not recovered from the opponent.

5. The fact that an LEI Insured may not have paid a premium (as was the case in Sarwar), or may not consciously have paid a premium (because the cover is by way of unsolicited extension to some other policy which he holds) does not restrict the scope of cover thus understood. The unsolicited nature of the cover, and its legal consequences which the Court of Appeal identified in Sarwar, entitles such an Insured to no less generous an interpretation of the scope of the cover.

6. Some LEI policies express themselves ambiguously. For example, while professing cover of the scope identified above, some policies suggest inconsistent

restriction of access to a lawyer, by referring to negotiation, apparently by Insurers' claims handling staff.

7. LEI policies conventionally provide cover so long as the claim has at least a 50% chance of success, i.e. the standard of proof in civil litigation. It is to be noticed that a conflict of interest arises here between an Insured subject to this scope of cover and the interest of any lawyer instructed on behalf of the Insured on "no win, no fee; if win, no uplift" terms. Such a lawyer may reasonably be expected to need to set his success criterion at some 80%.

8. LEI policies conventionally purport to restrict the Insured's entitlement to the instruction of any lawyer on his behalf to where the Insurer agrees to the commencement of proceedings, provided that the Insurer agrees to the commencement of proceedings, or to where the instruction of a lawyer is required by rules of Court if proceedings are commenced. Some policies expressly permit proceedings "where necessary", but are silent as to the definition of this necessity.

9. The Regulations were made to give effect to Directive 87/344 (EC), and apply to all LEI of the kind now being considered, because it is, within the definition imported from the Insurance Companies Act 1982, which is "general business class 17 in Part 1 of Schedule 2 to (the Act)", namely insurance business "Effecting and carryinng out contracts of insurance against risk of loss to the persons insured attributable to their incurring legal expenses (including costs of litigation)", which these are, at least in part. The Recitals to the Directive include:

“Whereas the interest of persons having legal expenses cover means that the insured person must be able to choose a lawyer or other person appropriately qualified according to national law in any inquiry or proceedings and whenever a conflict of interests arises”.

10. Article 4 of the Directive reflects this Recital in terms. Regulation 6 of the Regulations gives effect to Article 4. Regulation 6 provides:

“(1) Where under a legal expenses insurance contract recourse is had to a lawyer (or other person having such qualifications as may be necessary) to defend, represent or serve the interests of the insured in any inquiry or proceedings, the insured shall be free to choose that lawyer (or other person).

(2) The insured shall also be free to choose a lawyer (or other person having such qualifications as may be necessary) to serve his interests whenever a conflict of interests arises.

(3) The above rights shall be expressly recognised in the policy.”

11. The words "Where under a legal expenses insurance contract recourse is had to a lawyer" require to be read in association with the insuring clauses of (i.e. precisely what cover is provided by) the policies themselves.

12. Regulation 6 (1) is accordingly to be read (my emphasis added) as: "Where under a legal expenses insurance contract recourse may be had to a lawyer". This is

arguably the purposive interpretation which the Directive (87/344 (EC)) requires in order to prevent avoidance, and which the Regulations themselves require in order to give sense to the imported definition which I have cited. To provide cover only by way of negotiating, or only by way of appointing a lawyer on a no win no fee basis, is not to provide the indemnity against legal expenses which is, as I have observed above, the essence of the policy, i.e. what the reasonably fair-minded policyholder would assume is the purpose of paying the premium. Further, the rule as to business efficacy requiring the implication of terms, and the rule of interpretation against the proffering party of ambiguities for which he is responsible each achieve the same result. If there is any doubt about the interpretation which I identify, it is in my opinion resolved in favour of this interpretation by Regulation 6 (2) and (3). An LEI Insured has freedom to choose his lawyer wherever the funding conflict which I have identified above arises: Regulation 6 (2). Regulation 6 (3) expressly over-rides any contrary policy term.

13. Moreover, Sarwar, at paragraph 44, describing this cover as BTE, the Court of Appeal identified “the possible inappropriateness in these post-Woolf days of a BTE Claimant being denied freedom of choice of solicitor (at any event so far as the members of the Law Society’s or some other reputable panel of approved personal injury solicitors are concerned) at the time the procedures in a pre-action protocol come to be activated”.

14. It is instructive, and necessary, to call to mind quite how far-reaching is the effect of the Personal Injuries Protocol, and the Practice Direction giving effect to all Protocols, under CPR. This far-reaching effect is an essential element of the objective

of CPR in enabling access to justice in the true, wide sense of the term, which, as the following extracts from the Practice Direction and the Protocol plainly show, emphasises the importance of the resolution of disputes without litigation.

15. Practice Direction – Protocols, paragraph 1.3 provides:

“Pre-action protocols outline the steps parties should take to seek information from and to provide information to each other about a prospective legal claim”.

Practice Direction – Protocols, paragraph 1.4 provides:

“The objectives of pre-action protocols are:

- (1) to encourage the exchange of early and full information about the prospective legal claim,
- (2) to enable parties to avoid litigating by agreeing a settlement of the claim before the commencement of proceedings,
- (3) to support the efficient management of proceedings where litigation cannot be avoided”.

16. The Personal Injury Protocol, paragraph 2.6 provides, under the heading “Early Notification”:

“The Claimant’s legal representative may wish to notify the Defendant and/or his insurer as soon as they know a claim is likely to be made, but before they are able to send a detailed letter of claim, particularly for instance, when a Defendant has no or limited knowledge of the incident giving rise to the claim or where the Claimant is incurring significant expenditure as a result of the accident which he hope the Defendant might pay for, in whole or in part. If the Claimant’s representative chooses to do this, it will not start the timetable for responding”.

17. Effective application of the Personal Injury Protocol requires its immediate engagement by an experienced personal injury Solicitor. It would be no answer to say that a person not within the class of experienced personal injury lawyer there contemplated could do the job equally well. Experience, to which the Court would be alert, is that they do not. Whether or not some LEI panel Solicitors are sufficiently experienced in personal injury claims, I adopt as my opinion as to the appropriate definition of the class of Solicitor to which the Insured’s freedom of choice can properly be restricted the class which the Court of Appeal defined in Sarwar at paragraph 44, which I have cited at paragraph 13 above.

18. “No win, no fee; if win, no uplift” creates a perception of conflict of interest. Moreover, it is not for this that the Insured has paid the premium; or become committed to the cover of the policy. Lastly, but perhaps not necessarily to any decision on the issue, if an example is needed of the present inclination of the Court of Appeal to ensure that the concept of a fair trial requires a bold approach to these

considerations it is the judgment in Goode v Martin (13 December 2001) on amendment.

19. The ingenious interpretation of "inquiry" in Regulation 6 (1) which has been argued to the Ombudsman in support of freedom of choice of lawyer is in my view wrong. The term "inquiry" is derived from the Directive, and is to be taken as bearing in the Directive a meaning relating to forms of judicial process in certain of the so-called civil law jurisdictions of the EU which do not compel it to be interpreted to cover CPR or the Protocol in this jurisdiction. In view of my foregoing opinion the "inquiry" argument is an argument which it is not necessary to consider further.

TOBY HOOPER QC

12 King's Bench Walk
Temple
London EC4Y 7EL

hooper@12kbw.co.uk

30 January 2002

RE: LEGAL EXPENSES INSURANCE

OPINION

Pattinson & Brewer
30 Great James Street
London WC1N 3HA

Ref: FEM/HC

APIL response

Eschig review – legal expenses insurance

APPENDIX 8



COPY FINAL DECISION

Complainant:	"Mrs A"
Firm:	"B Company"
Complaint Reference:	1000326959/AYC/33
Date of Final Decision:	10 January 2003

Complaint

That B Company (the insurer) has refused to accept that a firm of solicitors chosen by the complainant (rather than a firm the insurer has chosen from its panel) should be an "Appointed representative" under the terms of the complainant's personal legal protection insurance cover.

Background

The complainant's son (then aged 15) was seriously injured in an accident on 31 May 2001: for present purposes the precise details of the accident are not relevant but it appears that he was with a group of friends when he walked into the road and was struck by an approaching car. Apparently there is a suggestion that the complainant's son may have been drinking and it is foreseeable there will be serious questions on liability and contributory negligence.

Through an organisation called xxxx, the complainant (who lives in xxxx) was referred to a firm of solicitors (Messrs Y) in xxxx. Messrs Y notified the insurer of the claim by letter 3 December 2001 and on 6 December 2001 the insurer replied explaining that it (as it saw it) had reserved by the policy wording the right to refer cases to its panel solicitors to assess the merits and thereafter (depending on the assessment of merits) seek itself to negotiate a reasonable settlement. The insurer's intention was to seek an assessment of merits from Messrs Z, solicitors in xxxx. The insurer's response to the complainant's solicitors' objection to that proposal was that whilst the complainant was free to instruct them the insurer would incur no liability under the policy if she did so. The case was then referred to us.

The Insurance Cover

The complainant's personal legal protection cover is through her xxxx policy and subject to various terms and conditions it extends also to members of the complainant's family (such as her son). Under the heading "*Insured incidents we will cover*" it lists a number of types of event in which a policyholder may require legal assistance but the only one relevant here is "*Bodily Injury*" in relation to which it is provided that the insurer

"... will negotiate for the insured person's legal rights after an event which causes ... bodily injury to an insured person".

That the initial focus of the handling of a claim (for bodily injury, for example) will be to negotiate a settlement is reiterated or emphasised by the "*Conditions which apply to the whole policy*", whereby it is provided (condition 2 (a)) that the insurer

" ... can take over and conduct in the name of an insured person, any claim or legal proceedings at any time. We [ie the insurer] can negotiate any claim on behalf of an insured person".

Condition 2 (b) deals with the situation where *"We agree to start legal proceedings"*, and sets out the procedure for appointing a solicitor of the policyholder's choice, and condition 2 (c) provides that

"Before an insured person chooses a lawyer ... we can appoint an appointed representative".

"Appointed representative" is defined as

"The lawyer, accountant or other suitably qualified person who has been appointed to act for an insured person in accordance with the terms of this policy".

Under the first operative (as opposed to explanatory) paragraph of the policy (*"This is your personal legal protection policy"*), paragraph 3 provides that

"If an appointed representative is used, we will pay the cost and expenses incurred for this".

The parties' respective arguments

The insurer's position is, therefore, quite simple: that until it agrees to start legal proceedings (or unless there is a *"conflict of interest"*, another situation specifically catered for), no one other than a solicitor *it* has appointed (which, in practice, usually means solicitors on its panel) can be an *"appointed representative"* under the policy and accordingly (it says) it has no obligation to meet legal fees other than those of the solicitor *it* has instructed. For routine matters it may in fact conclude that appointing a solicitor is in any event unnecessary and that the matter can be handled by one of its trained staff.

The complainant's solicitors seem not to dispute the interpretation of the policy wording; they argue, however, that the insurer's position is unreasonable in that (i) they are specialists in this type of work (ii) they are located close to where complainant lives (and the insurer's panel solicitors are not) and (iii) the recent decision of the Court of Appeal in *Sarwar v Alam* casts doubt on the insurer's approach.

My adjudicator Ms Woloski considered the matter and concluded that in the present case the firm should agree to the appointment of the complainant's preferred solicitors. She also set out some general observations on the issues. The insurer has raised various concerns about this and it therefore falls to me to determine the matter.

Discussion

Before considering the details of this case I think it would be helpful to set it in the wider context of the workings of legal expenses insurance. Policies of this type are common in motor and increasingly household policies, as well as being provided on a stand-alone basis. When sold as part of another product they are often presented as a free (or low cost) addition to provide legal expenses cover.

Typically the policies provide cover for legal expenses in the case of most personal injury, consumer, property and employment disputes and provide cover against an award of the

other party's legal costs. Normally policies require that any action must have "reasonable prospects of success" and require the policyholder to accept reasonable offers of settlement.

Where claims arise under a policy of this type the basic practice of many insurers is to assess the dispute in-house (or perhaps with the assistance of one of its panel of solicitors) and determine whether there is an arguable case. If the insurer concerned concludes that there is little by way of prospects of success it may simply notify the policyholder that it is not prepared to accept the claim.

Where the case appears more complex or where there are favourable prospects of success it is the insurer's practice to appoint one of its established panel of solicitors to consider the matter. The panel is established by the insurer to deal with such cases on previously agreed commercial terms. I understand that in some cases this is on a no fee basis (where the solicitors expect to cover their costs through the costs awarded against other parties where their client is successful) or on the basis of a set fee per case. Most cases handled in this way relate to car accidents and the recovery of uninsured losses from third parties or damages in respect of minor injuries or small consumer disputes. However, legal expenses insurance covers a wide spectrum of other disputes from medical negligence to property disputes. Only in exceptional circumstances will the insurer appoint a solicitor not on its panel.

These arrangements have given rise to concerns in some quarters and as the complainant suggests a number of these were raised in *Sarwar v Alam*. Many of these concerns relate to the basis upon which a solicitor is accepted on to an insurer's panel, or to other issues not directly related to the service provided to the individual policyholder, such as the impact on the market for legal services. These are not matters for me to determine and I do not believe they are relevant to my consideration of this case. However some general points that have been put to me do seem to raise issues about the impact of the insurer's practices on the individual policyholder and are therefore matters appropriate for me to consider.

I think these arguments can be summarised in four main points:

- a) the freedom of choice of solicitor provided for in the Regulations when "proceedings" commence, should be interpreted more widely than its traditional legal meaning to include any significant legal enquiry;
- b) the appointment of panel solicitors on a no fee or low fixed fee basis and their close relationship with the insurer may distort the solicitor's view about the case (for example in assessing whether or not a case has reasonable prospects of success) to the disadvantage of the policyholder;
- c) the panel solicitor may be of lesser quality or expertise than non-panel solicitors; and
- d) the policyholder may be misled about the nature of the cover available and their position prejudiced accordingly.

The first three of these are in effect arguments that the use of a panel system is inherently wrong or objectionable and likely to unfairly disadvantage the policyholder. I consider these three points in turn.

First, when the Insurance Ombudsman issued guidance on the issue of choice of solicitor in 1993 (see the Insurance Ombudsman Bureau's Annual Report for that year) he did so having regard to the Insurance Companies (Legal Expenses Insurance) Regulations 1990 (and the associated Directive). At that time there was little or no doubt that the phrase

"legal proceedings" meant proceedings which have actually been issued in the High Court or County Court.

Since then the rules of procedure have changed and I have seen it argued that the word "proceedings" should now be taken to have started at the time when the claimant's solicitors embark on the pre-action protocol now required. This is the line adopted by the Association of Personal Injury Lawyers and I have seen an opinion from leading counsel in support. Indeed, the Court of Appeal in *Sarwar v Alam* noted [paragraph 44] that there was some concern about the "possible inappropriateness" of denying policyholders freedom of choice before proceedings are actually issued.

I can see the force of the argument (although I note that the personal injury protocol, for example, itself uses the word "proceedings" in a way which makes it clear it is referring to proceedings in the traditional sense). I am also mindful however that many policyholders would not recognise this distinction. It seems to me that policyholders not used to legal action might well consider any serious step taken on their behalf by their solicitor as "legal proceedings". This point however goes to the comprehensibility of the policy to which I return later.

In so far as the Regulations themselves are concerned, in the absence of clearer authority from the courts and given the wider significance of the term outside the field of insurance, I do not think it appropriate for me to reach a formal view on the matter. I have concluded however that at present the position in favour of a wider interpretation does not seem so strong that I should conclude that the firm must offer a choice of solicitor earlier than is its present practice in order simply to comply with the Regulations.

Second, on the argument that the solicitor's arrangements with the insurer may distort their relationship with the client/policyholder, I note that the appointed solicitor has a duty to the policyholders who is his client. Disputes about whether a case has reasonable prospects can be (and often are) raised with this service. Similarly this service can and does consider complaints about withdrawal of cover because the insurer concludes that the policyholder has rejected a reasonable settlement offer. Of course non-panel solicitors may also offer their services on terms that may similarly encourage them to look critically at cases where the prospects of success are not very high. Also, any solicitor has duty to advise his/her client not to pursue claim that is unlikely to be successful.

In these circumstances and in the absence of clear evidence of any systematic distortion of the advice given by panel solicitors I do not see any reason to conclude that in relation to the policyholder the insurer's practice is inherently unfair or unreasonable.

There is one small but important caveat I need to add to this concerning potential conflicts of interest. The Court of Appeal in *Sarwar v Alam* considered this matter. The case concerned at its most basic the question whether it was reasonable for a claimant to take out an "after the event" legal expenses policy when (unknown to him and his solicitors at the outset) the wording of his driver's legal expenses policy allowed him to be funded to bring a claim against his driver. The court received submissions on many issues surrounding "before the event" legal expenses insurance and thought it inappropriate [paragraph 52] that the defendant's insurer (in its capacity as legal expenses insurer) should be in a position to control the manner in which the passenger's claim was managed.

The circumstances of that case were particular – although not that unusual – but I do not see anything in the Court of Appeal's observations to suggest that it considered that legal expenses insurers' use of a panel was *inherently* objectionable or *inevitably* gives rise to a conflict of interest. However the insurer (and hence its panel) will be dealing with

policyholders in a wide range of disputes, some of which may involve the insurer (or another insurer with which it has a commercial relationship in connection with legal expenses insurance) acting for the other party. Of course both solicitors in general and insurers are used to handling such matters but it is perhaps worth emphasising the significance of clear procedures (that can if necessary be explained to the policyholder) to deal with any actual or perceived conflicts of interest. In general, I would expect the firm to use third party non-panel solicitors to deal with such disputes.

Third, on the respective professional merits of panel and non panel solicitors I have, as might be expected, received conflicting views. However no evidence has been forthcoming to demonstrate any systematic difference in quality that might suggest that the firm's practice routinely disadvantaged policyholders in this respect. However, the insurer accepts that in some (albeit relatively infrequent and unusual) cases its panel may not contain solicitors with the relevant expertise or specialist knowledge. It says it is its practice on such occasions to appoint solicitors with the appropriate knowledge etc from outside its panel. In contrast the insurer argues, I think with some force, that for routine cases its own arrangements may well be at least as efficient and effective for the policyholder as those likely to be available without its involvement.

So in summary on these first three points I have concluded that the provision of legal services to policyholders in the manner in which the firm deals with these cases is not in general terms either in clear conflict with the Regulations (or Directive) or inherently likely to provide a less effective or inappropriate service to policyholders in comparison with the alternatives likely to be available. In brief therefore I conclude that there is nothing inherently objectionable from the policyholder's general perspective about the approach of requiring policyholders in most cases to use the services of the insurer's own appropriately trained staff or those of a pre-selected panel of providers chosen by the insurer.

I now turn to the fourth point raised above, that is whether the policyholder may be misled about the nature of the cover available. I have quoted the main relevant provisions of the personal legal protection policy. The insurer argues that the policy is reasonably clear and provides it with the discretion to appoint solicitors and act generally in accordance with its present practice. It says in any event the clarity of the policy is not of overriding importance. It notes that in many cases the policyholder will not be aware of the existence of the policy but when a potential claim arises will contact a solicitor direct. The insurer notes that the solicitor should act in accordance with professional conduct rules and consider the availability to the potential client of legal expenses insurance. Once the policy has been located the solicitor will be able to advise the policyholder/client on its proper interpretation. In cases where the policyholder is aware of the existence of the policy, the insurer says documentation is clear that the first step should be to contact the insurer by telephone. Its helpline explains the workings of the policy and the steps the policyholder needs to take.

It seems to me that, whilst the strict interpretation of the policy may well provide the insurer with the discretion it uses, in practice the policy wording is far from clear. I think that for most policyholders it is difficult to refer and cross refer to several different parts of the policy to find out what cover is on offer. Even if the policyholder can identify accurately the discretions open to the insurer, he has little idea of how those discretions will in practice be exercised. Put simply, even after a careful reading of the policy most policyholders would in my judgment have little idea that the firm would generally object to funding claims handled by an experienced solicitor selected by the policyholder (at least until such time as court papers have been issued).

Overall I have concluded that the present terms relating to choice of solicitor are not expressed in plain and intelligible language. In my view, in the absence of a clear and intelligible statement of what the policy does and does not provide, the prospective policyholder is unable to make a fair evaluation of the policy at point of sale. It seems to me that different policyholders would, for example, value differently a policy which provided the peace of mind due to the insurer (in effect) taking all responsibility for selecting and paying for legal support for the policyholder, from one where the policyholder has a choice of solicitor.

Second it seems to me that if the contract is not clear this may prejudice the policyholder's position at the time a claim is made. The policyholder may make arrangements with a solicitor of his or her choice and incur costs without recognising that the insurer is unlikely to fund advice from that solicitor or to reimburse those costs.

Of course I cannot assume that a poorly constructed policy will always prejudice the policyholder or give rise to an unfairness. In many "routine" cases it seems to me that the policyholder may well not be greatly disadvantaged or inconvenienced by any lack of clarity in the policy. For example, in most minor road traffic disputes (including routine personal injury claims) the policyholder is likely to become aware of the legal expenses policy whilst in discussion with an insurer. In such routine cases the arrangements made by the legal expenses insurer for handling claims are likely to be at least as effective as those provided in any other way and in practical terms are likely to be more efficient. Similarly in small scale consumer disputes the services provided in-house or through the panel arrangements are likely to provide an effective and efficient service for the policyholder. In either case if the policyholder first contacts another solicitor they can readily be re-directed to the insurer.

The position is less clear cut however in more complex cases. Here the policyholder may reasonably expect to search out specialist legal assistance. If the point of entry to the dispute has not been through another insurance claim then the relevance of the policy and the need to approach the insurer may well not be drawn to the policyholder's attention until he has presented the case to a solicitor of his choice. The explanation of the dispute may be time consuming. Transferring the case may well result in delays and inconvenience for the policyholder.

In such cases I conclude that the policyholder's position is likely to have been prejudiced and that the fair resolution of the matter, reflecting good industry practice will be for the insurer to fund advice from the policyholder's chosen solicitor. This would of course be subject to the claim fulfilling the other policy conditions (on matter such as prospects for success), the solicitor and insurer agreeing appropriate fees and arrangements for monitoring the conduct of the claim and the chosen solicitor having the requisite experience for handling the case in question.

Conclusions on General Position

It may be helpful to summarise here the general conclusions I have reached and to set out further observations on the types of circumstances where I have concluded that insurers should normally allow for policyholder choice, before applying those general principles to the present case.

I have concluded that that there is nothing inherently objectionable from the policyholder's general perspective about the approach of requiring policyholders in most cases to use the services of the insurer's own appropriately trained staff or those of a pre-selected panel of providers chosen by the insurer.

However I have concluded that the present terms relating to choice of solicitor are not expressed in plain and intelligible language. In my view, in the absence of a clear and intelligible statement of what the policy does and does not provide, the prospective policyholder is unable to make a fair evaluation of the policy at point of sale. In addition if the contract is not clear this may prejudice the policyholder's position at the time a claim is made. For example, the policyholder may make arrangements with a solicitor of his or her choice and incur costs without recognising that the insurer is unlikely to fund advice from that solicitor.

However, I cannot assume that a poorly constructed policy will always prejudice the policyholder or give rise to an unfairness. Indeed in many "routine" cases it seems to me that the policyholder may well not be greatly disadvantaged or inconvenienced by any lack of clarity in the policy. However in more complex cases or in cases with other special features it seems to me that the policyholder's position is likely to have been prejudiced and that the fair resolution of the matter, reflecting good industry practice will be for the insurer to fund advice from the policyholder's chosen solicitor. This would of course be subject to the claim fulfilling the other policy conditions (on matter such as prospects for success), the solicitor and insurer agreeing appropriate fees and arrangements for monitoring the conduct of the claim and the chosen solicitor having the requisite experience for handling the case in question.

Of course much will depend on the circumstances of the individual case but I have noted that motor accident disputes, minor personal injury claims and routine consumer disputes are all likely to be cases where the customer is unlikely to have suffered any significant prejudice. In contrast I would expect insurers to agree the appointment of the policyholder's preferred solicitors in cases of *large* personal injury claims and claims that are necessarily complex (such as those involving allegations of medical negligence). Outside the field of cases involving bodily injury, I think cases involving significant boundary or employment disputes (especially if there is considerable history to investigate and assess) might also be regarded as non-routine.

More generally there are other circumstances where I think a failure to agree to the policyholder's own solicitor may not be reasonable or in keeping with good industry practice. For example, I consider in cases where the policyholder's own solicitors have already had considerable involvement in (and therefore considerable knowledge of) the issue giving rise to the dispute or related matters it is likely to be appropriate for the insurer to use the policyholder's solicitor. This might arise in connection with the purchase of the property or negotiation of a contract at a time before the matter became contentious, but I think that situation is unlikely to arise in cases of bodily (personal) injury. For the avoidance of doubt however because a solicitor has simply continued to act notwithstanding policy provisions of the sort described earlier will not of itself lead me to conclude that an insurer should be forced to accept the policyholder's choice of solicitor.

I have also noted that it may be appropriate to use a policyholder's own solicitor in cases where there is a suggestion of conflict of interest. The appointment of the policyholder's chosen solicitor would be subject to the claim fulfilling the other policy conditions (on matter such as prospects for success), the solicitor and insurer agreeing appropriate fees and arrangements for monitoring the conduct of the claim and the chosen solicitor having the requisite experience for handling the case in question.

The application of these principles to the present case

My conclusion is that this case does involve special circumstances but they can be stated quite briefly: it is a combination of the fact that on the face of it this case involves a very serious injury where complainant's son is said to be likely to require care and attention in the future, that such a case is likely to involve more sensitive handling and more face-to-face contact with the complainant (although possibly not with her son) combined with the fact that there may well be serious issues on liability.

All things considered, I think that this is a case where (subject to the complainant's solicitors being able to agree appropriate terms and conditions with the insurer and subject to any other relevant terms and conditions applicable as between the complainant and the insurer) the insurer should indemnify the complainant in respect of Messrs Y's fees. I am conscious also that if the complainant's son's injuries are as severe as the present indications, proceedings are likely to have to be issued if only to obtain court approval for any settlements that may be agreed.

Decision

For the reasons set out above I conclude that the firm has acted unreasonably in refusing the complainant's request that it appoint her chosen solicitor to represent her in this matter. I therefore determine that subject to the complainant's solicitors being able to agree appropriate terms and conditions with the insurer and subject to any other relevant terms and conditions applicable as between the complainant and the insurer, the insurer should indemnify the complainant in respect of Messrs Y's fees and other reasonable costs.

Tony Boorman
Principal Ombudsman