CA on appeal from Oldham CC (Judge Tetlow District Judge Simpson) before Brooke LJ; Hale LJ; Arden LJ. 22nd May 2003.

Lord Justice Brooke: This is the judgment of the court to which each of us has contributed.

1. Conditional Fee Agreements: the History

(i) The Courts and Legal Services Act 1990

1. Until Parliament intervened by legislation in 1990 it was always considered to be contrary to public policy, and therefore unlawful, in this jurisdiction for the financial reward which a lawyer received for his services in connection with litigation to vary depending on the outcome of the litigation.

2. In 1988 the Report of the Review Body on Civil Justice (1988, Command Paper 394, at paras 384 to 389) encouraged the Lord Chancellor to re-examine the prohibition on what it described as "contingency fees and other forms of incentive scheme". In 1989 the government took this suggestion forward, first in a Green Paper and then in a White Paper later that year. These developments led in turn to the enactment of the Courts and Legal Services Act 1990 ("the 1990 Act"). In section 58 of that Act Parliament decided to permit conditional fee agreements ("CFAs") in relation to the provision of advocacy or litigation services in certain narrowly prescribed circumstances.

3. This section provided the enabling machinery. It was brought into force in July 1993. Two years later CFAs became lawful for the first time. They could only lawfully be made in connection with one or other of the six types of legal proceedings mentioned in article 2(1) of the Conditional Fee Agreements Order 1995 ("the 1995 Order"). They also had to comply as to form with the Conditional Fee Agreements Regulations 1995 ("the 1995 Regulations").

4. When he sought approval of the 1995 Order in the House of Lords (HL Hansard, 12 June 1995, p 1544) the then Lord Chancellor said that the whole purpose of permitting conditional fees in these cases was to extend access to justice. He also wished to increase consumer choice. He had sought to balance the need for clients and solicitors to be free to reach an agreement which reflected their mutual interests according to individual circumstances with the need for a framework which provided appropriate protection for the client. His aims could not be achieved by stifling the scheme with over-regulation.

5. Against this background the 1995 regulations were comparatively simple. In short, a lawful CFA had to be in writing and state:

> *"(a) the particular proceedings or parts of them to which it relates …;*
> *(b) the circumstances in which the legal representative's fees and expenses … are payable;*
> *(c) what, if any, payment is due –*
> *(i) upon partial failure of the specified circumstances to occur;*
> *(ii) irrespective of the specified circumstances occurring; and*
> *(iii) upon termination of the agreement for any reason;*
> *(d) the amount payable in accordance with sub-paragraphs (b) or (c) above or the method to be used to calculate the amount payable; and in particular whether or not the amount payable is limited by reference to the amount of any damages which may be recovered on behalf of the client." (regulation 3)*

6. The agreement also had to state that immediately before it was entered into the legal representative had drawn the client's attention to the four matters specified in regulation 4(2). One of these matters related to the circumstances in which the client might be liable to pay the fees and expenses of the legal representative in accordance with the agreement (regulation 4(2)(b)).

7. In those days legal aid was available for those of limited means for a much wider range of legal proceedings than it is today. Although the 1995 Order prescribed that fees might be increased (in the event of success) to a maximum of 100%, the Law Society encouraged its members to limit the amount they actually recovered by way of success fee to 25% of the damages recovered. It was not possible between July 1995 and April 2000 for a successful client to recover her solicitor's success fee from the other side. We have been advised by our assessor (see para 43 below) that solicitors for the most part accepted the Law Society's recommendations.

8. In 1998 a new Conditional Fee Agreements Order repealed the 1995 Order. This made CFAs permissible in all proceedings other than criminal proceedings and the family proceedings specified in section 58(10) of

the 1990 Act. By a parallel development litigants were being encouraged to obtain legal expenses insurance to protect them from costs orders in favour of the other party if they were unsuccessful. Here, too, they were not able to recover the premium they paid for such insurance from the other party by way of costs if they were successful in the litigation.

(ii) Three forces at work in the late 1990s

9. In the closing years of the last century three forces were at work in parallel with the civil justice reforms associated with Lord Woolf's name which led from his final report on Access to Justice in 1996 through the Civil Procedure Act 1997 to the implementation of the Civil Procedure Rules in April 1999. These three forces were characterised by a greater willingness to look critically at the old shibboleths which used to prohibit any kind of "contingency fee agreement"; a feeling that more should be done by way of consumer protection for clients who found themselves saddled with financial commitments they did not anticipate when they entered into one of the new CFAs; and the government's desire to move with all reasonable speed towards a radical reform of the demand-led state-funded arrangements for both legal advice and legal aid in litigation.

10. As to the first of these forces, in February 1998 this court decided the case of ***Thai Trading Co v Taylor*** [1998] QB 781. A solicitor had agreed with his wife in March 1993 that he would act for her in litigation on the understanding that he would only recover his profit costs if she succeeded in the action. Millett LJ, with whom Kennedy and Hutchison LJJ agreed, held that this agreement did not offend public policy. He distinguished this type of agreement from a contingency fee agreement which entitled a solicitor to a reward over and above his ordinary profit costs if he won. The latter was an arrangement which had always been condemned by English courts as tending to corrupt the administration of justice.

11. The Solicitors' Practice Rules 1987 provided that a solicitor engaged in any contentious business might not enter into any arrangement to receive a contingency fee (being defined as a fee payable only in the event of success in the proceedings). Millett LJ, however, was of the view that the fact that a professional rule prohibited a particular practice did not of itself make the practice contrary to law. In saying this he overlooked the decision of the House of Lords in ***Swain v The Law Society*** [1983] 1 AC 598 where it was made clear that the Solicitors' Practice Rules had the force of a statute, being rules made by the Council of the Law Society with parliamentary sanction for the protection of that section of the public who might be in need of legal advice, assistance or oversight. Indeed, failure to comply may result in a complaint to the Solicitors Disciplinary Tribunal (Solicitors Act 1974, s 31(2)).

12. In November 1998 the Divisional Court in *Hughes v Kingston upon Hull City Council* [1999] QB 1193 declined to follow the ***Thai Trading*** decision for this reason. This court had not, however, pronounced on the matter when what was to become the Access to Justice Act 1999 ("the 1999 Act") was going through Parliament. Parliament decided to put the position beyond doubt when it provided in section 27 of that Act that a new section should be substituted for the existing section 58 of the 1990 Act, and that it should say in terms that:

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

13. Rule 8 of the Solicitors' Practice Rules 1990, as amended, now provides that:

> *"(1) A solicitor who is retained or employed to prosecute or defend any action, suit, or other contentious proceedings, shall not enter into any arrangement to receive a contingency fee in respect of that proceeding,* ***save one permitted under statute or by the common law****." (Emphasis added)*

14. The words we have emphasised were added in January 1999, following the *Thai Trading* decision. The inclusion of the last five of them soon proved to be unnecessary. In November 1999 this court finally put to rest any lingering confusion. In ***Awwad v Geraghty & Co*** [2001] QB 570 it refused to follow *Thai Trading* and made it clear that there would no longer be any common law developments in this field. Now that Parliament had modified the law which had prohibited all arrangements for receiving a contingency fee in relation to litigation services, there was no room for the court to go beyond that which Parliament had now permitted (per May LJ, with whom Lord Bingham of Cornhill CJ agreed, at p 600D-E).

(iii) The Access to Justice Act 1999

15. In the meantime the Lord Chancellor had initiated a public debate about the ways in which alternative methods of funding litigation and access to justice might be taken forward, particularly in the light of the pending withdrawal of legal aid from a wide field of litigation. During 1998 this debate was triggered off by the publication of a consultation paper in March and the publication of the responses to that consultation four months later. The debate then flowed into Parliament, and in July 1999 the 1999 Act was enacted. Part I created the arrangements for the new Legal Services Commission, and Part II, which is of concern on these appeals, is entitled "Other Funding of Legal Services".

16. It is unnecessary for the purposes of this judgment to consider the whole of the new arrangements. This court has in any event already covered much of the ground in its judgment in ***Callery v Gray (No 1)*** [2001] EWCA Civ 1117 at [10]–[13]; [2001] 1 WLR 2112, and in the more detailed examination that followed this passage in that judgment. For present purposes it is sufficient to concentrate only on section 27 of the 1999 Act, which is headed "Conditional Fee Agreements".

17. The method by which Parliament chose to proceed was by repealing section 58 of the 1990 Act and substituting two new sections, 58 and 58A. This parliamentary device meant that these new provisions found themselves in Part II of the 1990 Act, which takes its signature tune from its opening sub-section. This provides, so far as is material, that:

> *"17(1) The general objective of this Part is the development of legal services in England and Wales (and in particular the development of … litigation … services) by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice."*

18. We have already recited the substituted section 58(1) in full (see para 12 above). Section 58(2) makes it clear that for the purposes of this legislation a CFA is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances (section 58(2)(a)). This covers the ***Thai Trading*** type of agreement. Further, a CFA provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances (section 58(2)(b)). Sections 58(4) and 58(5) make further provision with which we need not be at present concerned.

19. Section 58(3) and section 58A(3), on the other hand, lie close to the heart of the matters we have to decide. Section 58(3) provides:

> *"(3) The following conditions are applicable to every conditional fee agreement –*
> *(a) it must be in writing;*
> *(b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and*
> *(c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor."*

20. Section 58A(3), for its part, provides:

> *"(3) The requirements which the Lord Chancellor may prescribe under section 58(3)(c) –*
> *(a) include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made; and*
> *(b) may be different for different descriptions of conditional fee agreements (and, in particular, may be different for those which provide for a success fee and those which do not)."*

21. It will be seen that the general effect of these two sections, situated in a part of the statute which promotes the parliamentary purpose of making provision for new or better ways of providing litigation services, is to "legalise" by virtue of section 58(1) any CFA which satisfies all the conditions applicable to it. If a CFA does not satisfy all these conditions it will be unenforceable.

(iv) The indemnity principle

22. Defendant liability insurers, who have viewed with disfavour the increased financial burden imposed on them by a combination of the "front-end loading" of the Woolf reforms and the new liability to pay ATE premiums and success fees to successful claimants pursuant to other provisions contained in Part II of the 1999 Act, have seized the opportunity of challenging the enforceability of many CFAs by pointing to breaches of one or more of the "conditions applicable to it". They argued that, even if they only succeeded

in establishing a single breach, they could escape liability to pay any of the costs (and possibly also the disbursements) that were referable to the unenforceable CFA. In other words, it is not only the solicitor's success fee which is at risk, but the cost of all the solicitor's services (or the services of counsel, if rendered under an enforceable CFA), which may on occasion run to many thousands of pounds.

23. Liability insurers were able to take this course through the operation of the indemnity principle (for which see ***Harold v Smith*** 5 H&N 381, 385; ***Gundry v Sainsbury*** [1910] 1 KB 645, 649 and 653; and ***General of Berne Insurance Co Ltd v Jardine Reinsurance Management Ltd*** [1998] 1 WLR 1231). This common law principle, by which a paying party cannot be ordered to pay a receiving party more by way of costs than the receiving party is himself liable to pay, is now enshrined in statute, so far as solicitors are concerned, by section 60(3) of the Solicitors Act 1974 which provides: *"A client shall not be entitled to recover from any other person under an order for the payment of any costs to which a contentious business agreement relates more than the amount payable by him to his solicitor in respect of those costs under the agreement."*

24. In 1999 Parliament showed itself well aware of the possible application of the indemnity principle in the context of the reforms it introduced in the 1999 Act, because by section 31 it provided that: *"In section 51 of the Supreme Court Act 1981 (costs) in subsection (2) (rules regulating matters relating to costs) insert at the end 'or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs'."*

This section, however, has not yet been brought into force. (It will be noticed that these two sections state the principle in different ways, but that need not concern us for the purposes of these appeals.)

(v) Concerns about consumer protection

25. In the autumn of 1999, therefore, the way was clear for the Lord Chancellor to prepare new regulations pursuant to the substituted section 58(3) of the 1990 Act. In the meantime there had been two significant developments in relation to matters of consumer protection (the second of the forces we mentioned in para 9 above). The first was the publication by the Law Society in September 1999 of the Solicitors' Costs Information and Client Care Code ("the Client Care Code"). The other was the publication of a research study by Stella Yarrow and Pamela Abrams, funded by the Nuffield Foundation, entitled "Nothing to lose? Clients' experiences of using conditional fees".

26. The effect of the Client Care Code was to require solicitors to be much more open in the way they explained to their clients their methods of charging for their services and the potential liabilities their clients might face. "Costs information" was to be given to the client at the outset of any matter, and also at appropriate stages thereafter, and any information given orally was to be confirmed to the client in writing as soon as possible.

27. The Yarrow and Abrams study provided a snapshot of the experiences of 40 clients and 20 solicitors under the CFA regime that was introduced in 1995. It will be remembered that under this regime clients had to pay their solicitor's success fee out of the damages they recovered (subject to the 25% cap on such recovery which was recommended by the Law Society). This study revealed a considerable degree of ignorance among clients about the ways CFAs worked. Most of them had not been involved in litigation before, and the expression "no win, no fee" could lead to false expectations that no other costs were involved. The authors felt that the 1995 Regulations did not set out in sufficient detail solicitors' obligations to inform clients. Although they were aware of the introduction of the Client Care Code it was yet to be seen what impact this would have.

28. It was in this climate that the Lord Chancellor issued a new consultation paper in September 1999 entitled "Conditional Fees: Sharing the Risks of Litigation". Three of the questions posed in that paper were whether a solicitor should be under an obligation to explain a CFA to the client in addition to providing written information about it; whether he should be required to discuss with the client the desirability of insurance cover in a CFA; and whether he should be under an obligation to advise on the relative advantages and disadvantages of the available insurance products.

29. In February 2000 the Lord Chancellor published the government's conclusions following this consultation. Although the Law Society and the senior costs judge (see para 84 of that publication) had told the government that they believed the new Client Care Code adequately covered the need to provide

additional information about CFAs, the government decided on balance to prefer the views put forward by other respondents and to strengthen that part of the new regulations which required the provision of such information. It also decided to "draw on the example of the solicitors' Client Care Code" to require the legal representative to provide explanations of the different possibilities open to the client on the insurance front. This part of the paper (para 83) concludes: *"If the legal representative recommends a particular product, but also has an interest in doing so, for example because he or she will receive a commission or is a member of the insurer's panel of solicitors, then this must also be disclosed to the client."*

(vi) The Conditional Fee Agreements Regulations 2000

30. Because the government was committed to introducing its reforms to the legal aid scheme at the beginning of April 2000, it had no opportunity for consultation on the detailed drafting of the new regulations. Instead, the Conditional Fee Agreements Regulations 2000 (SI 2000 No 692) (which we will call quite simply "the CFA Regulations" or "the new Regulations" in view of their importance in this case) were laid before Parliament on 9th March 2000, and came into force 23 days later. The Conditional Fee Agreements Order 2000 was made on 20th March, as was a commencement order which brought sections 27-30 of the Access to Justice Act 1999 into force on 1st April. Mr Guy Mansfield QC, who appeared for two of the claimants and who in a different capacity was concerned on behalf of the Bar Council in these matters, told us that it was his recollection that copies of the new regulations were sent by the Lord Chancellor's Department to the Bar Council and the Law Society for the first time about a week before they were due to come into force. They differed from their predecessors in a number of significant respects.

31. Regulation 2 is very similar to regulation 3 of the 1995 Regulations (for which see para 5 above). It starts by saying that a CFA "must specify" as opposed to "an agreement shall state". The first three matters that have to be specified are very similar to their predecessors. Regulation 2(1)(d) refers to: *"the amounts which are payable in all the circumstances and cases specified or the methods to be used to calculate them and, in particular, whether the amounts are limited by reference to the damages which may be recovered on behalf of the client."*

This differs from regulation 3(d) of the 1995 Regulations in using the conjunction "whether" rather than "whether or not".

32. Regulation 2(2) of the new Regulations provides that:

"(2) A conditional fee agreement to which regulation 4 applies must contain a statement that the requirements of that regulation which apply in the case of that agreement have been complied with."

This is similar to regulation 4(1) of the 1995 Regulations, which required a CFA to state that various specified matters had been drawn to the client's attention immediately before the agreement was made.

33. Regulation 3 of the new Regulations contains requirements for the contents of CFAs providing for success fees. For the purposes of this judgment it is necessary only to set out the terms of regulations 3(1) and (2)(a):

"(1) A conditional fee agreement which provides for a success fee –

(a) must briefly specify the reasons for setting the percentage increase at the level stated in the agreement, and

(b) must specify how much of the percentage increase, if any, relates to the costs to the legal representative of the postponement of his fees and expenses.

(2) If the agreement relates to court proceedings, it must provide that where the percentage increase becomes payable as a result of those proceedings, then –

(a) if –

(i) any fees subject to the increase are assessed, and

(ii) the legal representative or the client is required by the court to disclose to the court or any other person the reasons for setting the percentage increase at the level stated in the agreement,

he may do so …"

34. Regulation 4 is a considerably expanded version of regulation 4 of the 1995 Regulations, as foreshadowed in the paper setting out the government's conclusions. It provides, so far as is material:

"4. Information to be given before conditional fee agreements made:

(1) Before a conditional fee agreement is made the legal representative must –

(a) inform the client about the following matters, and

(b) if the client requires any further information, advice or other information about any of these matters, provide such further explanation, advice or other information about them as the client may reasonably require.

(2) Those matters are:

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

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

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

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

(e) whether the legal representative considers that any particular method or methods of financing any of all of [the costs in respect of the proceedings to which the agreement relates] is appropriate and, if he considers that a contract of insurance is appropriate or recommends a particular such contract –

(i) his reasons for doing so, and

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

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

(5) Information required to be given under paragraph (1) … about the matters in paragraph 2(c) and the explanation required by paragraph (3) must be given both orally and in writing."

35. It will be noted that regulation 4(2)(e)(ii) gives effect to the government's identification of the need for a legal representative to disclose any interest he may have when he recommends a particular insurance product.

36. Both the Law Society and the Bar Council published new model forms of CFA very soon after the new Regulations came into effect. The Law Society's April 2000 model CFA was replaced three months later by their July 2000 model CFA. The later model made a change to a provision in the earlier model which has come under attack in these proceedings. No doubt if the new Regulations had not been introduced in such a rush the Law Society would have had more time to identify any imperfections in their original draft. Time, however, did not allow for this. It is against this background that we have to consider the merits of the defendants' contentions that any such imperfection rendered the whole CFA unenforceable and the solicitor who achieved a successful result for his client without a fee left seriously out of pocket.

(vii) Two other contemporary concerns

37. Before we consider the appeals there are two other contrasting contemporary concerns that we should mention. The first is that the government was also concerned at the same time with the activities of unregulated claims assessors who had no legal qualifications and who were acting for clients usually on a "no win, no fee" contingency basis. This may be linked to a perception that people are becoming too "litigation minded", pursuing compensation for minor injuries which they would previously have shrugged off. On the other hand there was the growing perception in some quarters that traditional methods of conducting legal business were regarded quite widely as being not particularly "client-friendly", and that many people who had suffered injuries through someone else's fault were not pursuing their right to compensation for this reason.

38. In early 2000 the Lord Chancellor published the report of a committee chaired by Mr Brian Blackwell into the first of these matters. The committee reported that one claims management company believed that 11.2 million accidents occurred in this country each year, and that in over two million of these the injured person blamed someone else for the accident. Only 350,000 made compensation claims, so that on this reckoning there was a potential market of 1.7 million additional claims for personal injury compensation each year. Although the committee noted certain deficiencies in the services rendered by some of these unregulated claims assessors, the majority of the committee considered that it had not unearthed sufficient public disquiet about their activities to justify a ban on their activities, particularly as such a ban could restrict consumer choice and access to justice.

39. The views of one experienced solicitor on this developing scene are best reflected in the evidence given by Mr Stewart McCulloch in the *TAG* cases. He is head of the personal injury department in a firm of solicitors in Huyton, and has had 18 years' experience in that field of practice. He described how the higher levels of client care and service demanded in the 1990s by both legal expenses insurers and the Legal Aid Board demanded a level of investment in IT systems which could only be supported by an increase in the volume of work undertaken by the firm. The demise of legal aid and the arrival of the new ways of doing business facilitated by Part II of the 1999 Act persuaded him that there was a pressing need to be able to process cases in large numbers without diluting quality.

40. He was of the view that his profession would have to look at innovative ways of providing a national or regional service without losing the essential qualities previously offered to clients on the basis of a bespoke local service. His hope was that in this way access to justice would be maintained and that a higher quality service would emerge in time such as would also reduce the number of hopeless claims.

2. The six appeals

(i) The issues they raise

41. To an increasing degree defendant liability insurers have not been content merely to scour CFAs for defects when they have been produced to them. They have also been demanding to see the claimant's CFA during the assessment proceedings. Resistance to this demand has also led to a significant amount of litigation. We understand that whereas disputed assessments were once comparatively rare, they have now become commonplace.

42. Because of the prevalence of these challenges, the Civil Appeals Office have brought together a number of different appeals that illustrate different elements of the trench warfare which is now being waged between claimants' solicitors and solicitors acting for liability insurers before district judges and circuit judges up and down the country. Most of them have now come to this court as second appeals because they raise important points of practice. One, an appeal from Master Hurst, the senior costs judge, has been directed to be heard by this court as a first appeal for similar reasons.

43. It was agreed between the parties that the appeals raised three distinct issues:

(i) the circumstances in which a court should put a receiving party in detailed assessment proceedings to its election, so that it must choose whether to disclose its CFA to the paying party or to endeavour to prove its claim by other means (*Pratt v Bull; Worth v McKenna*);

(ii) the proper construction of the words "satisfies all of the conditions applicable to it" in section 58(1) of the 1990 Act and whether any costs or disbursements are recoverable from a paying party in the event of non-compliance with the CFA Regulations (all cases);

(iii) whether, on particular facts, the requirements contained in one or other of regulations 2, 3 and 4 of the CFA Regulations were not complied with (*Hollins v Russell* (reg 2), *Tichband v Hurdman* (regs 2 and 3), *Pratt v Bull, Dunn v Ward* and *The Accident Group* ("*TAG*") *Test Cases* (reg 4));

Master Hurst sat as our assessor for the first two days of the hearing, when we were concerned with issue (i) and the first four appeals mentioned under issue (iii), and we benefited from his wise advice.

(ii) The concerns of the interveners

44. Before we come to consider and determine these six appeals, there are two other matters to which we must refer. In addition to the parties the Civil Appeals Office, on Brooke LJ's instructions, invited submissions from a few representative organisations who were known to have an interest in the outcome of these appeals. As a result we received helpful written submissions from the Association of Personal Injury Lawyers ("APIL"), the Motor Accident Solicitors' Society ("MASS"), and the Forum of Insurance Lawyers ("FOIL"). We also received helpful written and oral submissions from the Law Society.

45. APIL's paper in particular described vividly the difficulties faced by claimants' solicitors up and down the country as a consequence of defendant insurers' uncompromising tactics. The Association has 5,000 members who are solicitors and barristers practising on behalf of claimants in the fields of personal injury and clinical negligence. They thought that we might be helped by knowing of the experience of their members in the daily operation of the CFA Regulations, and how issues such as those now being argued were having and might yet have, in their opinion, a significant impact on citizens' access to justice.

46. It appears that 40 to 60% of the CFA caseload of a significant number of members of APIL is now affected by technical challenges like these, which often evaporate as the date of detailed assessment approaches. These tactics are delaying the payment of costs. This leads inevitably to a serious effect on cash-flow for those undertaking professional work of this kind, and a backlog of fee recovery work not only in members' offices but also in local courts. Their submission contained the following comments: *"… Our members talk about the uncertainty of undertaking claimants' personal injury work when it is impossible to know whether they will ever be paid for the work they are doing. … A disproportionate amount of solicitors' time is being spent sorting out these cases … [Our members] fear that their clients are fast losing confidence in the legal system, seeing 'technical challenges' as a means of depriving them of what has been recovered for them, if indeed they understand the matter at all … Many of our members have used the word 'bewildered' to describe their clients' states of mind when told about these challenges … Many of our members have indicated that they will not seek to recover any costs from the client in the event that the CFA is technically invalid. The loss will fall on the solicitor, who has done a competent job for his client and recovered damages for him, but will not be paid at all."*

47. We should also point out that the delay and uncertainty will have damaging effects for those claimants who have paid, or borrowed money to pay, for disbursements on such things as medical reports and any ATE insurance premiums. One of the parties wrote to draw our attention to this particular problem.

48. APIL fear that in the medium or longer term many of their members will simply not continue to offer legal services under CFAs. While not seeking to defend CFAs which are substantially defective, APIL urged us to adopt an approach to these appeals which would tend to uphold the enforceability of the CFAs as between solicitor and own client and to avoid bestowing windfalls on defendant insurers at the expense of claimants' solicitors in the short term and of access to justice in the longer term. We received a similar message, couched in varying terms, from the other bodies representing solicitors, and in particular from the Law Society. The Society's views deserve particular weight, as they represent all solicitors, acting for all kinds of party in all kinds of litigation. CFAs are now being used in many different types of case, including complex commercial litigation far removed from the simple personal injury claims in the cases before us. Whatever the approach to emerge from these cases, it must be appropriate to the wide variety of circumstances in which CFAs are now being made.

(iii) The concerns of the House of Lords

49. On the other side of the coin, defendant insurers drew our attention to the anxieties expressed by different members of the House of Lords in ***Callery v Gray (Nos 1 and 2)*** [2002] UKHL 28; [2002] 1 WLR 2000 in relation to the opportunities for abuse opened up by the new legislative regime. These stemmed largely from the fact that the client is unlikely to be very concerned about the details of a CFA because no liability will fall on her. If she wins, she will recover her costs, plus any additional liabilities, from the defendants. If she loses, she will be protected from paying the other side's costs by ATE insurance, which will often cover her own costs as well. If it does not, her solicitors will not charge her anything. Concerns about potential abuse are contained, for instance, in the speeches of Lord Bingham (at paras 5 and 10) and Lord Nicholls (at paras 12-16).

(iv) Matters of common ground

50. By the end of the four-day hearing into these six appeals, it was clear that there was common ground on two important matters. The first was that the maxim that the law does not care about very small matters must be applied when a court considers whether there has been compliance with any of the CFA Regulations or what the effect of non-compliance will be. The second was that except to the extent discussed in paras 83 - 84 below the European Convention of Human Rights has no part to play in our consideration of these appeals. Although the applicability of Article 1 of the First Protocol to the Convention was much canvassed in some of the skeleton arguments, it was eventually conceded by the claimants that neither the claimants' nor their solicitors' potential right to recover costs under a questionable CFA could possibly constitute "possessions" within the meaning of that article. The Strasbourg case of ***Marckx v Belgium*** (1979) 2 EHRR 330, 350 para 50 is clear authority for the proposition that where there are no property rights which pre-exist the interference complained of, the article is not engaged.

3. Disclosure of CFAs

51. In *Pratt v Bull* and *Worth v McKenna*, the paying parties sought to resist liability for any of the costs ordered against them on the grounds that the CFAs under which such costs were claimed were unenforceable by virtue of section 58 of the 1990 Act, and that accordingly it would be in breach of the indemnity principle to award any costs against them in the assessment of costs. Judge Cotterill and Judge Marshall-Evans QC were both of the view that the CFA entered into by the receiving party need not be disclosed to the paying party because the solicitor to the receiving party had certified on the bill of costs presented for assessment in the usual way that the costs claimed therein did not exceed the costs which the receiving party was required to pay to the receiving party's solicitors. In addition, they both found that the paying party had not demonstrated to their satisfaction any real ground for challenging the enforceability of the CFA and accordingly that this certificate raised a presumption that the indemnity principle was not infringed. The presumption was only a rebuttable presumption, but in the circumstances there was nothing to rebut it.

52. The starting point is section 58(1) of the 1990 Act (set out at para 12 above). Section 58 has to be read with the indemnity principle in mind, which (as explained at paras 22 and 23 above) itself has statutory force. It follows that the paying party will not be liable to pay costs to the receiving party if the fees sought by the solicitor are sought under a CFA which is not rendered enforceable by section 58(1). This section does not provide that such an agreement shall be unenforceable only as between the paying party and his solicitor. We deal with the argument that it should be so construed in paragraphs 92 to 95 below. For present purposes, it is enough to say that if that were its construction, it would cut across the well-established indemnity principle.

53. Accordingly, we must take it to be the policy of Parliament that the paying party should be protected by the indemnity principle in relation to the CFA entered into by the receiving party. In other words, that he should be entitled to object to paying costs which he has been ordered to pay if they are made payable by a conditional fee agreement which is not rendered enforceable by section 58(1).

54. It is not as we see it the policy of the Act to allow recovery of success fees come what may, or to allow fees under a CFA to be recovered from the paying party come what may, even if that is necessary to ensure the financial viability of CFAs. Nor is it a question of the paying party being the only real policeman of CFAs, even though in practice, the receiving party is unlikely to have any incentive to take the point that the agreement between him and his solicitor is unenforceable. There is nothing to suggest that the paying party is the gatekeeper chosen by Parliament to ensure compliance with section 58(1).

55. In order to explain our conclusions, it is necessary to describe the practice on assessment as respects the disclosure of documents to the paying party or his solicitors. Although all relevant documents must be filed with the court, there is no automatic disclosure of these documents to the paying party. However, paragraph 40.14 of the Costs Practice Direction provides (in relation to detailed assessment) as follows:-

"40.14 The court may direct the receiving party to produce any document which in the opinion of the court is necessary to enable it to reach its decision. These documents will, in the first instance, be produced to the court, but the court may ask the receiving party to elect whether to disclose a particular document to the paying party in order to rely on the contents of the document, or whether to decline disclosure and instead rely on other evidence."

56. Reference to the case law demonstrates the circumstances in which the court will exercise its discretion under this rule. In ***Goldman v Hesper*** [1988] 1 WLR 1238, the Court of Appeal held that it would be rare to exercise this discretion under Order 62, rule 29 of the Rules of the Supreme Court 1965, which contained provisions now to be found in CPR 47.6 and that part of the Costs Practice Direction that relates to CPR Part 47. By lodging his documents with the court, the claimant waived his legal professional privilege to that extent. If there was a challenge in good faith to any item of costs, the taxing master could put the receiving party to his election and if the document was produced disclosure would be for the specific purpose of taxation of costs only. Accordingly, the privilege could be asserted on other occasions thereafter.

57. This procedure was based on the judgment of Hobhouse J in ***Pamplin v Express Newspapers Ltd*** [1985] 1 WLR 689. At pages 696 to 697, Hobhouse J held: *"The [costs judge] does not have any power to order discovery to be given: he does not have any power to override a right of privilege. But it is the duty of the [costs judge] if the respondent raises a factual issue, which is real and relevant and not a sham or fanciful dispute to require the claimant*

to prove the facts on which he relies. The claimant then has to choose what evidence and to what extent he will waive his privilege. That is a choice for the claimant alone. The [costs judge] then has to decide the issue of facts on the evidence. In considering whether he is satisfied by the evidence, the [costs judge] will no doubt take into account that the claimant may have a legitimate interest in not disputing the most obvious or complete evidence and may prefer to rely on oral evidence rather than producing privileged legal documents."

58. In the later case of ***Hazlett v Sefton Metropolitan Borough Council*** [2000] 4 All ER 887, the principle that there must be a genuine dispute raised by the paying party was reiterated by the Divisional Court (Lord Bingham of Cornhill CJ and Harrison J). Harrison J, giving the judgment of the court, said (at p 893): *"The need for a complainant to give evidence to prove his entitlement to costs rather than relying on the presumption in his favour will not, however, arise if the defendant simply puts the complainant to proof of his entitlement to costs. The complainant would be justified in relying on the presumption in his favour. It would be necessary for the defendant to raise a genuine issue as to whether the complainant is liable for his solicitors' costs before the complainant would be called upon to adduce evidence to show that he is entitled to his costs."*

The court also held that: *"… there is normally a presumption that the complainant will be personally liable for his solicitors' costs and it should not normally be necessary for the complainant to have to adduce evidence to that effect."* (page 892).

59. Indeed, when the bill of costs is served, it is required to contain a certificate as to accuracy to the effect that the costs claimed in the bill do not exceed costs which the receiving party is required to pay to the solicitors presenting the bill. In ***Bailey v IBC Vehicles Ltd*** [1998] 3 All ER 570, the status of the certificate was elevated. In that case, the claimant succeeded in obtaining damages for personal injuries incurred in the course of his employment. The defendants agreed to pay damages together with costs to be assessed. The claimant was assisted financially by his union. When the bill was presented, the defendants objected to the hourly rate and to the claimant's solicitors' mark up and asked for evidence that the bill was not in breach of the indemnity principle. In due course a letter was produced to the court from a union representative which stated that the union's relationship with the solicitor was on the basis that the solicitors were entitled to make a full solicitor/client charge. Nonetheless, the district judge held that they were entitled to disclosure of the relevant material. The Court of Appeal (Butler-Sloss, Henry and Judge LJJ) were clearly very concerned about the prospect of satellite litigation in assessment proceedings. The court held that there was no breach of the indemnity principle merely because the successful litigant was a member of a trade union which provided financial support. It was accepted by the paying party that the costs judge was entitled, if he saw fit, to be provided with the information that he needed. Judge LJ held: *"The [costs] officer is exercising a judicial function with substantial financial consequences for the parties. To perform them he has trusted properly to consider material which would normally be protected from disclosure under the rules of legal professional privilege. If after reflecting on the material available to him, some feature of the case alerts him to the need to make further investigation or causes him to wonder if the information with which he is being provided is full and accurate he may seek further information. No doubt he would begin by asking for a letter or some form of confirmation or reassurance as appropriate. If these were to prove inadequate he might then make orders for discovery or require affidavit evidence … It would theoretically be open to him to order interrogatories. However, if the stage had been reached where interrogatories might reasonably be ordered the conclusion that the receiving party had not been able to satisfy the [costs] officer about the bill or some particular aspect of it would seem inevitable … An emphatic warning must be added against over-enthusiastic deployment of these powers, particularly at the behest of the party against whom the order for costs has been made … The danger of 'satellite litigation' is acute. As far as possible consistent with the need to arrive at a decision which does broad justice between the parties it must be prevented or avoided and additional effort required of the parties to keep to the absolute minimum necessary for the [costs] officer properly to perform his functions."* (pages 572 to 573).

60. The court attached considerable importance to the fact that solicitors are officers of the court and that they are trusted not to mislead the court or to allow it to be misled. Accordingly, the court indicated that it would expect solicitors to disclose the existence of a limit on the fees which they could recover from their client. Judge LJ said: *"They would not have produced a signed bill of costs which included a claim for 'reasonable' costs which would have fallen foul of the indemnity principle … In the ordinary case in which a 'client care letter' has been provided (and certainly if and when the client care letter becomes obligatory) the hourly rate claimed on the bill of*

costs should coincide with the terms of that letter … [I]n view of the increasing interest taken in this issue by unsuccessful parties to litigation, coupled with the developing practice in relation to conditional fees, the extension of the 'client care' letter and contentious business agreements under section 60(3) [on the Solicitors' Act 1974], in future, copies of the relevant documents (where they exist) or a short written explanation … should normally be attached to the bill of costs. This will avoid skirmishes which add unnecessarily to the costs of litigation." (page 575).

61. Our assessor has drawn our attention to paragraph 40.2(i) of the Costs Practice Direction, under which (if there is a dispute as to the receiving party's liability to pay costs to her solicitor) a copy of the client care letter must be produced to the costs judge. He tells us that the client care letter is also from time to time disclosed to the paying party. The client care letter, however, is not the same as the conditional fee agreement although a conditional fee agreement is often an integral part of the client care letter as we shall see in the Accident Group cases.

62. Henry LJ also highlighted the importance of the signature by the solicitor to the bill of costs: *"In so signing he certifies that the contents of the bill are correct. That signature is no empty formality. The bill specifies the hourly rates applied, and the care and attention uplift claimed. If an agreement between the receiving solicitor and his client … restricted (say) the hourly rate payable by the client, that hourly rate is the most that can be claimed or recovered on [detailed assessment] … The signature of the bill of costs under the rules is effectively the certificate by an officer of the court that the receiving party's solicitors are not seeking to recover in relation to any item more than they have agreed to charge their client … For the avoidance of doubt, I also agree that the [costs] officer may and should seek further information where some feature of the case raises suspicions that the whole truth may not been told. And the other side of a presumption of trust afforded to the signature of an officer of the court must be that breach of that trust should be treated as a most serious disciplinary offence."* (p 575)

63. The principles established in the case law we have just described have been seized upon by the respondents both here and below. They contend in essence that, once the solicitor has certified the accuracy of the costs due to his firm, the onus switches to the paying party to show some genuine ground why that certificate may be inaccurate. Specifically this would mean that the paying party in relation to a CFA would have to show some grounds why it may be unenforceable notwithstanding section 58(1) of the 1990 Act.

64. In our judgment, the *Bailey* decision is distinguishable. It was directed to a very different type of challenge. The paying party was not saying that there was no liability at all to pay any costs to the receiving party. The challenge was directed to the hourly rate and mark up being applied. The challenge to a bill of costs must surely move several ratchets up the scale once the challenge changes from a challenge to the figures produced to a challenge to the principle of paying anything at all. It is, of course, true that in respect of many items in a bill the paying party cannot be sure that they are properly incurred without sight of the underlying document. But in most cases the solicitors' certificate as to accuracy will be sufficient (see para 65 below) and paying parties are frequently content to rely on the costs judge. A potential challenge to the whole of a bill by reason of its non-compliance with section 58 of the 1990 Act is of a very different order.

65. The second reason for distinguishing the *Bailey* decision is that the matters which are normally the subject of a certificate as to accuracy are conventional matters. They would include such matters as whether particular advice related to the proceedings, or the correctness of the charging rates. The position is very different with CFAs made under the new Regulations. These introduced a level of complexity as then unknown. Moreover, many of the matters required to be covered by the Regulations are not conventional costs matters at all. This can be seen from the contents of the Regulations and the particular issues which have arisen in the appeals in *Tichband v Hurdman, Hollins v Russell* and *Dunn v Ward.*

66. Our third reason for distinguishing the *Bailey* decision is that the measure of detail provided by a solicitors' bill in normal circumstances is far greater than the information which the paying party will receive about the success fee under the Civil Procedure Rules and the Costs Practice Direction. The only documents under those rules which have to be served on the paying party merely because there is a success fee are:-

    Form N251 (this confirms that particular claims are funded by a conditional fee agreement of a specified date providing for a success fee. The requirement to produce this information is duplicated by paragraph 19.4(2) of the Costs Practice Direction)

The solicitors' bill showing the amount of the success fee

A statement showing the amount of the costs which have been summarily assessed or agreed and the percentage increase which has been claimed in respect of those costs (paragraph 32.5(1)(a) of the Costs Practice Direction)

A statement of the reasons for the percentage increase given in accordance with regulation 3(1)(a) of the CFA Regulations (paragraph 32.5(1)(b) of the Costs Practice Direction). The receiving party may disclose the risk assessment schedule for this purpose

Where points of dispute are served, information about other methods of financing the costs which were available to the receiving party (paragraph 35.7 of the Costs Practice Direction)

67. In addition, the paying party will have the assurance of the certificate as to accuracy attached to the bill. However, the information listed above is extremely basic. There is, for example, no requirement in the CPR or the Costs Practice Direction to specify or disclose the circumstances in which the success fee became payable. Obviously, the solicitor certifying the accuracy of the bill cannot properly certify its accuracy if a success fee has not become payable. However, the condition of the payment of a success fee may not be success in obtaining an order for the payment of damages. It may be conditional, for example, upon receipt of some of those damages. Yet details of the circumstances in which the success fee becomes payable for the purpose of section 58(2) of the 1990 Act are not required to be served on the paying party. In a summary assessment only the risk assessment schedule forming part of the CFA is required to be produced to the court (paragraph 14.9(3) of the Costs Practice Direction).

68. In our judgment, the solicitors' certificate as to accuracy, important though it is, may not be sufficient where the quality and quantity of the information served on the paying party about the success fee is less than would be made available in respect of the other aspects of the bill in the case of an assessment where there is no additional liability claimed.

69. Our fourth reason for distinguishing the *Bailey* decision is that the question whether the CFA complies with the 1990 Act is principally a matter of law. The question whether costs are properly claimed and the amount of the charging rates and like issues raised by conventional bills are generally questions of fact likely to be within a solicitor's peculiar expertise. Matters of law are not. That factor, too, would lead to the conclusion that the certificate as to accuracy may not be sufficient in the context of CFAs.

70. Fifthly, there are policy reasons for not extending the *Bailey* decision to CFAs. Given the complexity of the new Regulations, it is not appropriate to impose on costs judges or district judges the responsibility of acting as a filter to see that the regulations are complied with in every respect. This would be both a complex and time-consuming task, particularly as this would require reference to other documents (for example, attendance notes). Checking whether the CFA complies with the Regulations is likely to consume considerable court resources. Moreover, there will be many cases in which the costs judge or district judge simply cannot be satisfied that the regulations were fully complied with.

71. In all the circumstances, we have come to the conclusion that the ***Bailey*** decision should not be extended beyond the facts with which it was dealing, namely that of a conventional bill, so as to obviate disclosure of the CFA as the norm. As we see it, where there is a CFA, a costs judge should normally exercise his discretion under the Costs Practice Direction and the *Pamplin* procedure so as to require the receiving parties (subject to their right of election preserved by paragraph 40.14 of the Costs Practice Direction and the *Goldman* case) to produce a copy of their CFAs to the paying parties in order that they can see whether or not the Regulations were complied with and (where a CFA provides for a success fee) whether the liability of the receiving party to pay that success fee is indeed enforceable. We consider that this is appropriate where receiving parties may claim more than they would otherwise be entitled to in circumstances in which their whole claim may turn out to be unenforceable. Non-compliance may be sufficient to remove the paying party's liability. The court is entitled and bound to have regard to the interests of paying parties, and those to whom they pass on the costs (see in this connection the concerns of the House of Lords referred to in para 49 above), as well as those of receiving parties. If these appeals are a fair measure of CFAs in general use, it is apparent that mistakes in complying with the Regulations are not uncommon. In these circumstances we consider that greater transparency is desirable. As Brandeis J, the

great justice of the Supreme Court of the United States, once remarked extrajudicially, sunlight can often be the best of disinfectants.

72. If the CFA contains confidential information which is not required to be disclosed for the purposes of fairly determining the receiving party's claim to costs, for example privileged material with respect to issues other than those which have been disposed of by the settlement of the claim, the costs judge may permit that material to be redacted before service. There may be other circumstances which lead the costs judge to conclude that in the particular case he should not exercise his discretion in the manner indicated. However, as we have stated, the receiving party should normally be put to her election to produce the CFA to the paying party or rely on other evidence.

73. We have considered carefully the concern expressed in the *Bailey* decision about satellite litigation. Any satellite litigation generated in any circumstances results in an application of resources for collateral purposes and thus may absorb money and court resources which could be more usefully deployed. It is neither fair to the receiving party nor to other litigants that the courts' resources should be tied up in satellite litigation. However, the concern expressed about satellite litigation in the *Bailey* case applies with less force in the present situation: first, there is already considerable satellite litigation about disclosure which our approach should avoid; and secondly, however, on our interpretation of section 58(1) (see paras 106-109 below) there will be far less incentive for paying parties to raise an issue of non-compliance.

74. Our conclusions do not necessitate any amendment to paragraphs 14.3 (summary assessment) or 40.14 (detailed assessment) of the Costs Practice Direction. In our view the combination of the indemnity principle and a significant increase in the paying party's liabilities results in there ordinarily being a sufficient ground in cases involving a CFA (whether or not the CFA contains a success fee) for the paying party to require the receiving party to be put to her election to produce the CFA or rely on other evidence.

75. The contention of the appellants is that the respondents are in any event not entitled to claim legal professional privilege in respect of their CFAs. In the alternative, they submit that the CFA has to be disclosed because the receiving party is seeking to rely on it. They rely on a passage from the judgment of Pumfrey J in ***South Coast Shipping v Havant BC*** [2002] 3 All ER 779 at p 793, para 29, where the judge held, with respect to privileged material produced to the Costs Judge: *"Once a document is of sufficient importance to be taken into account in arriving at a conclusion as to recoverability, then, unless otherwise agreed, it must be shown to the paying party or the receiving party must content himself with other evidence."*

Mr McLaren QC, who appeared for the appellants in these cases, also referred us to ***Dickinson (T/A John Dickinson & Finance) v Rushmer (T/A F J Associates)*** [2002] 1 Costs LR 98, in which Rimer J took the view that a client care letter was not privileged. Mr McLaren argued that by the stage of the assessment of costs, any privilege has been exhausted.

76. We have heard very little argument in response to the appellants' argument on privilege. In *Worth v McKenna* it was common ground in the court below that the CFA was privileged. Accordingly, the point cannot be taken in that appeal at this stage. In *Pratt v Bull*, Mr Dingle did not put it at the forefront of his argument that the CFA is privileged. He contends in general terms that the appellants seek to conduct a fishing expedition into privileged documents. It was unnecessary for him to argue the question of privilege because of his contention on the effect of the certificate as to accuracy. The Law Society contends in its skeleton argument that the CFA is subject to both advice privilege and litigation privilege but this submission was not amplified orally. Accordingly, we have not heard full argument on the question of privilege.

77. Legal professional privilege protects confidential communications between a solicitor and his client for the purpose of obtaining and giving legal advice. There is a separate litigation privilege when litigation is contemplated, as it was in these cases at the time when the conditional fee agreements were signed. If it is clear that there is a sequence of exchange of information, the court has not adopted "a narrow or nit-picking approach to documents and has ruled out an approach which takes a record of communication sentence by sentence and extends the cloak of privilege to one and withholds it from another" (per Lord Bingham of Cornhill CJ in ***R v Manchester Crown Court ex parte Rogers*** [1999] 1 WLR 832). However, legal professional privilege does not apply to every document generated in the course of a retainer. There must

actually be a communication between the solicitor and the client. In ***R v Manchester Crown Court ex parte Rogers,*** the police had sought disclosure from the applicant's solicitors of any record of the time at which the applicant arrived at the solicitors' premises on a particular date and like documents. The Divisional Court held that such records would not be privileged because they did not relate to legal advice or the subject matter of legal advice. The facts of the present case are not analogous to the record of appointment in that case. We have also considered the very recent decision of this court in ***Three Rivers District Council v Bank of England*** [2003] EWCA Civ 474, [2003] 1 WLR 210, which was concerned with legal advice privilege, but there was no suggestion in that case that privilege did not attach to direct communications between a solicitor and his client.

78. We note that in ***Hodgson v Imperial Tobacco*** [1998] 1 WLR 1056 the issue arose in the course of litigation whether the CFA was privileged but by the time the case came to the Court of Appeal, the defendants had abandoned their application for disclosure. The Court of Appeal (Lord Woolf MR, Aldous and Chadwick LJJ) considered that it was inappropriate to express any concluded view on the question whether a CFA is at any stage of the proceedings subject to professional privilege. Lord Woolf, giving the judgment of the court, said this (at p 1067D-F): *"Before expressing a view we would like to have had before us a claim for privilege specifying the grounds upon which it is based. We would also like to hear the full argument that was not presented on this appeal in view of the approach now adopted by the defendants to their seeking to inspect the CFAs. We recognise that a distinction might exist between the position in relation to any advice given to a client about the advisability of entering into a CFA and the document itself. However, what follows from what we have said as to the effect of CFAs means that absent exceptional circumstances which we cannot envisage, unless and until the other party to the proceedings makes an application for an order making the legal advisers personally liable for costs, the existence or the terms of a CFA are of no relevance to the issues and the proceedings. They are therefore on that ground not required to be disclosed."*

79. This court, too, is being asked to consider the question of privilege in the absence of a claim specifying the grounds relied on. As in the ***Hodgson*** case, it is undesirable for us to express a view on privilege when the matter has not been fully argued. Indeed, as we see it, given the ***Pamplin*** procedure, it is not necessary for us to express a view on privilege. As we have explained above, we consider that the costs judge has ample powers which he should normally exercise to put the receiving party to her election as to whether to produce a copy of the CFA to the paying party.

80. We conclude, therefore, that if, in costs proceedings, a party seeks to rely on the CFA, as a matter of fairness she should ordinarily be put to her election under the *Pamplin* procedure. (This procedure applies whether or not the document is privileged. It is no answer to an exercise of the discretion to contend that the document is privileged.) This is not simply because of the fact of reliance but because of the centrality of the CFA in an assessment of costs in which a CFA is relied upon. If the party does not wish to produce the CFA, she can theoretically undertake to prove the terms of the agreement in some other way. However, we doubt whether costs judges will in general be prepared to accept merely oral evidence of the existence of such an agreement and its terms. On the other hand, the court has a discretion in putting a party to his election to allow parts of it to be redacted if, for instance, those parts contain material which there is a good case for saying should not be revealed to the other party even for the purposes of the assessment only, and which it would not be unfair to the paying party to withhold. For instance, they may relate to legal advice on matters which have not been resolved by the claims in respect of whose disposal the success fee is claimed (for example, claims in separate proceedings), or further proceedings between the same parties may be anticipated. Moreover, there may be exceptional cases in which the costs judge is prepared to say that no purpose would be served by disclosure of the CFA. However, we have been unable to think of any circumstances in which this might arise, but the possibility exists.

81. The appellants in the present cases also seek disclosure of the attendance notes prepared by the receiving parties' solicitors showing compliance with regulation 4. We do not consider that these should ordinarily be disclosed. We consider that the costs judge should not require these to be disclosed unless there is a genuine issue as to whether there was compliance with regulation 4. The measure of explanation given to the client is largely a matter of fact and we consider that it is, therefore, appropriate that the paying party

should have to rebut the presumption arising from the fact that the receiving party's solicitor, an officer of the court, has signed the certificate of accuracy.

82. Although the procedure envisages that the costs judge will put a party to her election as to the disclosure of the CFA, now that it is clear from our judgment in this case that this is to be the general practice, we hope that receiving parties will disclose the CFA without more ado. It would obviously lead to further costs and delay if receiving parties were to take an unreasonable view on this issue.

83. Reliance was also placed on article 6 of the European Convention on Human Rights, the argument being that the paying party was effectively deprived of equality of arms or access to court by denial of access to the CFA and attendance notes. The argument will not now ordinarily arise in relation to the CFA itself. In relation to the attendance notes, the court will, unless it orders disclosure, be proceeding on the basis of a presumption to which the solicitor's certificate of accuracy gives rise. It will not be proceeding on the basis that there is no evidence of compliance with regulation 4. However, the presumption is not irrebuttable. The party seeking to challenge compliance with regulation 4 can raise a genuine issue about this, in which case the costs officer must consider whether in the exercise of his discretion the attendance notes should be disclosed. Once that threshold is reached, the paying party's right of access to court is fully protected (see the ***Pamplin*** case). In our judgment, under Convention jurisprudence, the question what evidence the national court considers necessary to support a claim is a question for national law. The paying parties would have to show that they did not receive a fair trial under the procedures established by the national court. We are not satisfied that this would occur in the type of case with which we are at present concerned. Convention jurisprudence does not, moreover, proscribe a process which filters out fanciful claims (***Z v UK*** [2002] 34 EHRR 97).

84. In ***South Coast Shipping Co Ltd v Havant Borough Council*** [2002] 3 All ER 779, Pumfrey J considered the question whether if the costs judge has been shown documents that the paying party had not been allowed to see, there is a breach of article 6 of the Convention. Pumfrey J concluded that if the costs judge had seen the documents and required the receiving party to elect between giving secondary evidence of the retainer and waiving the privilege, there was no incompatibility with the Convention. The judge continued: *"This is not intended to suggest the costs judge may potentially put the receiving party to its election in respect of every document relied on, regardless of its degree of relevance. I would expect that in the great majority of cases the paying party would be content to agree that the costs judge alone should see the privileged documents. Only where it is necessary and proportionate should the receiving party be put to his election. The redaction and production of privileged documents, or the adducing of further evidence, will lead to additional delay and increased costs."*

We agree.

85. Since the hearing we have read the judgment of District Judge Harrison in ***McCreery v Massey Plastic Fabrications Ltd*** (LTL 21/3/2003). We note that the district judge has given permission to appeal, but as the appeal is not before us it is not appropriate for us to comment in detail on the judgment. We note, however, that the district judge has advocated changes in the practice regarding disclosure of CFAs and risk assessments which go beyond the practice we have laid down in this judgment.

86. It was also argued on these appeals that by authorising his solicitor to seek reimbursement by the paying party, the receiving party has effectively waived privilege in the documents lodged with the court. This submission was based on ***Al Fayed v Commissioner of Police for the Metropolis*** [2001] EWCA Civ 780. In this context, we see no reason to depart from the principles as respects privilege established in the *Goldman* case (see para 56 above).

87. It follows that in *Worth v Mackenna* the order of Judge Marshall-Evans must be set aside. In *Pratt v Bull* paragraph 2(a) of the order of Judge Cotterill must be set aside and paragraphs 2 and 3 of the order of Deputy District Judge Roach restored.

4. Satisfying the conditions in section 58

88. All of these cases raise (or in the disclosure cases may raise) the issue of failure to comply with any of the applicable conditions in section 58(3) and (4), including the requirements prescribed by the Regulations. This primarily involves a question of construing section 58(1). This sub-section, it will be recalled, provides that: *"A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall*

not be unenforceable by reason only of its being a conditional fee agreement; but . . . any other conditional fee agreement shall be unenforceable."

The whole of section 58 was substituted (and section 58A added) by section 27(1) of the Access to Justice Act 1999. Its predecessor, enacted in 1990, had simply provided in section 58(3) that

"Subject to subsection (6) a conditional fee agreement which relates to specified proceedings shall not be unenforceable by reason only of its being a conditional fee agreement."

The only provision specifically making a CFA unenforceable was that in subsection (6) dealing with CFAs which contained a success fee greater than the permitted maximum for the proceedings in question.

89. The new section 58(1) was clearly intended to leave it to Parliament to decide what further inroads might be made into the principle that contingency or conditional fee agreements are unenforceable: see ***Awwad v Geraghty & Co*** [2001] QB 570 (para 14 above). It also reflected Parliament's assessment of the state of public policy in this area: see ***R (Factortame Ltd) v Secretary of State for Transport (No 8)*** [2002] EWCA Civ 932 at [61]; [2002] 3 WLR 1104. The question for us is whether it was also intended to render unenforceable a CFA which did not comply in every particular with the requirements of the section and of regulations made under powers contained in the section.

90. Mr Drabble QC, for the Law Society, took the lead in arguing this issue, with the support of counsel for all the receiving parties. He argued that the statutory regulation has two distinct aims. The first is to ensure that CFAs do not have an unacceptable tendency to corrupt public justice - that is to place the legal representative in an intolerable conflict between his own self interest and his duty both to his client and to the court. The second is to protect the client - to ensure so far as possible that she understands what she is letting herself in for and is able to make an informed choice amongst the funding options available to her.

91. Thus, he argued, the conditions provided for in the section itself were designed to avoid any tendency to corrupt public justice: the agreement must be in writing (s 58(3)(a)), must relate to the right sort of proceedings for any sort of CFA (s 58(3)(b)) or for a CFA with a success fee (s 58(4)(a)), must state the percentage of any success fee (s 58(4)(b)), and that percentage must not exceed the prescribed limits (s 58(4)(c)). The requirements which have in fact been prescribed by the Regulations (for the purpose of s 58(3)(c)), on the other hand, are there to protect the client rather than the wider public interest, although Mr Drabble accepted that requirements might be prescribed which had a wider purpose.

92. His first submission was that "unenforceable" means only unenforceable in proceedings between solicitor and client, so that it is not open to the paying party to take the point. A great deal of the written and oral submissions to us concerned this point, and in particular the distinction between an unenforceable and an illegal contract. It faces the immediate difficulty that in *Dimond v Lovell* [2002] 1 AC 384, HL, the defendant was able to resist paying the claimant's car hire charges on the ground that the hire agreement was an unenforceable consumer credit agreement between the claimant and the hirer. It is difficult to see any difference in principle between this situation and that.

93. In any event, as we have already said at paragraph 52 above, even if correct, this argument would be of no help to the receiving parties because of the indemnity principle. Again, a great deal of the argument before us was directed at qualifying the application of that principle in these cases. Ultimately, however, it became clear that a CFA is a contentious business agreement to which section 60(3) of the Solicitors' Act 1974 (see para 23 above) applies. If the solicitor cannot enforce the agreement against his client, then the amounts provided for in the agreement are not payable by the client at all (as discussed in paras 113 to 116 below, the position as to the ATE premium and disbursements is different). In the present state of the law, therefore, they cannot be recovered from the other side.

94. It was also argued that this construction of section 58(1) would undermine the policy on access to justice and the statutory objective contained in section 17(1) (see para 17 above). However, this sub-section contains not one purpose but two, increasing access to justice and maintaining a proper and efficient system of justice. These two objectives have to be balanced. It cannot be the case that Parliament was entirely unconcerned with the interests of the other party to the litigation. The replacement section 58, together with section 58A, was enacted at the same time as paying parties were made liable for both the success fee and the ATE insurance premium. These are significant additional liabilities. There are also the

concerns referred to in the House of Lords in *Callery v Gray* (see para 49 above). The requirement that the CFA be in writing and the statutory cap on the success fee, for example, also provide some protection for paying parties.

95. Accordingly, we reject Mr Drabble's first submission.

96. Mr Drabble's third submission was that the prescribed requirements should themselves be construed in a realistic way, on the basis that the maker of the delegated legislation should not be taken to have intended that it should be construed in so rigid a fashion as to render the whole CFA unenforceable, and thus the whole of the solicitor's fees irrecoverable, because of a minor breach. More precisely, this submission is that what at first sight might appear to be a breach is not a breach at all because the regulations when properly construed do not require anything different.

97. He acknowledged that this approach has its disadvantages. The main disadvantage is that it might tempt a court in costs proceedings, where the client herself makes no complaint and has suffered no detriment, to interpret the requirements in such a way as to dilute the protection given; but in other proceedings, where the client had indeed suffered detriment and wished to raise a legitimate complaint against her legal representative, the court would not wish to do this. Mr McLaren showed us that a client may still be at significant risk under a CFA, for example if she refuses a Part 36 offer, or the costs recovered from the paying party do not meet everything in the solicitor's bill, or she has had to pay interest on a loan to fund the ATE premium, or she fails to recover the whole premium. Not all solicitors will be prepared to forego these charges, especially in higher value cases than those with which we are concerned. The need for consumer protection, though reduced under the new scheme, is still real.

98. An example of this difficulty might be the issue under regulation 2(1)(d) raised in *Tichband v Hurdman* and *Hollins v Russell* (see paras 118 to 130 below): from a consumer protection perspective it is more important for a client to be told that there is no cap on the amount in costs for which they might become personally liable than that there is such a cap. The research by Yarrow and Abrams (see paras 25 and 27 above) indicated that clients were confused between conditional fees on the UK model and contingency fees on the American model. They might well assume that the solicitor became entitled to a percentage of the damages recovered rather than an extra percentage of his normal charges. In construing that requirement, it might be said, we should not be tempted to conclude that it is unnecessary to make clear the absence of a cap simply in order to save the CFA.

99. Another disadvantage of this approach is that it deals only with those points which have so far been raised. Experience has shown and is continuing to show that there is no end to the arguments of paying parties. It is a fair assumption that once one head of the hydra has been slain two more will pop up in its place. Even if in due course it turns out to be unfounded, much time and effort may have been devoted to dealing with it by costs judges up and down the country to the detriment of the efficient administration of justice which was one of the objectives of the 1990 Act.

100. Hence Mr Drabble's preferred approach was his second submission. The words "satisfies all the conditions applicable to it" in section 58(1) should be construed in a realistic way to reflect the purposes of the legislation. These were to increase access to legal services by making new types of funding arrangements possible, while protecting both the public interest and the interests of clients. Parliament will not have intended to render unenforceable CFAs which fulfilled the first objective without detriment to the second. Hence an agreement which satisfies all the conditions of the primary legislation and substantially if not literally conforms to the prescribed requirements should be held to satisfy the conditions applicable to it. Put another way, an agreement should not be held unenforceable for immaterial breaches of the regulations.

101. He drew an analogy with the approach to breaches of procedural rules adopted by this court in ***R v Secretary of State for the Home Department, ex parte Jeyeanthan*** [2000] 1 WLR 354. At p 358, Lord Woolf MR commented on the conventional distinction between directory and mandatory requirements thus: *"The position is more complex than this and this approach distracts attention from the important question of what the legislation should be judged to have intended should be the consequences of the non-compliance. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance."*

He concluded his discussion of examples at p 359: *"It must be remembered that procedural requirements are designed to further the interests of justice and any consequence which would achieve a result contrary to those interests should be treated with considerable caution."*

102. The point is well taken by Mr McLaren that these observations were made in the context of procedural rules which made no express provision for the consequences of breach. By contrast, section 58(1) makes express provision for the consequences of failure to satisfy the applicable conditions. Unlike, for example, the Consumer Credit Act 1974, there is no graduated response to different kinds of breach: it is all or nothing. On behalf of the paying parties both Mr McLaren and Mr Burnett QC (who appeared for the defendants in the *TAG test cases)* accepted that the principle that the law does not care about very little things applies here. But they urged us not to elaborate it by reference to concepts of materiality derived from public law.

103. However, we are not here concerned with the interpretation of "unenforceable". That was the subject matter of Mr Drabble's first submission. We are concerned with the meaning of the words *"satisfies all of the conditions ...".* Mr Drabble also drew a little support from some words of Lord Woolf MR in ***Hodgson v Imperial Tobacco*** [1998] 1 WLR 1056, at p 1065. Lord Woolf was pointing out that a legal adviser acting under a CFA should be no more vulnerable to an order for costs against him personally than any other legal adviser, provided that the CFA was inside the protection provided by section 58 (in its original form): *"If the statutory requirements are complied with the CFA will be valid and enforceable by the legal advisers against a client. If it* ***materially*** *departs from the legislative requirements it will not be enforceable and will not be a CFA which is protected by [the section]." [Our emphasis]*

104. Of course, too much should not be read into an adverb used in the course of arriving at the conclusion that no pre-emptive order was required to protect the solicitor's position. But the case is an early example of the court's desire to further the Parliamentary purpose by respecting rather than suspecting this innovation in funding legal services. The House of Lords has recently reminded us of the principles of purposive construction in ***R v Secretary of State for Health, ex parte Quintavalle*** [2003] UKHL 13; [2003] 2 WLR 692. Lord Bingham, at para 8, said this: *"The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encouraged immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."*

105. We have already considered (in paras 1 to 40 above) the historical context of this legislation, its declared statutory objective, the extensions to the CFA regime in April 2000, and the purposes of the regime in section 58 and the new Regulations. In approaching the meaning of the words "*satisfies the conditions… "* we can be confident that Parliament would not have meant to render unenforceable a CFA which adequately meets the requirements which were designed to safeguard the administration of justice, protect the client, and acknowledge the legitimate interests of the other party to the litigation. The other party to the litigation has no legitimate interest in seeking to avoid his proper obligations by seizing on an apparent breach of the requirements which is immaterial in the context of the other two purposes of the statutory regulation.

106. The question whether something is "satisfied" inevitably raises questions of degree. What is enough to satisfy? There can be different degrees of satisfaction. A court may be satisfied beyond reasonable doubt or on the balance of probabilities but it is still satisfied. Different things can be satisfied in different ways. Hunger is satisfied by enough to eat. Greed may only be satisfied by more than enough. Sufficiency produces satisfaction. Conditions are satisfied when they have been sufficiently met. How sufficiently must depend upon the purpose of the conditions. It is not impossible to imagine conditions which would only be sufficiently met if they were observed in every minute particular: the specifications for precision

machinery might be an example. But in general conditions are sufficiently met when there has been substantial compliance with, or in other words no material departure from, what is required.

107. The key question, therefore, is whether the conditions applicable to the CFA by virtue of section 58 of the 1990 Act have been sufficiently complied with in the light of their purposes. Costs judges should accordingly ask themselves the following question: *"Has the particular departure from a regulation pursuant to section 58(3)(c) of the 1990 Act or a requirement in section 58, either on its own or in conjunction with any other such departure in this case, had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice?"* If the answer is "yes" the conditions have not been satisfied. If the answer is "no" then the departure is immaterial and (assuming that there is no other reason to conclude otherwise) the conditions have been satisfied.

108. We would not draw any formal distinction between the conditions contained in the section itself and those contained in the Regulations. The meaning of "satisfies" must be the same in each case. However, it is more difficult to envisage questions of degree coming into the question whether the conditions in the section have been sufficiently met. Either the CFA relates to permissible proceedings or it does not. But one example might be that in section 58(4)(b) which requires that a CFA providing for a success fee "must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased". Was that condition sufficiently met by an agreement such as that in *Tichband v Hurdman,* which left blank the percentage in the clause where it should have been filled in but stated it clearly in the risk assessment (see para 133 below)? The answer to that question is obviously "yes".

109. We would, however, draw from both ***Jeyeanthan*** and ***Factortame*** the principle that sufficiency or materiality will depend upon the circumstances of each case. This is not to encourage paying parties to trawl through the facts of each case in order to try to discover a material breach. Quite the reverse. At the stage when the agreement has been made, acted upon, and success for the client has been achieved, it is most unlikely that any minor shortcoming which the paying party might discover in the agreement or the procedures leading up to its making will amount to a material breach of the requirements or mean that the applicable conditions have not been sufficiently met.

110. We should, for completeness, mention one other argument which was put to us. This drew a distinction between the requirements of regulation 4, which relate to what must be done before a CFA is made, and the requirements of regulations 2 and 3, which relate to the content of the CFA itself. Section 58(1) speaks of the "conditions applicable to it", and "it" is the CFA. The requirements in regulation 4 do not relate to the CFA at all but to what must be done beforehand. Section 58A(3)(a), which enables the Lord Chancellor to prescribe under section 58(3)(c) requirements about the information to be provided before the agreement is made, reinforces rather than undermines the argument. Without it, it is argued, a power to prescribe requirements with which the CFA must comply would not encompass this.

111. We reject this argument for three reasons. First, section 58A(3)(a) clearly characterises such requirements as among those with which the agreement must comply for the purpose of section 58(3)(c). Secondly, the words "applicable to it" are readily able to encompass steps taken by one of the parties before the agreement is made. Thirdly, regulation 2(2) requires a CFA to state that regulation 4 has been complied with, thus making compliance part of the obligations under the CFA.

112. The argument is also unattractive on policy grounds. Pre-contract warnings are a common feature of consumer protection legislation. They are likely to be more important than the contract itself in ensuring that, so far as possible, the client understands both what she is letting herself in for and, more importantly, the alternatives available to her. To hold that section 58(1) did not apply to breaches of regulation 4 would be to deprive the client of a remedy, which Parliament considered important.

113. Before leaving the subject of compliance, we should mention two other points which were discussed during the hearing and upon which there appeared to be common ground. They are not necessary to our decision but they could be of considerable importance in practice. They relate to the recoverability of the ATE premium and any disbursements which the client has in fact paid "up front" whether personally or by taking out a loan to do so.

114. Section 29 of the Access to Justice Act 1999 provides that: *"Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy."*

It will be seen, therefore, that ATE insurance premiums are recoverable as costs in any proceedings, irrespective of whether or not there is a CFA between the receiving party and her legal representatives. The client's liability to pay the insurance premium arises from the contract of insurance, not from her contract with the legal representative. It arises whether or not there is a CFA and whether or not the CFA is enforceable. The CFAs which we have seen refer to the possibility of such insurance, but do not make it a term of the contract that such insurance is taken out. It would appear, therefore, that there is no bar to the recovery of the ATE insurance premium as costs whatever may be the bar to the recovery of the lawyers' charges and success fee.

115. Secondly, it is not uncommon for the client to put the solicitor in funds for the purpose of paying disbursements, for example the fees of medical or other experts. The funds may be provided either from the client's own pocket or financed by a loan to the client for which the client is legally responsible irrespective of the fate of the CFA. The solicitor is required to retain this money on clients' account until it is expended in accordance with the client's instructions. If the CFA fails, and the money has not been paid out, the solicitor would be required to pay it back to the client. If the money has been paid out, then this is money actually paid by the client. Mr McLaren accepted that this should be recoverable by the client as costs. The costs claim is that of the client, not of the solicitor. If the client has actually paid a debt to a third party, properly incurred in the conduct of the litigation, there seems no reason why this should not be recoverable from the paying party, insofar as it is reasonable and proportionate. (If a debt to a third party has been properly incurred, the paying party will not have to reimburse it until it has in fact been paid, but at that point it will become money actually paid by or on behalf of the client and thus recoverable from the paying party.) This is irrespective of whether the solicitor can enforce the CFA for his charges and success fee.

116. These two propositions would go a long way to remove any detriment suffered by the lay client as a result of a CFA being found unenforceable in costs proceedings. The client can recoup his or her own expenditure on the proceedings from the paying party. The true interests in the cases before us, therefore, are those of the solicitors rather than the clients. That does not in any way invalidate the conclusions to which we have come.

5. Particular allegations

117. We now turn to the specific allegations of breaches of regulations which have been made in five of these cases: *Hollins v Russell, Tichband v Hurdman, Dunn v Ward, Pratt v Bull* and the *TAG test cases*. In these cases we are concerned with elements of regulations 2, 3 and 4. The appeal in *Hollins v Russell* is concerned with regulation 2(1)(d) alone. In *Tichband v Hurdman* this sub-regulation and regulation 3(1)(b) are in issue. In *Pratt v Bull, Dunn v Ward* and the *TAG test cases* we are concerned with aspects of regulation 4.

(i) Regulation 2(1)(d)

118. No difficulty will arise under regulation 2(1)(d) for solicitors who use the Law Society's model CFA which came into use in July 2000. It contains the following clear statement: *"If you win your claim, you pay our basic charges, our disbursements and a success fee. The amount of* ***these*** *is not based on or limited by the damages."* (Emphasis added)

119. In *Hollins v Russell*, the Law Society's April 2000 model CFA was used. This contains the following provision under the heading "Paying Us": *"If you win your claim, you pay our basic charges, our disbursements and a success fee. The amount of* ***the success fee*** *is not based on or limited by reference to the damages."* (Emphasis added)

120. In *Tichband v Hurdman* no reference at all was made to the question whether any element of the amounts payable were limited by reference to the damages recovered. In that case there was also no reference in the CFA to the matters covered by regulation 3(1)(b).

121. In the courts below, Judge Holman and Judge Tetlow held that the CFAs did not comply with the CFA Regulations in the relevant respects, and that they were unenforceable for that reason.

122. It will be remembered (see para 31 above) that regulation 2(1)(d) requires a CFA to specify the amounts which are payable in all the circumstances and cases specified or the method to be used to calculate them "and, in particular, whether the amounts are limited by reference to the damages which may be recovered on behalf of the client". This is clearly a reference to the sort of cap recommended by the Law Society under the old CFA regime, where success fees could not be recovered as part of a solicitor's costs from the other side and the suggested cap preserved for the client at least 75% of the damages she recovered.

123. It is apparent that if the risk that a successful client may have to pay some of the costs under the new CFA regime is a real one – and we have described (see para 97 above) how Mr McLaren, who appeared for the defendants in these two cases, showed us instances in which this potential risk might be a real one – the absence of a cap would be more disadvantageous to a client in those circumstances than the presence of a cap.

124. Given the potential importance to the client of knowing that there is no limit to the amounts for which she may be held personally liable, and given the continuing concerns about consumer protection which led to the new 2000 Regulations, we are reluctant to place too much weight on the change from "whether or not" in the 1995 Regulations. "Whether" is clearly capable of expecting both the answer "yes" and the answer "no" even without the addition of the words "or not". It all depends upon the question being asked. If a person is asked whether he is coming to dinner, the questioner clearly expects to be given an answer, whether it is yes or no. If a person asks whether it is raining, he clearly expects to be told either that it is or that it is not. If a client asks whether the sums she will have to pay will be limited by the amount of the damages she recovers, she clearly expects to be told if they are not.

125. The operative requirement in regulation 2(1)(d) is that the CFA must "specify" the matters listed in regulation 2(1)(a) to (d), including "*in particular, whether the amounts are limited by reference to the damages which may be recovered on behalf of the client.*" The ordinary meaning of "specify" is to state explicitly (see, for example ***BWE International Ltd v Jones*** [2003] EWCA Civ 298 at [27]). In both *Hollins v Russell* (para 119 above) and *Tichman v Hurdman* (para 120 above), there was a departure from regulation 2(1)(d) and we now turn to consider whether, applying the test formulated above, section 58(1) rendered the CFAs in those cases unenforceable.

126. To fulfil precisely the requirements of the regulations, the CFA in *Hollins v Russell* should have said in terms that basic charges and disbursements (as well as the success fee) were not limited by reference to the damages which might be recovered on behalf of the client. However, the extract from the CFA in this case (quoted in para 119 above) continues *"You are entitled to seek recovery of part or all of our disbursements, basic charges … from your opponent. Please see [Law Society Conditions 4 and 6]."*

Law Society Condition 4, accompanying the CFA, says this: *"If you win: You are then liable to pay all our basic charges, our disbursements and our success fee …"*

Law Society Condition 4 then explains that these items can be recovered from the client's opponent, unless they are disallowed by the court. It states that in that event *"you pay the difference"*. The same is stated to be the position if the opponent is publicly funded and basic charges and disbursements cannot be recovered for that reason.

127. The CFA has to be read as a whole and when it is so read its meaning is that basic charges and disbursements are payable in full and are not limited by reference to damages. This is expressly stated in relation to the success fee and it would clearly have been preferable if it had been so stated in relation to basic charges and disbursements as well, in the part of the agreement set out in paragraph 119 above.

128. We thus resolve the question of construction in the receiving party's favour but that is not in itself enough because, as we have said in paragraph 107 above, the court must ask: Has the particular departure from regulation 2(1)(d), either on its own and in conjunction with any other departure in this case, had a materially adverse effect either upon the protection provided for the client by the requirement in question or the interests of the administration of justice? If the court can be satisfied that the answer to this question is "No", the requirements of section 58(1) of the 1990 Act, read in conjunction with section 58(3)(c), are met.

In the present case, we consider that the effect of the CFA read as a whole is sufficiently clear and that the failure to specify the position did not affect the protection given to the client or the administration of justice to any material degree. The result would have been different if the CFA was less clear as to its effect, that is if it would not have been reasonably comprehensible to a lay person. Accordingly, we allow the appeal in *Hollins v Russell* and set aside the order made by Judge Tetlow.

129. Although the agreement in *Tichband v Hurdman* does not state in so many words whether the amounts payable under the CFA are limited by reference to the damages which may be recovered on behalf of the claimant, clause 30 of the CFA makes it clear that the amount of the solicitors' base costs is calculated by applying an hourly rate to the number of hours spent. This method of calculating the base costs is obviously not one which is dictated by the amount of the damages recovered, and there is no suggestion in the agreement that the costs are limited by reference to the damages. The agreement is in plain language and perfectly clear about this.

130. We have accordingly concluded that in the context of this particular agreement, too, the position was spelt out with sufficient clarity that the client can have been in no doubt about it. The test we have formulated above is met and accordingly the requirements of section 58(1) are satisfied.

(ii) Regulation 3(1)(b)

131. In *Tichband v Hurdman* the motorist's insurers also relied on a point under regulation 3(1)(b). Under this regulation the CFA was required to specify how much of the percentage increase (by way of success fee), if any, related to the cost to the legal representative of the postponement of the payment of his fees and expenses. This has to be specified because under the Costs Rules this part of a success fee cannot be recovered from the paying party (see CPR 44.3B(1)(a)).

132. The point the defendants' insurers sought to take (and on which they succeeded before Judge Holman) is as unattractive as it is unmeritorious. Clauses 32 and 33 of this CFA are headed "Success Fee" and read:

"32. The reasons we have set the success fee at the level stated are explained on the Risk Assessment form attached to this agreement. We will not seek to recover from you any of the success fee which we are unable to recover from your opponent.

33. None of the success fee is attributable to the postponement in paying our fees."

133. The amount of the percentage uplift on the solicitor's basic charges was omitted from the first page of the CFA. The Risk Assessment form, however, makes it clear that there is to be a total success fee of 45%, made up of one component of 15% and six components of 5% each. One of the latter represents the cost of postponing payment of the solicitor's costs until the end of the case.

134. Mr McLaren was compelled to admit that as between solicitor and client no court would dream of allowing the solicitor to recover this 5% from his client when he was necessarily unable to recover it from the paying party due to the operation of CPR 44.3B(1)(a). The language of Clause 32 makes this clear. The reality therefore is that, despite what is said in the risk assessment calculation, none of the recoverable success fee is attributable to the postponement in payment of the solicitor's fees. Taken together, Clauses 32 and 33 prevail over the risk assessment schedule, and thus on its true construction the CFA in this case complies with the Regulations.

135. For these reasons we also allow the claimant's appeal in *Tichband v Hurdman*. The order of Judge Holman must therefore be set aside.

(iii) Regulation 4(2)(c)

136. In *Pratt v Bull, Dunn v Ward* and the *TAG test cases* regulation 4 is in the spotlight. Under regulation 4(2)(c) a client must be informed *"whether the legal representative considers that the client's risk of incurring liability for costs in respect of proceedings to which the agreement relates is insured against under an existing contract of insurance"*.

137. In *Pratt v Bull*, the 80 year old claimant was severely injured when she was struck by the defendant's car when using a pedestrian crossing. Initial instructions were given by relatives while she was in intensive care. The following month, when she had recovered enough to give instructions, a solicitor visited her in hospital and a standard CFA was made. When her solicitors sought to recover their costs, the defendant's solicitors demanded to be provided, not only with the CFA, but also with attendance notes and documents

to show that she had been given all the oral and written information required by regulation 4. They expressed concern that other methods of funding might not have been properly explored. They seized upon one reply given to their questions as indicating that the possibility of legal expenses insurance under her home insurance policy had not been fully explored. The claimant's solicitor's response was that other funding possibilities had indeed been discussed. "Evidently our client did not think she had cover. . . . Of course there was consideration of the point but to a reasonable degree where this lady was still lying in her hospital bed recovering from the horrific injuries inflicted by your insured".

138. For the reasons given earlier (see paras 81 to 86 above) we do not consider that documents such as these should ordinarily be disclosed, nor should the costs judge require this unless there is a genuine compliance issue. In our view, this is a classic case in which there was no good reason to think that the conditions applicable to this CFA had not been sufficiently satisfied. There are limits to what can reasonably be expected of the interchange between solicitor and client in circumstances such as these. It would be ridiculous to expect a solicitor dealing with a seriously ill old woman in hospital to delay making a CFA while her home insurance policy was found and checked. It is sufficient to satisfy section 58 that he had discussed it with her and formed a view on the funding options.

139. It must be remembered that recovery of the insurance premium is provided for under section 29 of the 1999 Act (see para 114 above) and is an entirely separate matter from the enforceability of the CFA. If the premium is unreasonable or if, in all the circumstances, it was not reasonable to enter into the policy, the matter can be raised on assessment in the usual way.

140. For these reasons we do not consider that the defendant's solicitors in *Pratt v Bull* were entitled to disclosure of the documents they were seeking for the reasons they gave. We have dealt with the quite different issue relating to the routine disclosure of the CFA itself in the third section of this judgment.

(iv) Regulation 4(2)(e)(ii)

141. **In *Dunn v Ward*** the CFA ended in these terms, so far as is material:

"*Other points*

Immediately before you signed this agreement, we verbally explained to you the effect of this agreement and in particular the following:

(e)(i) In all the circumstances, on the information currently available to us, we believe that a contract of insurance with Temple Legal Protect Ltd is appropriate. Detailed reasons for this are set out in Schedule 2.

(ii) In any event, we believe it is desirable for you to insure your opponent's charges and disbursements in case you lose.

(iii) The premium payable for this insurance is payable by you, although in certain circumstances it may be recoverable from your opponent."

142. District Judge Wallace considered that the word "whether" in regulation 4(2)(e)(ii) meant "whether or not". Even if a solicitor had no interest in recommending a particular insurance contract he must expressly state this to the client. For this reason he held that this sub-regulation was not complied with.

143. Judge Barnett allowed the claimant's appeal against this decision. He said that the purpose of this sub-rule was to ensure that the client knew if the legal representative had an interest in a particular product he recommended. It would be of no consequence to the client if there was no such interest. Parliament must have introduced this requirement in order to ensure that clients were protected, and part of that protection involved them having the information they needed in order to make properly informed decisions. Clients did not need to know facts for this purpose which were wholly irrelevant to the decision to be made. The *raison d'être* of the CFA regime was to increase and facilitate access to justice, and it could not be right to declare a CFA unenforceable merely because it did not mention some fact which was wholly immaterial.

144. In our judgment the judge was correct. In this context there is no reason to construe "whether" as meaning anything other than "if". The language of the regulation set out in paragraph 34 above mirrored the language of the government's February 2000 paper (see para 29 above). The mischief which this regulation was introduced to remedy was the risk that the client's legal representative might induce the client to enter into insurance arrangements in which he had an interest. If he had no interest, then there was no identified mischief. In our judgment Mr McLaren was embarking on a quite hopeless quest when he sought to

establish reasons why it might have been desirable for the legal representative to say in terms that he had no relevant interest when he recommended the insurance contract in question. The answer is that these regulations do not require him to.

(v) Regulation 4(5)

145. The defendants' insurers in ***Dunn v Ward*** also sought to establish a breach of regulation 4(5), which requires the legal representative to explain the effect of the CFA in writing to the client before she enters into it, in addition to the oral explanation of its effect required by regulation 4(3).

146. The evidence on this issue is slightly surprising, although typical of the muddles that may occur in the course of a busy litigation solicitor's practice. Miss Dunn had a cast-iron claim for damages for the injuries she suffered when the bus in which she was travelling was involved in a road traffic accident. She contacted her solicitors on 23rd May 2001, and in a 48 minute interview she elected to enter into a CFA and received a full oral explanation of the effects of a CFA (so as to satisfy regulation 4(3)). It is not clear whether she met her solicitor for this interview, or whether the explanation was given to her on the telephone.

147. It appears that on the same day her solicitors posted her two documents. The first was their standard introductory client care letter, written as if she were a privately paying client. They confirmed that they had taken out an ATE insurance policy on her behalf with Temple Legal Protection Ltd (a matter on which she had instructed them to proceed during her interview that day) but they made no mention of a CFA. At the end of their letter they said: *"Unless otherwise agreed, these terms of business apply to any future instructions you give us".*

148. The other document they sent her was the CFA. This was in two parts, although they were stapled together. The first was headed "Conditional Fee Agreement", and is based on the Law Society's July 2000 model CFA. The second is headed "Law Society Conditions" and is identical to the conditions which follow at the end of that model CFA.

149. We were told that this composite document won a "Plain English" award for the clarity of its wording. It is in clear, legible print. It starts: *"The agreement is a binding legal agreement between you and your solicitors. Before you sign, please read everything carefully.*

An explanation of words like 'our disbursements', 'basic costs', 'win' and 'lose' is in Condition 3 of the Law Society Conditions which you should also read carefully."

150. Signposted as she was to the Law Society Conditions, Miss Dunn would have been able to read the effect of the CFA expressed in clear terms. If she had then turned back to the part of the CFA which refers to the Law Society Conditions she would have read: *"You should read the conditions carefully and ask us about anything you find unclear."*

151. She then signed the agreement. She also signed a statement which read: *"I confirm that my solicitor [has] verbally explained to me the other points set out in paragraphs (a) to (e) above."*

This list contains the matters listed in regulation 4 which the solicitor's attendance note shows that he explained to Miss Dunn on 23rd May.

152. Judge Barnett refused to find that this clear explanation of the effect of the CFA, albeit contained in a document attached to the CFA and forming part of it, contravened the requirements of regulation 4(5). He said that there was no reason in principle why an agreement should not be or contain an explanation of its own terms and effect, and that there was nothing in the 1990 Act or the CFA Regulations which unambiguously excluded this possibility, or required its exclusion by necessary implication. Having reached that conclusion, he expressed the view that although this arrangement did not breach the regulation, it would be better to have a free-standing document containing the required explanation.

153. All these cases turn on their own facts. The regulatory intention is that the client should not be left in the confusion portrayed by the Yarrow and Abrams research study. If these documents had been in small print and as far removed from winning a prize for Plain English as many documents of their type, then it is obvious that regulation 4(5) would have been breached. On the facts of the present case, however, we asked Mr McLaren to describe what sort of additional document his clients required to see as explaining

the effect of the CFA more clearly than the Law Society Conditions did. We did not receive a very clear answer. No doubt if the solicitors had essayed a short letter summarising part of the effect of the CFA more briefly, Mr McLaren's clients would have complained that this abbreviated explanation did not explain its full effect, and that the regulation had been breached for that reason instead.

154. We therefore agree with the approach adopted by the judge and also with his preference for a free-standing explanatory letter, which may of course cross-refer to any part of the Law Society Conditions which sets out the effect of the CFA with clarity. For these reasons we dismiss the appeal in *Dunn v Ward*.

(vi) The TAG cases: who is the "legal representative" in regulation 4?

155. In the *TAG test cases* the factual position was very much more complex, although the defendant's appeal eventually fell to be determined on a comparatively straightforward point of law. This is another regulation 4 case, and the point of law in issue was whether the regulation 4 information was given to the claimants by someone who qualified as "the legal representative" for the purposes of that regulation.

156. By regulation 1(3) the term "legal representative" is defined to mean "the person providing the advocacy or litigation services to which the conditional fee agreement relates".

157. The TAG arrangements are fully described in Master Hurst's masterly judgment. This is now reported under the name of ***Sharratt v London Central Bus Company Ltd*** [2003] 1 All ER 353. He was concerned with preliminary issues in 19 test cases, all of them small personal injury claims which were settled without the need for legal proceedings for sums varying between £1,000 and £3,500. The claims for costs varied between £3,400 and £4,900. A number of different insurance companies represented the defendants in these cases. Before Master Hurst, Mr Burnett QC and Mr Williams were instructed by one group of insurers, and Miss Taylor by the other. On the appeal to this court all three counsel appeared for the defendants in all nine cases.

158. For the purposes of this judgment the facts can be summarised much more briefly than was necessary for the purposes of Master Hurst's judgment. In November 1999 The Accident Advice Bureau Ltd launched an insurance backed CFA in anticipation of the coming into force of the 1999 Act and the abolition of legal aid for personal injury claims. At that time ATE insurance premiums and the percentage uplift on CFAs with success fees were not recoverable.

159. On 1st April 2000 Part II of the 1999 Act came into force, as did the Conditional Fee Agreements Order 2000 and the CFA Regulations. The Accident Advice Bureau Ltd became The Accident Group Ltd (TAG). The TAG scheme grew rapidly. In a report on personal injury litigation in 2001 TAG was described as the market leader with a market share of 15%. Master Hurst was told that cases were being accepted at the rate of 15,000 per month. Users of the scheme were required to use the services of TAG agents and a specified medical agency, and to take out an ATE insurance policy with TAG's nominated insurers.

160. When liability insurers took the point that each CFA was unenforceable for a number of different reasons and each ATE premium irrecoverable, a number of test cases were selected in order to test the viability of the insurers' arguments. In particular they were contending that the information given by the TAG representative to a potential client did not comply with regulation 4 of the CFA Regulations because, among other things, that representative is not a "legal representative" within the meaning of that regulation. Master Hurst was told that there were about 211,000 cases in which this point had arisen, and that if the court were to find that the regulation had not been complied with this would result in a "windfall" of £1 billion or more to the liability insurers. It was also said that it would have a devastating effect on the 700 or more firms of solicitors that are TAG panel members.

161. The defendants were sceptical about the accuracy of these figures. TAG had not provided data showing how many cases led to successful claims, or how many dropped out of the scheme. The figure of £1 billion was calculated in a broad brush way, included the insurance premiums, and made no allowance for reductions on detailed assessment. They also questioned the assumptions that the average costs in the simplest cases would be about £4,000, that all cases would be successful, and that every case was indistinguishable from the test cases on other grounds. However all this may be, there is no doubt that the viability of a very well-used scheme is under challenge in these test cases.

162. To put the matter quite simply, the 700 panel solicitors whom TAG uses play a carefully defined role in a highly organised structure. They are each bound by the conditions of the agreement they make with TAG, and TAG's operations manual, the terms of which each solicitor is bound to observe, and which is updated from time to time, sets out the framework within which TAG's clients' claims are processed. The solicitors have to use a standardised client care letter and a standardised CFA (with no success fee). What they lose by acting without fee in losing cases and without the consolation of a success fee in the cases which they win is made up, they hope, by the volume of potentially successful cases they hope to receive from TAG every month.

163. TAG obtain their clients through their presence in shopping centres, through cold calling, or through telephone inquiries in response to advertisements. The client signs some initial documentation, which includes a TAG service agreement and declaration form, and TAG then sends an agent employed by an associated company to complete a questionnaire at the client's home. This will contain sufficient detail to enable solicitors to assess whether the claim has a better than 50% chance of success. A firm called Rowe Cohen vets the viability of all TAG's claims against this criterion and the additional criterion that the damages are likely to exceed £1,500. If the cases pass these two tests, the papers are then sent to a panel solicitor for the first time.

164. At this stage the panel solicitor's responsibilities are fairly limited. He must consider the papers and apply the same tests. If the tests are not passed, he will reject the case and send the papers back to TAG. If the tests are passed, he will send the client a letter of introduction, and will enclose with that letter a standard client care letter, duly completed, a standard CFA, and a copy of the completed questionnaire.

165. In the introductory letter he tells the client that a TAG representative will contact her by telephone very soon to arrange an appointment to call and see her on his behalf to ensure that the client understands the nature of their agreement. He has already explained in this short letter that it is a statutory requirement that the client must be provided with certain advice before she signs any documentation. The letter ends with the assurance that if the client has any queries and would like to speak to the solicitor personally, she should not hesitate to contact him on a given telephone number. Mr Charlton told us, on instructions, that Mr McCulloch recalled only eight cases in which a client had called him out of the 3,500 cases he had handled for TAG.

166. It is at this point that the procedure becomes controversial. The regulation 4 information is not given to the client by the solicitor or by a member of his directly employed staff, or even by somebody whom he engages as an independent contractor for this purpose. It is given by a representative of TAG. This representative will visit the client at his home by appointment. On his visit he will explain the CFA and complete what is called the fact find and oral explanation sheet. A copy of this 3-page sheet is contained in the operations manual. It begins with a statement to the effect that the panel solicitor has authorised TAG to obtain certain information from a claimant in relation to the claimant's funding options following an accident on [the relevant date] "and to orally advise the claimant as detailed below in connection with the Panel Solicitor's CFA". There follow five questions, designed to elicit information relating to the possible existence of alternative funding arrangements, and then ten fairly full paragraphs of text which set out, among other things, the information required by regulation 4. These end with the following: *"We understand that you do not require any further explanation, advice or other information about these matters."*

167. At the end of the sheet the TAG representative will certify that he has given this information to the claimant and that he orally gave advice on behalf of the panel solicitor in relation to his CFA and the legal expenses insurance policy "as detailed above". The claimant for his part will sign beneath a statement by which she confirms: *"That the above information was provided by me to the TAG representative and that I received the oral explanation in relation to the appointed representative's CFA and the legal expenses insurance policy as detailed above. I am aware that the TAG representative is obtaining the above information and providing me with the above explanation on behalf of the appointed representative."*

168. During this visit the TAG representative will also confirm the contents of the questionnaire and obtain the claimant's signature on a statement of truth, the CFA and the solicitor's client care letter; and on a completed credit agreement which will enable him to obtain a loan to fund the cost of the policy premium and the solicitor's disbursements.

169. These completed documents are then sent back to TAG. On receipt of them TAG will issue a certificate of insurance to the claimant under its delegated authority from the insurers, and send the CFA, client care letter and fact find and oral explanation sheet, all now signed by the client, to the panel solicitor, together with a copy of the certificate of insurance. On receipt of these documents the panel solicitor will then sign the CFA and client care letter and start to act for his client in the usual way. The only reason why this agreement, which lacks a success fee, is caught by the CFA Regulations is that the panel solicitor is acting on what is colloquially called a "no win no fee" basis, and is thus caught by the definition of a CFA in section 58(2)(a) (see para 18 above).

170. There were, in retrospect, certain unsatisfactory features about the arrangements for the trial conducted by Master Hurst at the end of October last year. A judgment adverse to TAG by a district judge in early August 2002 had put the continued viability of the TAG scheme in question, and the parties wished to obtain an authoritative ruling from the senior costs judge as soon as possible. On 20th September 2002 Master Hurst made an order directing the trial of two preliminary issues within the test cases:
"(i) Whether under the Accident Group Scheme the Regulation 4 information is given by a "Legal Representative" within the meaning of Regulations 1 and 4 of the Conditional Fee Agreements Regulations 2000;
(ii) Whether if the answer is in the negative, what are the consequences of that for the Claimants' claims for costs."

171. He directed that the trial of these issues should take place on 29th and 30th October. In view of the time pressures the parties were not obliged to exchange statements of case on these issues, and disclosure of documents was also dispensed with. The claimants provided two witness statements and certain other voluntary information about the operation of the TAG scheme (so far as it related to these issues). The defendants for their part filed no evidence, and their case on the preliminary issues only became apparent when they served their skeleton arguments shortly before the hearing.

172. In those skeleton arguments they made two main points:
(1) that the regulation 4 information could only be given by the individual solicitor who was TAG's "appointed representative" within the panel solicitors' practice, and he had no authority to delegate this responsibility to anybody;
(2) that if this was wrong, then he could delegate this responsibility to someone else within his practice who was qualified to conduct litigation services within the meaning of section 28 of the 1990 Act: in other words, to another qualified solicitor, or to a Fellow of the Institute of Legal Executives."

173. In their skeleton arguments, and more particularly in their oral arguments at the hearing, a second fall-back argument started to emerge, whereby the original solicitor might delegate the responsibility to somebody whom he judged to have appropriate skill and discretion, but this description did not embrace the TAG representatives on account of their lack of training and other perceived inadequacies. Nor did the solicitor have any choice about this. He was obliged to delegate to representatives chosen and trained by TAG. In early October the defendants' solicitors had elicited from TAG's solicitors the information that TAG possessed no documentation relating to the training of their representatives received in connection with their regulation 4 duties. Some reference was made in this context to role-play. Mr Charlton understandably objected that the defendants' case was now straying well beyond the simple issues on which his clients had prepared their evidence, and that any dispute about the quality of the TAG representatives' regulation 4 performance should await the trial of the second round of issues in the test cases which was due to commence on 24th March 2003.

174. It is clear that Master Hurst adopted Mr Charlton's submissions on this point in the court below. Although Mr Burnett attempted to open up this ground of challenge again in his skeleton arguments on the appeal, he eventually accepted that it was inappropriate to do so. He had by now abandoned his clients' primary contention before Master Hurst. The basis on which he contested the appeal was that his fall-back contention before the Master was correct, alternatively that under no circumstances, given his obligations under the Solicitors' Practice Rules and his code of professional conduct, could these regulation 4 duties be delegated by a solicitor to an organisation like TAG or to one of TAG's representatives, however well those duties were performed.

175. Mr Charlton, for his part, attempted to revive an argument which Master Hurst had rejected quite summarily. Parliament has preserved, by section 27(2)(e) of the 1990 Act, the common law right long

enjoyed by unqualified staff working for the litigation department of a solicitor's firm to exercise rights of audience in chambers in the High Court and the county court. Mr Charlton argued that a TAG representative might qualify by this route as a person to whom the panel solicitor might appropriately delegate the regulation 4 responsibility.

176. The trouble with this argument is that the retention of this common law practice is limited to the conferring of a right of audience to someone who *"is employed (whether wholly or in part), or is otherwise engaged, to assist in the conduct of litigation and is doing so under instructions given (either generally or in relation to the proceedings) by a qualified litigator"* (s 27(2)(e)(i)). There has never been any question of a TAG representative performing advocacy services of this type. It was never indeed contemplated that he would exercise any such services in relation to any proceedings on behalf of the TAG client (for the statutory definition of "advocacy services" see section 119 of the 1990 Act).

177. We return, then to the main points of challenge, on which Master Hurst favoured the claimants' arguments. A solicitor has always been able to delegate part of his functions in appropriate cases. The ground rules were set out by the House of Lords in ***Law Society v Waterlow*** (1883) 8 App Cas 407. In that case an issue arose as to whether Waterlows, the law stationers, had fallen foul of a provision of the Attorneys and Solicitors Act 1870 which made it an offence to impersonate a solicitor. The House of Lords decided that they had not. Lord Selborne said at p 412: *"[Waterlows] have simply executed instructions to do ministerial acts in order to save the real solicitor from the trouble and expense of doing them."*

178. And Lord Blackburn said at p 415: *"A solicitor taking out probate is not bound to do everything in his own person. There are some things which he cannot delegate, he is to give his personal responsibility and obligation to his client to use his own skill and his own judgment in some things which are to be done, and he ought not to delegate them at all. There are some matters as to which though he may delegate them and need not do them in person but may employ a clerk, yet he would be required to see that that clerk had competent knowledge."*

179. After concluding that Waterlows could be used as a messenger to lodge or retrieve documents in the Probate Registry, he went on to comment at pp 416-7 on the tasks which might not be acceptably delegated:

> *"[It] was contended that it might be that a great deal more was done, - that … this messenger of Messrs Waterlows was to argue it and to advise upon it, and to discuss it, and to do various things which certainly I think [the solicitor] would not be doing quite his duty to his clients if he delegated to another person to do for him, and as to which certainly, if Messrs Waterlow did them (I think it is probable that they were too wise), if they incurred all the responsibility of advising on matters of law and things of that sort they would be doing a very foolish and rash thing. If they did all this it would be a plausible argument to say that in doing things like that, furnishing intelligence and legal advice and so on, which [the solicitor] ought not to have delegated to them to do, they were acting as solicitors [and were thereby committing the offence alleged]."*

180. In ***Arbiter Group Plc v Gill Jennings*** [2000] PNLR 680 this court was concerned with the alleged negligence of a firm of American patent searchers who had been instructed by a firm of English patent agents. Swinton Thomas LJ said at p 686F: *"… a professional man in appropriate circumstances is entitled to delegate tasks. Whether he is entitled to delegate a particular task will depend on the nature of the task. He is entitled to delegate some tasks to others but is not entitled to delegate others. It all depends on the nature of the task involved. If he does delegate he must delegate to a suitably qualified and experienced person."*

181. These principles are now reflected in the modern arrangements governing solicitors' conduct. The modern prohibition on unqualified persons acting as solicitors is to be found in section 20 of the Solicitors' Act 1974. Rule 13 of the Solicitors' Practice Rules now provides, so far as is material, that:

> *"(1) The principals in a practice must ensure that their practice is supervised and managed so as to provide for*
>
> *(a) compliance with principal solicitors' duties at law and in conduct to exercise proper supervision over their admitted and unadmitted staff…"*

182. Note (b) to this rule relates to "supervision" and "management". It contains the following guidance:

> *"(i) 'Supervision' refers to the professional overseeing of staff and the professional overseeing of clients' matters.*
>
> *(iii) Operationally, supervision and management may be delegated within an established framework for reporting and accountability. However, the responsibility under paragraph (1)(a) of the rule … remains with the principals."*

183. The Guide to the Professional Conduct of Solicitors 1999 contains (in para 3.07) the rubric: *"A solicitor is responsible for exercising proper supervision over both admitted and unadmitted staff."*

This is followed by a note which reads: *"1. The duty to supervise staff covers not only employees but also independent contractors engaged to carry out work on behalf of the firm, eg consultants, locums, solicitors' clerks."*

184. Further guidance on modern practice is evident in Annex 21G to the Guide, which is concerned with solicitors' supervision responsibilities over the conduct of unadmitted staff who exercise rights of audience on behalf of their firms under section 27(2)(e) of the 1990 Act. After reciting the effect of paragraph 3.07 of the Guide, and of Note 1 that follows it, Annex 21G continues:
"Accordingly, as a matter of professional conduct, when instructing an unadmitted person (whether an employee or an independent contractor) to appear in chambers in the High Court or the county court, a solicitor should:
- *be satisfied that the person is responsible and competent to carry out the instructions;*
- *give the person sufficiently full and clear instructions to enable him or her to carry out those instructions properly;*
- *afford proper supervision."*

185. We had the benefit of receiving a written submission from the Law Society on this aspect of the TAG appeal. The Society drew our attention, as did the parties, to the matters we have set out in paragraphs 177-184 above. Its short written submission also contained the following observations:

"It is the Law Society's view that it is open to Solicitors to delegate a wide range of tasks to unqualified persons, whether those persons are employees or independent contractors. This is provided, of course, that the person to whom the task is delegated is competent and responsible and provided that the performance of the individual is adequately supervised.

It is the Society's view that the decision as to whether an individual is competent must be made by the Solicitor concerned based on the nature of the task to be delegated and the qualities of the delegate. Further, the level of supervision required would be for the practitioner to decide in these circumstances.

It is also the Society's view that the individual's competence must be assessed in the context of the work which that individual is expected to do. Using employees or independent contractors who may be competent to handle only a very limited range of tasks, provided they are competent to handle the tasks which they are asked to undertake, gives rise to no objection at law or breach of the Solicitors Conduct Rules.

If there were any justified complaint about the adequacy of work carried out by an unadmitted person, then under the rules of professional conduct, the Society would expect (assuming the person concerned continued to undertake the work) that the supervision arrangements would be amended.

The Society accepts that, in the context of these appeals, these propositions may be trite and uncontested. Nevertheless the Society would wish the Court to have them at the forefront of its considerations whatever the outcome of these appeals. The Society would be concerned if, by any part of its judgment, the Court were to restrict a Solicitor's ability to delegate tasks. Provided the rules of professional conduct are complied with, this ability to delegate is essential to the efficient and profitable running of virtually every Solicitor's practice. It is also essential to ensuring that the cost to the public of legal services is not unnecessarily increased."

186. As we have observed, following Master Hurst's summary rejection of their contention that a solicitor had no authority to delegate his regulation 4 responsibilities at all, even to a more experienced solicitor in the same firm, the defendants had jettisoned this argument by the time their Notice of Appeal was settled. Mr Burnett, however, argued vigorously that the solicitor might only delegate this responsibility to another qualified solicitor (however inexperienced) or to a Fellow of the Institute of Legal Executives who was himself qualified to perform litigation services pursuant to section 28 of the 1990 Act. A legal executive of vast experience of litigation practice would not do, Mr Burnett said, unless he had qualified as a Fellow of the Institute.

187. There was a paradox at the heart of his clients' submissions. We have seen (in para 17 above) how Part II of the 1990 Act has the purpose of fostering new or better ways of providing litigation services. An outside observer might have expected liability insurers to approve of practices which tend to drive down the cost of these services (for which they have to pay, when they are used by successful claimants) as opposed to insisting that every regulatory duty, however routine, must be performed by expensive professional

people. However, such was their enthusiasm for the potential windfalls that might be achieved by their adherence to the indemnity principle whenever it might work to their financial advantage that they happily turned a blind eye to this paradox.

188. In developing his argument that a solicitor might only delegate his regulation 4 responsibilities to another person who was himself qualified to conduct litigation services, Mr Burnett invited us to consider the statutory framework of the new legislative scheme along the following lines. He said that the current approach of the law to CFAs was informed by two concerns, one ancient, one modern. The former was the rule against champerty, and the latter was the need to protect consumers of limited sophistication. In general, the first was the concern of the common law, whilst the latter was the emphasis supplied by statute. The regulations themselves were principally directed at the need to protect consumers, as was observed in ***Callery v Gray*** **(No 1)** [2001] EWCA Civ 1117 at [26]; [2001] 1 WLR 2112. They also operated to protect unsuccessful litigants who had to pay the costs of their opponents on CFAs.

189. He said that the need to protect consumers entering CFAs was pressing. Many clients who considered bringing an action for the recovery of damages for personal injury had had no prior contact with the legal system, and were wholly unaware of the different types of funding for litigation, the risks of litigation, or the range of and comparison between available insurance products and funding schemes. Most were likely to be one-off users of personal injury or employment claims services. They would therefore have no previous experience against which to compare the service provided. Many were unaware of the differences in quality and skill between solicitors and other unqualified persons appearing to offer the same service, a point made in the Blackwell Report (see para 38 above).

190. In this context CFAs were complex documents, which many lay people have difficulty understanding, and the current regulations significantly enlarged on the degree of consumer protection afforded by their predecessor, partly as a result of the findings in the Yarrow and Abrams study (see paras 25 and 27 above) as to the level of consumer misconception. There was also a temptation for CFAs to be marketed in excessively simplistic terms – classically 'no win, no fee' – which could and did give rise to a misleadingly understated description of the potentially onerous obligations to which consumers were subscribing.

191. Mr Burnett submitted that Parliament's anxiety to protect consumers entering CFAs was amply demonstrated by the serious sanction which it imposed for non-compliance with the regulations, namely the unenforceability of the agreement. The regulations specifically required that the regulation 4 information, advice and explanation must be given before a client entered into a CFA which could potentially involve her in incurring liability for costs, and at a point where it was anticipated she would need and require advice on the CFA and any financing or funding options available to her: see ***Sarwar v Alam*** [2001] EWCA Civ 1401; [2002] 1 WLR 125.

192. He added that the fair administration of justice also required the protections afforded to consumers by the regulations to be balanced by a measure of protection for paying parties in this type of litigation.

193. He pointed out that as access to justice has been liberalised through the statutory relaxation of the law against champerty and the enlargement of rights of audience, great concerns have been expressed about the proliferation of unqualified "claims assessors" involving themselves in litigation: see the Blackwell Report. This court stated in ***R v Secretary of State for Transport ex parte Factortame (No.8)*** [2002] EWCA Civ 932; [2002] 3 WLR 1104 at [56] and [59] that: *"... In its context it is natural to read section 58 as applying to the provision of advocacy and litigation services by those authorised in accordance with the earlier sections to exercise rights of audience or conduct litigation. There is nothing in the section which suggests that it is intended to apply to the provision of services ancillary to the conduct of litigation by the many different categories of person who have, in the past, been accustomed to assist with the conduct of litigation.*

…[T]he legislative intent was that the provisions of section 58 of the 1990 Act were intended to apply only to those who could be described as 'litigators', that is advocates and those conducting the litigation."

194. Mr Burnett submitted that the integrity and independence of the solicitors' profession was seen as the principal safeguard (not least by the authors of the Blackwell Report) against such practices and the risk of abuse noted by members of the House of Lords in *Callery v Gray*. It was a bulwark against the public evil of champerty because it holds a higher duty to the court than to its clients, and against the private evil of mis-

selling to consumers because of the strict rules of professional conduct and advice, including the Solicitors' Costs Information and Client Care Code 1999 (which regulation 4 closely reflects).

195. In our judgment Mr Burnett protests too much. We must stress that we are only concerned on this issue with the question whether as a matter of principle a solicitor may delegate his regulation 4 responsibilities to a wider class of people than those embraced by Mr Burnett's primary argument on the appeal. If it is possible to delegate more widely, then the solicitor will remain professionally responsible for the performance of the person who actually performs the duties. Each situation must be considered on its own facts. Parliament wishes to foster new ways of rendering litigation services, and provided that the performance of the regulation 4 duties is appropriately delegated, and the duties are properly performed under appropriate supervision, we cannot see that Parliament's intentions are being thwarted if the solicitor delegates more widely than is allowed for in Mr Burnett's primary argument before us. We would not wish to be prescriptive about the form which that supervision should take, provided that an appropriate system has been set up.

196. We have found it useful in this context to compare the position of a solicitor in relation to delegation with that of a company director. In that context there is a helpful passage in the judgment of Jonathan Parker J in ***Re Barings plc*** [1999] 1 BCLC 433 where he says at p 489:

"(i) directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors;

(ii) whilst directors are entitled, subject to the articles of association of the company, to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegate function, which importantly includes a duty to monitor delegates in the performance of their delegated functions;

(iii) no rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty and the question whether it has been discharged must depend of the facts of each particular case, including the director's role in the management of the company."

197. This passage is valuable in that it clearly distinguishes the governing principle set out in (ii) from the question of fact which will need to be answered under (iii) in any particular case.

198. When we tested the validity of Mr Burnett's submissions we examined the nature of the services which were being performed for the solicitor in the present case. We did not in this context concern ourselves with the matters set out in regulation 4(e) because a particular feature of the TAG scheme is that the client has already agreed with TAG that she will purchase TAG's preferred insurance scheme before the solicitor appears on the scene, even if TAG does not actually procure the insurers to issue cover until after the credit agreement has been signed. This is the effect of the declaration signed by the claimant when she enters the TAG scheme. In it she agrees to pay the premium for the insurance policy on the basis that TAG will not seek to enforce this liability in the event that evidence of insurance is not issued on the sole grounds of liability and quantum. What this all means in practice will have to be worked out at a later hearing, but at the level of generality with which we are concerned to determine the preliminary issues before us on this appeal, we consider it to be better to concentrate on the aspects of the regulation 4 duties which do not relate to advice about the policy.

199. These duties oblige the panel solicitor to ensure that his client receives proper oral explanation of the following matters:

(a) the circumstances in which he may be liable to pay the panel solicitor's costs in accordance with the CFA;

(b) the circumstances in which he may seek assessment of the fees and expenses of the panel solicitor, and the procedure for doing so;

(c) whether he considers that the client's risk of incurring liability for costs in respect of the proceedings to which the CFA relates is insured against under an existing contract of insurance;

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

The client must also receive an explanation of the effect of the CFA both orally and in writing.

200. We can see no reason why these duties cannot be performed by someone on the solicitor's behalf who does not happen to be a qualified solicitor or a Fellow of the Institute of Legal Executives. The relevant advice is very clearly set out in the oral explanation sheet, and the fact find part of that sheet, discussed with the client in his own home (where she can readily look for documents relating to his household insurance or her trade union membership), will enable the client to deal with the matters raised in (c) and (d) above. The first four questions, which relate to other possible methods of funding the litigation, are simple questions followed by "Y/N". The client will circle Y or N as appropriate, and these answers will reach the panel solicitor in due course.

201. Mr Burnett argued eloquently that the procedure adopted by TAG's representatives on behalf of the panel solicitor did not admit of the kind of dialogue to be expected when a qualified solicitor discusses matters of this kind with a client. Although TAG bridled at his suggestion that their representatives read the oral explanation "parrot-fashion" – and whether they did or not is a matter for the later hearing – Mr Burnett was on stronger ground when he observed that regulation 4(1) contains not only a duty to inform but also a duty to provide such further explanation, advice or other information about the matters listed in the regulation as the client may reasonably require. In this context he reminded us that Master Hurst had shared his client's surprise at the final item of the oral explanation sheet in which (as quoted in para 166 above) it is said that the client does not require any further explanation, advice or other information about these matters. We, too, find it difficult to reconcile this with the solicitor's introductory letter which invites the client to telephone if she has any queries.

202. Mr Charlton, however, told Master Hurst on instructions that in practice the TAG representative will deal with any matters which the client may raise, and we share the Master's view that the explanation of what happens in practice is best left for the later hearing.

203. In our judgment, the issues raised by Mr Burnett should not drive us to the conclusion that the person who actually gives the regulation 4 advice must inevitably be someone who is himself qualified to conduct litigation services. Parliament has not made this requirement, and in the context of the liberalising effect of Part II of the 1990 Act it would be wrong for us to do so.

204. The question then arises, if a wider degree of delegation is legally possible, can a solicitor lawfully delegate his responsibility to an organisation like TAG, and can TAG sub-delegate it to one of their representatives?

205. The way in which Mr Burnett advanced his fall-back argument was to the effect that if a solicitor could delegate his regulation 4 duties more widely, he could only do so in favour of someone with appropriate skill or discretion, and that this description could not embrace TAG or its representatives. In this context he relied on certain passages in *Bowstead & Reynolds on Agency* (17th Edition) at paras 2-017 to 2-018 and 5-001):

"2-017 An agent may be appointed for the purpose of executing a deed, or doing any other act on behalf of the principal, which the principal might himself execute, make or do; except for the purpose of executing a right, privilege or power conferred, or of performing a duty imposed, on the principal personally, the exercise or performance of which requires discretion or special personal skill, or for the purpose of doing an act which the principal is required, by or pursuant to any statute or other relevant provision, to do in person.

Comment: 2-018 The authorities cited for the proposition contained in this article indicate that it is a general rule of common law which will apply unless displaced…

5-001 When agent may delegate authority (1) An agent may not delegate his authority in whole or in part except with the express or implied authority of the principal.(3) The above principles are inapplicable when the act done or to be done is purely ministerial and does not involve confidence or discretion."

206. Because the TAG staff who perform the regulation 4 duties do not have the professional obligations upon which Mr Burnett laid such emphasis, he said that a vital filter was stripped out of the TAG scheme. Being employees of TAG (or associated enterprises) they could not be expected to give impartial advice (as must solicitors – see the Solicitors' Introduction and Referral Code 1990). Their task (in all probability supported by a remuneration package which has large commission and other incentive elements) was to maximise their own TAG revenue – a business-driven model with different values from those to be expected of an officer of the court.

207. Mr Burnett argued that the use of TAG representatives in this way, in place of solicitors and legal executives or people directly employed by a solicitor's firm, is to undermine the protective statutory regime. He said that it raised a serious issue of public policy, given the scale on which TAG itself says its scheme operates: the statutory requirements were being side-stepped at a rate of 15,000 cases per month.

208. Master Hurst's approach to this final question was to start with the proposition that a "legal representative" might be an individual or a firm or even a prescribed membership organisation (see regulation 4(4), and section 30 of the 1999 Act). His reasons are set out in paragraphs 54 to 60 of his judgment and we need not repeat them here. He then concluded that delegation within a solicitor's firm must be permissible. If the task is delegated to someone incompetent within the firm, the firm will suffer the consequences when it is found that the requirements of the CFA Regulations have not been complied with (judgment, para 75).

209. He showed that he understood clearly the criticisms made by the defendant insurers. Paragraphs 76 to 77 and 82 to 83 of his judgment show how well he understood them. Since he had found that the legal representative might be an individual, a firm or a recognised body, it followed that there could be delegation within the firm or recognised body. He concluded, however, that given his finding that there could be delegation within the firm or recognised body, it followed that there could be delegation to a duly authorised agent.

210. Although questions might arise as to whether the agent was competent to carry out the required task, or indeed whether the task had actually been carried out with the necessary competence, these were questions of quality which were not within the scope of his present judgment. It was the legal representative who would bear the consequences if his appointed agent did not carry out the task correctly, as would be the case in relation to internal delegation to an incompetent member of staff. "Incompetence by the delegate does not invalidate the delegation" (judgment, para 85).

211. At the end of this part of his judgment, he said (at para 88): *"Can it be, [Mr Burnett] asked, that Parliament intended, when it enacted that CFAs which failed to comply with delegated legislation would be unenforceable, and when it had approved delegated legislation imposing mandatory requirements to give information and provide such explanation, advice or information as the client may require, that a TAG representative or someone similar would give the information required by regulation 4 by using the wording set out in the fact find and oral explanation sheet? The answer to that question is that there is nothing in the general law of delegation and agency or in the 2000 Regulations which prevents delegation of the regulation 4 task to a properly appointed agent. The essential question is one of quality, ie was there sufficient explanation given by or on behalf of the legal representative? If the answer to that question is Yes: was that information given by a duly appointed agent? If the answer to the essential question is No, it is immaterial who gave the explanation."*

212. Like Master Hurst we can only answer this question on this preliminary issue at a high level of generality. As we have observed, solicitors are now free to delegate some of their functions, where it is appropriate to do so, to unadmitted staff and to independent contractors, provided that they comply with their responsibilities for supervision which appear in the Practice Rules and the Guide to Professional Conduct. If they use independent contractors, they may use individuals, or they may use a reputable firm or company which will itself furnish staff who will perform the necessary functions. We were told that this often occurs when solicitors use inquiry agents to visit witnesses and prepare witness statements for them in the course of litigation.

213. These practices have their convenient aspects, so far as client care is concerned. In the TAG cases there was evidence that solicitors and their staff usually work conventional office hours. The client, particularly if she is at work, prefers to deal with matters like the processing of a small accident claim at home in the evenings, and this is where the TAG scheme comes into its own. Although in the conventional way in which solicitors' business is conducted, the solicitor will have a personal interview with the client in his office (for which he will charge out at the appropriate hourly rate) Mr McCulloch described the practical difficulties he encountered when determining how to implement the new regulations.

214. He said that when they were first introduced he held the view that in order to ensure that the client was fully informed of the nature of the agreement and had the ability to ask questions, there had to be some kind of personal conversational contact. Whilst it might have been possible to provide this advice by

telephone he had concluded that it was virtually impossible to do this effectively without delaying progress. Clients were frequently not available during his normal office hours, and his practice, in common with many others, could not afford to provide a night-time or weekend service. It was simply beyond their resources.

215. We have concluded that on this appeal Master Hurst directed himself correctly on the relevant law. So far as his application of the law to the facts is concerned, we can only interfere with this decision of a judge who has immense practical experience of the market in which solicitors now operate, and a keen understanding (which is apparent from his judgment) of the need to maintain appropriate professional standards, if we are of the opinion that his decision was wrong (CPR 52.11(3)(a)). We are quite unable to do so. Master Hurst showed that he understood the subject-matter of these preliminary issues and their legislative background. He directed himself correctly on the law. He appreciated the strength of the opposing arguments, and he summarised them accurately in his judgment. And he reached a conclusion which was rationally argued and logically defensible.

216. Whether when he descends to the detail of how the TAG scheme operates in practice during the later hearing, when the relevant issues have been defined with greater precision and when there is fuller evidence before him, both in the form of witness statements (which may be tested in cross-examination) and documents, than was available at the first trial, he finds breaches of regulation 4 in one or more of the test cases will have to await the outcome of the later hearing. For the purposes of the first trial, and of this appeal, it is sufficient if we make it clear that it will be in theory permissible for a solicitors' firm to delegate the performance of its regulation 4 duties to an organisation like TAG, and for TAG to sub-delegate to its representatives, provided that in so doing the solicitor is not abandoning the supervisory responsibilities required of him by Practice Rule 3.07 and the Guide to Professional Conduct. Whether the TAG scheme can and does provide properly for this is a matter for the fact-finding trial.

217. Part II of the 1990 Act is concerned with the search for new or better ways for providing litigation services. A national organisation like TAG may be able to achieve economies of scale and standards of client service which simply are not available to an ordinary solicitors' firm. Quality control, however, is all important, and if a solicitor abjures his duty to maintain supervisory responsibility, through an established framework for reporting and accountability, over the TAG representatives when they visit his client's home on his behalf, it is likely that it would be found that it was not he who gave the information he was required by regulation 4 to give, and that the regulation has therefore been broken.

218. For these reasons we will dismiss this appeal.

6. Conclusions: the right approach

219. We believe it will be helpful if we set out in one place the broad effect of this judgment.

220. So far as matters of procedure are concerned, we consider that it should become normal practice for a CFA to be disclosed for the purpose of costs proceedings in which a success fee is claimed. If the CFA contains confidential information relating to other proceedings, it may be suitably redacted before disclosure takes place. Attendance notes and other correspondence should not ordinarily be disclosed, but the judge conducting the assessment may require the disclosure of material of this kind if a genuine issue is raised. A genuine issue is one in which there is a real chance that the CFA is unenforceable as a result of failure to satisfy the applicable conditions.

221. When we turn to matters of law, we have explained that a CFA will only be unenforceable if in the circumstances of the particular case the conditions applicable to it by virtue of section 58 have not been sufficiently complied with in the light of their statutory purposes (see paras 105-110 above). Costs judges should ask themselves the following question: "Has the particular departure from a regulation or requirement in section 58, either on its own or in conjunction with any other such departure in this case, had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice?"

222. Thus the judge conducting the assessment should first consider the position as between solicitor and client. If the judge had done so in ***Tichband v Hurdman***, for instance, he would immediately have seen that the client could not possibly have avoided his liability under the CFA by relying on the discrepancy between

clause 33 and the risk assessment (see paras 131 to 134 above). If the court considers that as between solicitor and client the client would have just cause for complaint because some requirement introduced for his protection was not satisfied, or that the CFA otherwise offends public policy (for example, through a breach of section 58(3)(b), a provision with which we are not concerned on these appeals), then the CFA will be unenforceable, and the indemnity principle will operate in favour of the paying party.

223. Even then, however, the client should be able to recover the disbursements which she has already financed, whether personally or through a loan, and any ATE premium (see paras 113-116 above).

224. The court should be watchful when it considers allegations that there have been breaches of the Regulations. The parliamentary purpose is to enhance access to justice, not to impede it, and to create better ways of delivering litigation services, not worse ones. These purposes will be thwarted if those who render good service to their clients under CFAs are at risk of going unremunerated at the culmination of the bitter trench warfare which has been such an unhappy feature of the recent litigation scene.

225. In ***Burstein v Times Newspapers Ltd*** [2002] EWCA Civ 1759 at [29] Latham LJ ended the judgment of the court with these words: *"… The Deputy Costs Judge is to be commended for ensuring that the detailed assessment did not become an excuse for further expensive litigation at the behest of a disappointed but persistent litigant. Satellite litigation about costs has become a growth industry, and one that is a blot on the civil justice system. Costs Judges should be astute to prevent such proceedings from being protracted by allegations that are without substance."*

226. In future district judges and costs judges must be equally astute to prevent satellite litigation about costs from being protracted by allegations about breaches of the CFA Regulations where the breaches do not matter. They should remember that the law does not care about very little things, and that they should only declare a CFA unenforceable if the breach does matter and if the client could have relied on it successfully against his solicitor.

7. Results of the individual appeals

227. We allow the defendants' appeals in the two disclosure cases, *Worth v McKenna* and *Pratt v Bull*. We allow the claimants' appeals in *Hollins v Russell* and *Tichband v Hurdman*. We dismiss the defendant's appeal in *Dunn v Ward*. We also dismiss the defendants' appeal in the *TAG test cases*.

228. We consider that in *Worth v McKenna* the fair order to make is that if the receiving party so requests within five days of the order on this appeal the detailed assessment be reheard by the district judge in accordance with the principles set out in this judgment. In *Pratt v Bull* we remit the matter to the district judge to set a new timetable for the future conduct of the assessment proceedings. In *Hollins v Russell* the order of Judge Tetlow is set aside and the order of District Judge Simpson restored. In *Tichband v Hurdman* we remit the matter to a district judge to conduct a detailed assessment in accordance with the principles set out in this judgment.

Order: The defendants' appeals in the two disclosure cases Worth v McKenna, Pratt v Bull allowed; claimants' appeal in Hollins v Russell and Tichband v Hurdman allowed; defendants' appeal in Dunn v Ward dismissed; defendants' appeal in the TAG test cases dismissed; hearing on costs in all cases except TAG adjourned to a date between now and the end of July; written submissions to an agreed timetable; amendment of Master Hurst's order as per Mr Charlton's footnote 1; the appellants to pay 85 per cent of TAG's costs on the appeal; counsel to lodge a draft minute of order. (Order does not form part of the approved judgment)

Richard Drabble QC & David Holland (instructed by Gruber Garratt) for the Appellant and also for the Law Society (intervening in all these appeals) Ian McLaren QC & Andrew Hogan (instructed by DLA) for the Respondent

Guy Mansfield QC & Nicholas Bacon (instructed by Colemans-CTTS) for the Appellant Ian McLaren QC & Andrew Hogan (instructed by DLA) for the Respondent

Ian McLaren QC & Andrew Hogan (instructed by DLA) for the Appellant Guy Mansfield QC & Nicholas Bacon (instructed by Amelans) for the Respondent

Ian McLaren QC & Andrew Hogan (instructed by DLA) for the Appellant Jonathan Dingle (instructed by the Stokes Partnership) for the Respondent

Ian McLaren QC & Andrew Hogan (instructed by DLA) for the Appellant Nicholas Bacon (instructed by Irvings) for the Respondent

Ian Burnett QC, Deborah Taylor & Benjamin Williams (instructed by Beachcroft Wansboroughs, Carters and Vizards Wyeth) for the Appellants/Defendants Timothy Charlton QC & Nicholas Bacon (instructed by Rowe Cohen) for the Respondents/Claimants