

ENGLAND AND WALES / JUDGMENT

Jones v Wrexham Borough Council

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Neutral Citation Number: [2007] EWCA Civ 1356 IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM MANCHESTER COUNTY COURT His
Honour Judge Holman 4MA 70460 Case No: A2/2006/2514 and A2/2007/1275 Royal Courts of
Justice Strand, London, WC2A 2LL Date: 19/12/2007 Before : LORD JUSTICE WALLER Vice
President of the Court of Appeal, Civil Division LORD JUSTICE LONGMORE and LORD JUSTICE
HUGHES

- ----- Between : Jones

- and - Wrexham Borough Council

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- ----- Nicholas Bacon (instructed by Messrs Birchall Blackburn Solicitors)
for the Appellant Jeremy Morgan QC (instructed by Messrs Beachcroft LLP) for the
Respondent Appellant Respondent Hearing date : 22nd October 2007

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Judgment

Lord Justice Waller : 1. 2. This court, differently constituted, has had to consider on a number of occasions conditional fee agreements (CFAs). By s.58 of the Courts and Legal Services Act 1990, as substituted by s.27(1) of the Access to Justice Act 1999 such agreements, to be enforceable had to be in writing; must relate to proceedings, which could be the subject of an enforceable fee agreement and had to comply with such requirements (if any) as might be prescribed by the Lord Chancellor. (See s.58(3)). The requirements of the Lord Chancellor were set out in the Conditional Fee Agreements Regulations 2000 (SI 2000 No 692). The unsatisfactory way in which satellite litigation had mushroomed with challenges to the enforceability of CFAs, by reference to those regulations, was spelt out in the judgment of the court, prepared by Brooke LJ in a decision dealing with a number of cases including *Hollins v Russell* and *Sharratt v London Central Bus Company Limited* and other cases [2003] EWCA Civ 718 [2003] 1WLR 2487. As that history demonstrates, the challenges to enforceability by reference to the 2000 Regulations had been on the whole, not by the clients the regulations were designed to protect, but by defendants, who having accepted liability in the main proceedings then resisted liability under the order for costs in the claimant's favour. The court in the 3. 4. above decision sought to discourage the taking of technical points by defendants on the 2000 Regulations. By Conditional Fee Agreement

(Revocation) Regulations 2005 (SI 2005 No 2305) all previous CFA regulations were revoked as from 1 November 2005, leaving parties from that date to enter into CFAs on the basis of the primary legislation. But as recognised in *Garrett v Halten Borough Council* [2006] EWCA Civ 1017 [2007] 1 WLR 554, despite the 2005 Regulations, there remained many points arising on the 2000 regulations by reference to CFAs entered into prior to 1 November 2005. That appears still to be the case. This appeal is concerned with such a case. The defendants challenge the enforceability of a CFA, relying on a breach of the 2000 Regulations. The point taken is somewhat similar to the point taken in *Garrett*, i.e. that there was a failure to comply with Regulation 4(2)(e)(ii) relating to the requirement to inform the client of any “interest” the solicitors might have in recommending a particular insurer. Although Mr Bacon and those previously representing the claimant, seeking to uphold the validity of the CFA in this case, have sought to distinguish *Garrett* they have more significantly contended first before District Judge Fairclough and on appeal from the district judge’s decision before His Honour Judge Holman that Regulation 4 had been disapplied by the Conditional Fee Agreement (Miscellaneous Amendments) Regulations (SI 2003 No 1240) (the 2003 Regulations) and the CFA with which we are concerned is a ‘CFA Lite’ within those regulations. By the 2003 Regulations the 2000 Regulations were amended so as to insert a regulation 3A in the following terms:- “3A – (1) This regulation applies to a conditional fee agreement under which, except in the circumstances set out in paragraph (5), the client is liable to pay his legal representative’s fees and expenses only to the extent that the sums are recovered in respect of the relevant proceedings, whether by way of costs or otherwise.

- (2) In determining for the purposes of paragraph (1) the circumstances in which a client is liable to pay his legal representative’s fees and expenses, no account is to be taken of any obligation to pay costs in respect of the premium of a policy taken out to insure against the risk of incurring a liability in the relevant proceedings.
 - (3) Regulations 2, 3 and 4 do not apply to a conditional fee agreement to which this regulation applies. . . .
 - (5) A conditional fee agreement to which this regulation applies may specify that the client will be liable to pay the legal representative’s fees and expenses whether or not sums are recovered in respect of the relevant proceedings, if the client –
 - (a) fails to co-operate with the legal representative;
 - (b) fails to attend any medical or expert examination or court hearing which the legal representative reasonably requests him to attend; 5. 6. 7. 8.
 - (c) fails to give necessary instructions to the legal representative; or
 - (d) withdraws instructions from the legal representative.”
- The 2003 Regulations came into force on 2 June 2003. Some point is made by Mr Morgan QC for the respondents that it is simply a matter of chance if the 2003 Regulations do apply, since the CFA with which this appeal is concerned was one which was in a form produced in 2001 and which purported to be an agreement complying with the 2000 Regulations. The CFA was dated 19 June 2003 and was

sent to Mrs Jones on 2 June 2003 under cover of what is known as the Rule 15 letter, and it thus was pure chance that the 2003 Regulations applied, if they do. In one sense one sees the point being made by Mr Morgan but, since the 2003 Regulations were amending the 2000 Regulations, it seems to me no more than a forensic point to the effect that the solicitors may not have had the terms of the 2003 Regulations in mind but (if I may say so) I do not see where that takes Mr Morgan. The appellants were successful in their contention that the 2003 Regulations applied before District Judge Fairclough, who delivered a judgment on 11 April 2006. In essence, he allowed reliance on what is described as the Rule 15 letter and reliance on the recoverability of disbursements under an insurance policy, so as to reach the conclusion that the CFA fell within the Regulation 3A. However, on appeal before His Honour Judge Holman the appellants were unsuccessful, the judge ruling that the letter was not an admissible resource when construing the CFA contract and also ruling that, if the fees could be met by insurance, it followed that the liability was that of the client, since an insurance company simply indemnifies the clients against a liability. It was for that reason that His Honour Judge Holman then went on to consider Regulation 4 of the 2000 Regulations and reached the decision that there had been non-compliance with Regulation 4 and that the CFA was unenforceable for failure to inform the client of an interest. The main issue on the appeal before us is whether the CFA in this case fell within Regulation 3A, but before coming to that regulation I should set out briefly the background facts against which the issues on this appeal arise. In this case the claimant, a child, was injured on 1 September 2002. On 16 May 2003 her mother entered into a loan agreement and insurance policy with Claims Bureau UK (CBUK). The certificate of insurance covers the pursuit of a personal injury claim arising out of the accident and, provided that the appointed representative should be a panel solicitor of CBUK, to be advised. There was a limit of indemnity of £25,000. CBUK referred the matter to Birchall Blackburn, a panel solicitor. The solicitors wrote to Mrs Jones on 2 June 2003 confirming acceptance of instructions and setting out in detail what is commonly known as the client care letter, written pursuant to Rule 15 of the Law Society's Solicitors' Practice Rules. The letter requested the signing of a CFA, which was a document of some five pages, referring to and incorporating a further five pages of Law Society conditions. The Rule 15 letter recommended the insurance with CBUK for the reasons set out in the CFA. By the terms of the CFA it was stated that CBUK "litigation insurance cover is only made available to you by solicitors who have joined the scheme." But by the final term of the CFA the solicitors stated "We confirm that we do not have an interest in recommending this particular insurance agreement." Was the CFA within the Regulation 3A? 9. This is the first occasion on which this court has had to consider the 2003 Regulations. Indeed it is striking that in Garrett reference was made to the fact that by the date of that decision the 2005 Regulations had come into effect and to the fact that the decision was still important because of the number of outstanding disputes relating to CFAs under the 2000 Regulations. No mention, however, was made of the 2003 Regulations at all. As we are advised by Senior Costs Judge Hurst, who, as so often has been the case, has helpfully assisted this court in its deliberations, that is because solicitors have not often intended, at least with any deliberate intent, to use the 2003 Regulations. Why that is we are not clear and

perhaps it matters not. But it seems probable that following Garrett a number of CFAs were at risk if Regulation 4 of the 2000 Regulations applied and that has led to consideration as to whether some CFAs were actually within Regulation 3A, inserted by the 2003 Regulations.

10. The background to the 2003 Regulations was explained by the then Master of the Rolls, Lord Phillips of Worth Matravers in speeches that he made to Law Society Litigation conferences in 2003. He was conscious of the fact that many technical arguments were taking place on the 2000 Regulations. He was conscious of the fact that it was the indemnity principle which was causing much of the problem and he said this:- “A no win no fee agreement does not impinge on the indemnity principle. Once the client has won he becomes liable to the solicitor to pay the solicitor’s costs and thus he can properly claim an indemnity in respect of that liability from the unsuccessful party. But, s.31 of the Access to Justice Act contained a provision which did violate the indemnity principle. The section provided that the Rules Committee could introduce a rule:- “For securing that the amount awarded to a party in respect of the costs to be paid by him to [his legal] representatives is not limited to what would have been payable by him to them if he had not been awarded costs.” This slightly cryptic provision envisaged an agreement between solicitor and client along the lines – you will not have to pay me any more than the costs that are awarded against the other side. Thus s.31 envisaged that the court would award costs to a litigant although the litigant was not under any pre-existing liability to his solicitor to pay those costs. Once the award was made, however, the litigant would be liable to pay his solicitor the costs awarded. Such an agreement does not go far enough to meet the reasonable needs of a solicitor. Costs awarded are not necessarily costs recovered. What the solicitor wants to be able to agree with his client is that the client can enter into the litigation without financial risk at all – that is he will not have to pay his solicitor anything that he does not recover from the other side. It was and is my view that there was no difference in principle between an agreement – I will not have to pay you any more costs than I am awarded by the judge than an agreement which provides I will not have to pay any more costs than I recover from the other side. After some lengthy discussions I persuaded both the Lord Chancellor’s department and the Rules Committee that s.31 opened the door for the award of costs that would be payable by the litigant only if those costs were recovered from the other side. Rules are being introduced to make it plain that this is legitimate. Such an agreement will, by definition, be a condition of the agreement. Simplified regulations are being introduced in relation to this type of CFA, which some describe as “CFA Lite”. I hope and believe that this change will allow solicitors to agree legitimately with their clients what I suspect many have been agreeing surreptitiously, namely that if the client doesn’t recover, the client will not have to pay.” 11. In the result the 2003 Regulations were passed and provided as quoted above. There is an explanatory note at the end of those regulations which states as follows:- “. . . . These regulations make amendments to the Conditional Fee Agreements Regulations 2000 and the Collective Conditional Fee Agreements Regulations 2000 to provide that a conditional fee agreement will be enforceable even though the client is liable to pay his legal representative’s fees and expenses only if and to the extent that he recovers damages or costs in the proceedings. Amendments made to the Civil Procedure Rules 1998 provided that

costs payable under such a conditional fee agreement are recoverable under Parts 44-48 of those rules.” Amendments to the Civil Procedure Rules were indeed made, most importantly CPR 43.2(3). 12. The essential question is therefore whether (subject to paragraph 3A(5)) the CFA in this case was one under which Mrs Jones was only liable for fees and expenses to an extent that she would recover the same “by way of costs or otherwise.” “Or otherwise” 13. It is convenient to take two points of principle at the outset. The first relates to the use of the words in Regulation 3A(1) “or otherwise”. Different views have been expressed in the County Court as to whether ‘or otherwise’ can include recovery under a policy of insurance. There is the view of His Honour Judge Holman in the present case that the words do not include ‘insurance’ but there is the view of His Honour Judge Halbert, in a judgment given in King v Halton Borough Council on 14 November 2006, that they do. Judge Halbert’s view coincides with the view of District Judge Hoffman in the case in which he was sitting on appeal, and also coincides with the view of District Judge Fairclough from whose decision Judge Holman was sitting on appeal in the present case.

14. Mr Bacon for the claimant appellant not unnaturally submits that the words do include ‘insurance’ so that if the effect of the CFA, plus the insurance taken out, is that the claimant will either not have to pay anything to his solicitor or will recover what he might otherwise be liable to pay, either from the unsuccessful defendant or under an insurance policy, he will succeed in showing that the CFA is within the Regulation 3A.
15. Mr Morgan’s argument is that by using the word ‘recovery’ it is clear that the words ‘or otherwise’ do not include insurance. Recovery denotes recovery in the costs sense from the other side. 16. 17. 18. The strength of Mr Morgan’s argument at first sight is that Lord Phillips was clearly talking about a distinction between “costs awarded” and “costs recovered” and clearly had in mind dealing with a situation which the client was protected insofar as costs were not recovered in that sense. Mr Morgan, indeed, underlines that ‘recovery’ naturally has that meaning, taking us to certain rules in the CPR, including CPR 43.2(3), where ‘recovered’ or ‘recoverable’ certainly relates to recovery of costs from a party. But that argument is considerably weakened by the fact that the explanatory note obviously contemplates recovery by way of “damages” as well as recovery by way of “costs”. Thus one cannot place too much reliance on the use of the word ‘recovered’ in Regulation 3A. But if reliance is to be placed on the explanatory note for that purpose, Mr Morgan would suggest that the words ‘or otherwise’ simply allow for recovery by way of damages. The answer to that point from Mr Bacon is that if the regulation had meant damages only it could have said so. Furthermore, he points out that Regulation 3A(2) contemplates insurance being taken out. He submits that one should presume that the draftsman made the wording deliberately broad so as to include insurance.
19. Mr Morgan suggested a further reason why ‘or otherwise’ should not include insurance was that if insurance was key, that would seem to be the one situation in which, in order to protect the consumer/client, Parliament would insist on compliance with Regulation 4(2)(e) (ii), i.e. a disclosure to the client that the solicitor had an interest in recommending the

insurers. That, at first sight, seems a powerful point, but the fact is that whether ‘or otherwise’ includes insurance or not, insurance is always going to be important where Regulation 3A applies. The fact that Parliament has chosen to disapply Regulation 4 in any event seems to answer Mr Morgan’s point. 20. I do not myself think that there are any pointers to a requirement to place some constrained meaning on ‘or otherwise’. If a claimant recovers costs and some disbursements from the other side, and is paid under an insurance policy in relation to some disbursements, it seems to me to be a perfectly appropriate use of language that the claimant has ‘recovered’ the latter disbursements under the policy. I would see no reason why, as a matter of language, ‘or otherwise’ could not include recovery under an insurance policy. Furthermore the fact that the client must be liable in order to obtain an indemnity as reasoned by the judge does not to my mind provide an answer as to why recovery under an insurance policy is not within regulation 3A.

21. Mr Morgan had other reasons why ‘or otherwise’ should not mean insurance. He submitted the terms of the cover would have to be examined, and indeed a question could arise as to whether the policy was voidable. He submits it cannot have been contemplated that there would be a need for such an investigation in deciding whether a claimant could recover costs or disbursements. He further points to the fact that there is a limit on the indemnity of £25,000 and he submits that it could not have been contemplated that there would be doubt as to whether a policy would be enough to cover costs. He uses those arguments to support the submission that the words ‘or otherwise’ could never have been intended to include insurance in the first place. 22. As I shall indicate when considering the effect of the Rule 15 letter, since the question to be asked is whether the agreement as between solicitor and client objectively ascertained was that the client would not be liable for own-side fees and expenses, save to the extent that they could be recovered from the other side or under an insurance policy falls to be considered in a practical way as at the date the CFA is entered into, these points do not persuade me that the words ‘or otherwise’ were never intended to include insurance. The Rule 15 letter 23. I now turn to the second point of principle. There has again been a difference of view between judges in the County Court as to whether, in considering whether a CFA falls within Regulation 3A, regard should be had to the Rule 15 letter, or whether it is the formal CFA agreement alone which should be considered. His Honour Judge Holman in the instant case concluded as follows:- “I accept that the Rule 15 letter forms part of the contract, regulating affairs between the client and the solicitor. So to that extent it is admissible. However, in my judgement the District Judge erred in concluding that it overrode the CFA, and relieved the client of any obligation to pay own disbursements. The Rule 15 letter itself describes the CFA as fully setting out the terms of the arrangement. On any sensible and purposive interpretation ‘fully’ means ‘entire’. This clearly makes the CFA the primary document and the purpose thereafter is to cover contractual arrangements which do not appear in and do not need to appear in the CFA. To hold otherwise would undermine the provision and purpose of s.58 of the Courts and Legal Services Act 1990, which created and permitted CFAs. Furthermore to construe the words “these fees will be met by insurance” as a waiver by the solicitor of any right to claim own disbursements from

the client, is to strain the natural and purposive interpretation of this letter. The reality is that the insurance company will indemnify their client against their liability to the solicitors for these disbursements.” 24. Taking a contrary view District Judge Fairclough in the present case said this:- “The Rule 15 letter pre-dates the CFA and in fact enclosed it for signature by the claimant. To the extent there is conflict between the policy and the Rule 15 letter, I take the view that the Rule 15 letter would override the policy. It informs the client in clear terms that he would not have to pay and I conclude that it sets out the intention of the solicitors to forgo any shortfall, notwithstanding the terms of the policy. I consider that the solicitors would be estopped from proceeding against the client for costs and disbursements in a manner which is contrary to the wording of the letter.” 25. It would further appear that Master Simons, Costs Judge, by a judgment in *Brian Foord and American Airlines Inc* [2007] EWHC 90076 (Costs), also took the view that regard could be had to the Rule 15 letter, saying in paragraph 37:- “I am also satisfied that this CFA was a CFA Lite to which Regulation 4(2)(e) of the CFA Regulations 2000 is disappplied. There is no doubt in my mind that in the conditions of the CFA and in the correspondence from the solicitors for the client, it is made clear that “the client is liable to pay his legal representative’s fees and expenses only to the extent that sums are recovered in respect of relevant proceedings. . . .”. The documents state that the client would receive his damages without deduction. . . .” 26. 27. I am not myself quite clear why His Honour Judge Holman took the view that to have regard to the letter would “undermine the provisions and purpose of s.58”. That section makes CFAs enforceable provided they comply with the provisions of s.58 and 58A. S.58(3) makes it a condition that a CFA must be in writing. Regulation 5 of the 2000 Regulations requires the signature of both parties. It does not, however, say that a CFA must be in one document and I am not persuaded that, by implication, that is a requirement of that section. Here both the letter and the agreement were signed by both parties. I can see no reason why the court should not look at the whole package produced by the solicitor, the CFA agreement, the Rule 15 letter explaining to the client the effect of the agreement, and indeed the insurance policy recommended by the solicitor. In that way it can be ascertained whether, as between client and solicitor, the proper understanding was that (save in the circumstances described in paragraph 5 of the Regulation 3A) the client will not be liable for any own-side costs whatever the result of the proceedings, save to the extent that they can be recovered from the other side or under the insurance policy. I use the word “costs” but would emphasise that, as between client and solicitor, it is unlikely that a client will have at the forefront of his mind a distinction between expenses and disbursements or between client’s disbursements and solicitor’s own disbursements. 28. I would add (although words used in the Regulations might, I accept, be construed differently) that insofar as Mr Bacon was suggesting that in Regulation 3A the word ‘expenses’ might not include solicitor and own client disbursements, I would reject the same. Section 58(2)(a) provides as follows:- “A conditional fee agreement 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.” 29. 30. If Mr Bacon were right that in Regulation 3(A) “expenses” excluded disbursements, that would also have to be true of the word “expenses” in s.58(2)(a). As Mr Morgan

submitted, that would have the effect of a solicitor being unable to agree that disbursements should only be paid in specified circumstances. That cannot have been Parliament's intention. The important point is that if and insofar as Mr Morgan would seek to look at the CFA on its own, and construe that CFA strictly, I would reject that approach. I would further emphasise that the construction of the arrangement with which one is concerned is one between solicitor and client, with the Rule 15 letter being an explanation by the solicitor of what is in the CFA to a client unfamiliar with the technicalities of costs' assessment. The correct approach in my view is to ask the question, has the solicitor produced an arrangement for a CFA under which the client would not be liable for any own-side costs or expenses (apart from the circumstances defined by paragraph 5), other than those that are actually recovered from the other side or from insurers.

31. Mr Morgan submits that on a proper construction of the CFA the client in this case was still in certain circumstances liable for own-side costs and expenses. In considering the points taken by Mr Morgan thought needs to be given first to the words of the formal CFA on which he relies, then to one or other of the Rule 15 letter or the insurance policy and ultimately Regulation 3A(5). If he is right about the proper construction of the words of the CFA, and the client would remain liable despite the letter and the insurance policy, then unless the position is covered by Regulation 3A(5), the CFA will not be a 'CFA Lite' and its enforceability will depend on whether Regulation 4(e)(ii) of the 2000 Regulations has been complied with.
32. It is worth setting out the important terms in the Rule 15 letter:- "OUR COSTS-
CONDITIONAL FEE AGREEMENT As you know, in any legal case, the question of costs arises. Normally Solicitors charge clients for their work on a hourly basis, however, to ease the financial burden upon you, we propose dealing with your case on a Conditional Fee Arrangement (often known as "No Win, No Fee"). We enclose a Conditional Fee Agreement in duplicate which fully sets out the terms of this arrangement and who pays our costs in certain circumstances. Before you sign and return the Agreement Felicity Fawcett will ring you to ensure that you understand the contents. Providing you comply with your requirements under the Conditional Fee Arrangement and do not withdraw instructions, we will not charge you for our services unless we are successful whereupon we will receive our costs from the losing party. . . . OTHER PARTY'S COSTS We have to bear in mind that if you lost the case you could face an Order to pay the other party's costs and it is for this reason that we are happy to endorse you taking out the following insurance against the risk.
CLAIMS UK LITIGATION INSURANCE We are happy to recommend this policy for the reasons set out in the Conditional Fee Agreement. We remind you that this insurance policy covers you for the following:- 1 OUR DISBURSEMENTS These are any fees or expenses that we pay in order to pursue your claim and can include the following (although this list is not exhaustive):- 1.1 Medical Reports 1.2 Engineers Reports; 1.3 Fees for obtaining Medical Records; 1.4 Court Fees; 1.5 Agents Fees; 1.6 Accident Investigation Fees; 1.7 Travelling Expenses In a case of this nature, these fees can be very substantial and if your case is not successful, these fees will be met by the insurance. 2 OTHER PARTY'S COSTS AND DISBURSEMENTS If your case is not successful, you may be Ordered to pay the other party's

costs which again, for a case of this nature, can be very substantial. If you lose, the insurance will pay any award. . . . SUCCESS FEE Under the terms of this Conditional Fee Agreement, we are allowed to impose an additional charge above our basic costs which is known as a Success Fee. This is to reflect the risk that we are taking in that if we do not win your case, we will not get paid. We have set out in the enclosed Conditional Fee Agreement the reasons for setting our success fee at the level of 100% of our basic costs. Again, this success fee is recoverable from the other side upon the successful conclusion of your case, however, if all or part of the success fee is disallowed, we waive our right to come to you for the balance, which means that there will be no deduction from your damages or a bill for you to pay if any of our own costs are unrecovered. LEVELS OF SERVICE Throughout your case we aim to provide you with an efficient service and to keep you fully informed throughout of any material developments to your case. Under the terms of our agreement with Claims UK we have accepted very strict standards of service under which, our performance in handling your case will be monitored. . . .” 33. That letter is dated 2 June and, as District Judge Fairclough pointed out, enclosed the formal CFA requesting both the letter and the CFA to be signed by the client. His Honour Judge Holman seemed to suggest that the fact that the Rule 15 letter was signed by Mrs Jones on 21 June 2003, whereas the formal CFA was dated 19 June 2003, was of some significance. In my view the correct approach to the Rule 15 letter is to recognise that it would have been read by the client before entry into the formal CFA on the 19 June and that confirmation that she had read the letter, by signature on 21 June 2003, does not give that letter any less potency. 34. I suggest that any client reading that letter would expect:- i) ii) That unless they withdrew instructions, no fees or expenses would be payable to the solicitors; That they would not be liable for disbursements, possibly because, as the letter suggests, they would be covered by insurance provided they took out insurance. But the understanding of the client would be simply that no liability would fall on the client. [It is suggested that some form of concession was made in the court below as to the meaning of “our services” – see paragraph 8b of Mr Morgan’s skeleton. Since we are concerned with the question of construction of a written contract in relation to which it is not suggested some evidence was produced in reliance on such a concession, in my view the appellant should be free to withdraw the same if it was made]; iii) iv) That any costs which might be ordered to be paid because the case was lost would be covered by insurance. That the solicitors would be producing a CFA contract and recommending an insurance policy that would produce the above result. 35. One then turns to the terms of the CFA and Mr Morgan’s points. As I understood him, he accepted that, so far as the first four points are concerned, if the Rule 15 letter applied or insurance could be taken into account, the points would not bring this CFA outside Regulation 3A, but I should deal with them briefly. First he points to the term of the CFA which deals with “paying us”. That provides:- “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. You are entitled to seek recovery from your opponent of part or all of our basic charges, our disbursements, a success fee and the insurance premium. Please also see conditions 4 and 6.” 36. The reference to conditions 4 and 6 is a reference to the Law Society conditions. Condition 4 is in

the following terms:- “What happens if you win? If you win you are then liable to pay all our basic charges, our disbursements and success fee – please see condition 3(n). Normally you would be entitled to recover part or all of our basic charges, our disbursements and success fee from your opponents. If you and your opponent cannot agree the amount the court will decide how much you can recover. If the amount agreed or allowed by the court does not cover all our basic charges and disbursements, then we waive our right to recover the difference from you. . . . If the court carries out an assessment and disallows any of the success fee percentage because it is unreasonable in view of what we knew or should have known when it was agreed, then that amount ceases to be payable unless the court is satisfied that it should continue to be payable.” 37. 38. He submits that on a proper construction of those conditions there remains a liability to pay and thus the language of Regulation 3A is simply not complied with. Thus, he submits, that there remains a liability in relation to disbursements commonly called ‘client’s disbursements’. The answer to these points is that any client reading the letter would assume that he had no liability to pay that which could not be recovered. So far as ‘client’s disbursements’ were concerned he would understand that they would be waived, or possibly that they were covered by insurance, but critically he would understand from the wording of the letter that there was no liability on the client. The last sentence of the paragraph relating to the success fee indicates that “There will be no deduction from your damages or a bill for you to pay if any of our own costs are unrecovered” and a client would assume that covered everything.

39. Mr Morgan’s second point related to when a case was lost. By the terms of the CFA it is provided as follows:- “If you lose you must pay your opponent’s charges and disbursements, your own disbursements, plus any related loan interest and the premium plus any related loan interest, however you have taken out insurance cover again these risks through CBUK. . . . Please see conditions 3 and 5. If you lose you do not pay our charges.”
40. Mr Morgan submits that there could remain a liability on the client. He submitted as a possibility that the insurance might turn out to be invalid or the cover too low and thus there would be no recovery under an insurance policy. Condition 5 of the Law Society Conditions is in the following terms:- “What happens if you lose? If you lose you do not have to pay any of our basic charges or success fee. You do have to pay us for our disbursements; your opponent’s legal charges and disbursements. Assuming that you are still insured against liability to pay these amounts under your certificate of insurance, we would make a claim on your behalf and receive any resulting payment in your name. We would give you a statement of account for all money received and paid out.”
41. Mr Morgan stressed the word “assuming” as emphasising the point he made as to the possible non-availability of insurance at the end of the day. He would also again submit there is a liability, albeit the client may be indemnified against it, and thus the wording of Regulation 3A is not complied with. 42. 43. Once again the Rule 15 letter provides the answer to these points. It advises, and in effect warrants, that insurance will cover. Furthermore, it seems to me the question whether a CFA complies with the 2003 Regulations must be tested

at the time the agreement is entered into. If there is valid insurance to cover own-side disbursements (as well, no doubt, as other-side costs and disbursements), and indeed the other side's costs and disbursements, that will provide the 'or otherwise'. The possibility of later avoidance is not, in my view, to the point. It is convenient here to deal with the limit on indemnity point. The insurance was limited to £25,000 and thus, submitted Mr Morgan, there could be a liability on the client if the costs of the defendant exceeded that sum. Once again, the Rule 15 letter represents to the client that the insurance will cover against certain eventualities and the client would understand the limit to fully cover her, as indeed in practice it would.

44. Mr Morgan's third point related to the success fee. He referred to the sub-paragraph under the heading 'What happens if you win?' So far as success fee is concerned it states:- "If the court carries out an assessment and disallows any of the success fee percentage because it is unreasonable in view of what we knew or should have known when it was agreed, then that amount ceases to be payable unless the court is satisfied that it should continue to be payable." Mr Morgan submitted on the true construction of that provision the court might rule that a part of the success fee should not be recovered from a losing defendant but might rule that part was still be recoverable from a winning client. That may be the proper construction of the CFA provision but the Rule 15 letter and the last sentence of the paragraph in the letter relating to success fee (see paragraph 32 above) makes clear that the solicitors waive their right to come for any balance as against the client.
45. Finally Mr Morgan took certain points, not as I understand it taken before the judge or the district judge, and which he suggested would allow him to succeed, even if the Rule 15 letter and insurance were taken into account. They are taken by reference to the condition in the Law Society's Conditions headed 'What happens when this agreement ends before your claim for damages ends?' Mr Morgan relied on sub- paragraph (b) headed 'Paying us if we end this agreement'. The sub-paragraphs of that sub-paragraph provide as follows:- "i) We can end this agreement if you do not keep to your responsibilities in Condition 2. We then have the right to decide whether you must: pay our basic charges and our disbursements including barrister's fees when we ask for them; or pay our basic charges and our disbursements including barrister's fees and success fees if you go on to win your claim for damages. ii) We can end this agreement if we believe you are unlikely to win. If this happens you will only have to pay our disbursements. These will include barrister's fees if the barrister does not have a conditional fee agreement with us. iii) We can end this agreement if you reject our opinion about making a settlement with your opponent. You must then pay the basic charges and our disbursements, including barrister's fees; pay the success fee if you go on to win your claim for damages. If you ask us to get a second opinion from a specialist solicitor outside our firm we would do. You pay the cost of a second opinion."
46. Mr Morgan submits that the above termination provisions provide conclusively the answer as to why the CFA cannot be a CFA Lite. The 2003 Regulations 3A(1) allows for an exception to the rule that the client should have no direct liability under a CFA Lite, namely that allowed in 3A(5). He points out that Regulation 3A(5) allows the client to be charged in only

four situations:- a. b. c. d. The failure to co-operate with a lawyer; Failure to attend a medical or expert examination or court hearing; Failure to give necessary instructions; Withdrawal of instructions. He thus submits that if the above termination provisions create a liability to the solicitor in any situation outside Regulation 3A(5) that will render the CFA outside Regulation 3A(1), and thus not a CFA Lite. 47. He submits that under clause (b)(i) it is provided that the solicitor may terminate the CFA and charge the client if the client does not keep to his responsibilities under condition 2. Condition 2 is Condition 2 of the Law Society's Conditions, which purport to impose on the client the following responsibilities:- "Give us instructions that allow us to do our work properly; Not ask us to work in an improper or unreasonable way; Not deliberately mislead us; Co-operate with us; Go to any medical or expert examination or court hearing." 48. Comparing those responsibilities with the terms of 3A(5) Mr Morgan submits that the following situations fall outside Regulation 3A(5): i) Where the client asks the solicitor to work in an improper or unreasonable way; ii) Where the client deliberately misleads the solicitors.

49. Mr Bacon's response to the above points is that asking a solicitor to work in an improper or unreasonable way, or deliberately misleading the solicitor would provide a good example of a failure by the client to co-operate with the lawyer. Thus, he submits, it does fall with Regulation 3A(5). I would accept Mr Bacon's submission on this point.
50. Mr Morgan then suggests that clause (b)(ii) of the conditions quoted above enables solicitors to charge disbursements if they terminated because they think the client is unlikely to win. That, he submits, is outside Regulation 3A(5).
51. Mr Bacon's response is to submit that 'disbursements' are not covered by the words 'fees' and 'expenses' in Regulation 3A. I have already expressed the view that I do not accept that argument. More powerfully, Mr Bacon points out that the circumstances would amount to a lost case and in those circumstances the ATE policy would pay out.
52. Mr Morgan points to condition 3(b) of the insurance, which provides that the certificate will become void if the conditional fee agreement is terminated or is otherwise unenforceable. Mr Bacon's response is to submit that termination may bring the insurance to an end but cannot be read as avoiding the policy ab initio. In my view Mr Bacon is almost certainly right in this submission but even if not, for reasons to be given below, the Rule 15 letter would cover the position. 53. Finally, Mr Morgan submits that clause (b)(iii) enables the solicitors to end the agreement and charge the client profit costs and disbursements if the client rejects the solicitor's opinion about making a settlement. That, he submits, is outside Regulation 3A(5). Mr Bacon's response is to submit that the rejection of an opinion whether to settle a case would amount to failure to co-operate and come within (a) of Regulation 3A(5). Alternatively, he would submit that it will give rise to a failure by the client to give necessary instructions to the legal representative, and thus fall within (c) of Regulation 3A(5). 54. I can see that in many situations a client might be acting unreasonably not to accept the solicitor's advice in relation to a settlement. If the client were acting unreasonably then there would be force in Mr Bacon's submission that there would then be

a failure to co-operate or a failure to give necessary instructions. However, I cannot accept that in every situation a refusal by a client to accept a solicitor's advice would amount to non-co-operation or a failure to give necessary instructions. Particularly in cases where a solicitor is dependent on success in the action for recovery of a fee, including a success fee, it must be recognised that there can be room for perfectly reasonable disagreement as to whether a settlement figure should be accepted. It is, however, in this context necessary to go back to the Rule 15 letter.

55. Mr Bacon makes a submission, which he accepts he did not make until the Court of Appeal, to the effect that the Rule 15 letter is a CFA Lite. Since he is responding to submissions made by Mr Morgan not made previously, it is reasonable he should be allowed to do so. I would not accept the submission that he is entitled to look at the Rule 15 letter alone to make good that submission. But the point which he makes in relation to the Rule 15 letter seems to me to be a valid one, when construing the terms of the arrangement between the client and solicitor, looking at the Rule 15 letter and the CFA agreement together. The letter advises the client that, only if the client withdraws instructions, will the client be liable for any charge for the client's services. It further advises the client that other parties' costs and disbursements will be covered by insurance if the case is lost and the effect of the letter overall is to assure the client that, unless the client withdraws instructions, there will be no liability on the client at all. 56. In those circumstances, it seems to me, that if the solicitor sought, in reliance on clause (b)(iii) to charge the client profit costs and disbursements in circumstances where the client reasonably was rejecting the opinion to make a settlement, the client would have an answer that he or she had the assurance that the only circumstances in which charges would be made would be if the client withdrew instructions and not where the solicitor, unreasonably, terminated the retainer. Conclusion on the 2003 Regulations 57. In my view, the question whether a CFA is a CFA Lite within Regulation 3A depends on the construction of the arrangement made between the solicitor and client, including such arrangement as may have been made by a Rule 15 letter and by insurance. Since the agreement in this case was that so far as the client was concerned there would be waiver, except to the extent that there was recovery, either from a losing defendant or under an insurance policy so that the client, unless she withdrew instructions, had no liability for costs, the CFA in this case was a CFA Lite. Regulation 4(2)(e)(ii) 58. I will deal with this issue despite the views expressed as to whether this regulation applies. Regulation 4(1) provides that before a CFA is made the legal representative must inform the client, and provide any further explanation, advice or other information reasonably required by the client about the matters set out in Regulation 4(2). The matters in question include:- "(c) 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,
- (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 or all of these costs is appropriate and, if he considers that a contract of insurance is appropriate or recommends a particular such contract . . . (ii) whether he has an interest in doing so.” 59. 60. So far as the present case is concerned, the solicitors advised the client that a CBUK insurance policy was appropriate and asserted that the solicitors had no interest in recommending this particular agreement. The certificate of insurance is dated 16th May 2003 and thus predates the Rule 15 letter and the CFA. It is accepted on the evidence that the certificate also predates the first instruction of the solicitors, which appears to have been on 19 May 2003. The issues on this limb of the appeal are thus:- a. b. c. Are the matters which the solicitor is obliged to explain under Regulations 4(2)(c) to (e) mutually exclusive? Was the judge’s approach of standing back and looking at the overall picture [judgment paragraph 14] correct? Did the solicitors have an interest which they ought to have declared?
61. Mr Bacon submits that that (e) of Regulation 4(2) only applies where the legal representative is dealing with a situation where there is not already existing insurance. He submits that where there is existing insurance (c) is the applicable provision and
- (d) and (e) simply do not apply. 62. 63. 64. 65. I would reject that submission for the simple reason that it cannot have been intended that the solicitor should not be obliged to consider whether the insurance was one that it was appropriate to use. In my view, there is no reason why (c), (d) and (e) should not apply cumulatively, whether or not insurance is in place. Accordingly, I would reject Mr Bacon’s submission on this aspect. The judge’s approach seems to use the fact that the solicitors gave advice on insurance to reinforce his view that Regulation 4(2)(e) was engaged. That may not be a legitimate aid to construction but since my view is that on a proper construction of Regulation 4(2) all sub-paragraphs apply, even where there is pre-existing insurance, there is nothing to be made of the way the judge approached the matter. Did the solicitors have an interest? Mr Bacon sought to submit that he could distinguish this case from Garrett on the basis that there was no term established that if the solicitors did not recommend this insurance their membership of the panel would be terminated. He further submitted that the evidence of Mr Patton supports the view that these solicitors did not, as a matter of course, recommend a CBUK policy. So far as the evidence of Mr Patton is concerned, that simply reveals that if the solicitors discovered that a client had their own legal expenses insurance taken out prior to the event, the solicitors would advise cancellation of the CBUK policy. It further confirms that that did not harm the business relationship between solicitors and CBUK. Since one of the conditions on which CBUK accept the proposal from a client is “that I have not got pre-accident legal cover, e.g. legal expense cover on my home or car insurance or with my trade union membership . . .” it is hardly surprising that a cancellation in circumstances where the client has such cover can be achieved without trouble. What Mr Patton’s evidence does not reveal is whether those solicitors have ever, in a situation where there is not legal expense insurance pre- event, advised a client not to continue with CBUK ATE insurance but go to another insurer. If that advice had ever been given, one would expect Mr Patton to have given evidence of it. The

reality of the situation so far as solicitors on the CBUK panel are concerned is that the operations manual requires solicitors to use the CBUK's precedents, i.e. Rule 15 letter and CFA, which include the recommendation of CBUK's own policy. It is an obvious inference not requiring any evidence that, if solicitors ignored the operation manual and recommended a different policy from CBUK, involving cancellation of the policy already entered into with CBUK, considerable damage would be done to the solicitor's business relationship with CBUK. An insurer in the position of CBUK in addition to receiving premiums under the policy received fees for doing the work that solicitors would otherwise do and would not view lightly a solicitor on the panel advising clients to go to different insurers. In my view, Mr Bacon simply cannot distinguish this case from Garrett. The decision in Garrett was not, at least so far as the Court of Appeal was concerned, based simply on the fact that there was a term under which membership of the panel could be terminated. The language of the judgment is in general terms saying as follows (paragraph 97):- "There was a close relationship between Websters and Ainsworth. Websters were dependent on Ainsworth for referrals of cases, although it is unclear to what extent. As Mr Morgan point out, cases are the life blood of solicitors. Profit generated by cases is likely to be of greater significance to solicitors than commissions paid on insurance premiums, paid for ATEs in connection with CFAs. The indirect financial interest of maintaining a flow of work through membership of a panel of solicitors is greater than the direct financial interest in commissions paid for insurance premiums. The advice to use the Ainsworth insurance product came in a CFA that it had apparently supplied to its panel solicitors and which bore its livery." In my view, the solicitors in this case clearly had an interest. It is not suggested that the fact that in some part of the CFA they disclosed that they were on the panel would be sufficient, having regard to the absolute terms in which they suggested they had no interest. If, therefore, this CFA had not been a CFA Lite I would have held that there had been a non-compliance with Regulation 4(2)(e) by the solicitors' failure to disclose their interest and the CFA would have been unenforceable. 66. 67. 68. 69.

Conclusion

70. I would, for the reasons given in paragraphs 1 to 57 above, allow the appeal. Lord Justice Longmore : 71. I agree with my Lord that the requirements of the 2003 Regulations are satisfied. I am glad to be able to do so, since I do not think the intricacy of defendants' insurers' arguments, or the passion with which they were espoused are consistent with Parliament's intentions about access to justice, as reflected in the Access to Justice Act 1999 and the regulations made thereunder. Lord Justice Hughes :
72. When the first rudimentary forms of conditional fee agreement ("CFA") were introduced by the Courts and Legal Services Act 1990, they were rapidly christened "No win; no fee" agreements. Like many other apparently attractive labels applied to legal processes, this was, then, a significant misnomer. 73. 74. 75. 76. 77. 78. Under the paradigm form of CFA the client escaped his own solicitor's charges if he lost. He did not escape (i) his own-side disbursements or (ii) the other-side costs of the successful defendants who would ordinarily

obtain an order that he pay them. And if he won the case, he had to pay the success fee of his own solicitors out of the damages. Very soon, after the event (“ATE”) insurance became available under which the client could insure against one or other or both of those first two potential liabilities. So far as he could obtain such insurance, that left him exposed, if he lost, only to the cost of the premium, or, if he won, to the success fee. Later still, by the Access to Justice Act 1999, it became possible for the claimant, if successful in his action, to recover the insurance premium (and also his solicitor’s success fee) from the defendants as costs. By a yet further development in recent years, ATE insurance has commonly contained a provision (remarkable in some respects) which gives cover for its own premium if the case is lost. A CFA, properly so called, still regulates only the contractual relationship between the client and his own solicitor. Legislation permitting, and regulating, CFAs is directed to this relationship. The current reality, however, is that a CFA is frequently, perhaps normally, entered into in association with ATE insurance. Between them, the CFA and the ATE policy have moved towards making the client less and less exposed to the payment of costs, not only of his own side, but also of the other side. Although the CFA is an agreement between client and solicitor, both it and the associated ATE insurance are commonly initiated by commercial claims handlers, who seek out the business of potential claimants and are very often their first port of call. The package which they offer will commonly include (i) a CFA with a solicitor nominated by them, (ii) ATE insurance with an insurer nominated by them, and (iii) a loan agreement with a bank nominated by them, designed to provide funds for the claimant to pay, initially at least, the insurance premium and own-side disbursements as they are incurred. The latter may well include, and did in this case, not only conventional disbursements by way of fees for expert reports and the like, but also what is in effect a handling/investigation fee payable to the claims handler. There are no doubt intricate financial arrangements between the claims handlers and their various nominated solicitors, insurers and banks, but their terms, whatever they may be, have not figured in the evidence or argument in this case. Some examples of the kind of arrangement which is sometimes involved can be seen in *Re Claims Direct Test Cases* [2003] Lloyd’s Rep IR 69 and *Sharratt v London Central Bus Co* (No 2)

[2003] All ER(D) 232. The effect of these, now common, arrangements is much to reduce the potential liability of the client for any costs, on either side, whether he wins or loses. The CFA has come much closer to the original label “no win; no fee”; indeed often it approaches “no fee; win or lose”. Effectively, the expense of litigating all claims, successful or unsuccessful, is shifted onto those who are successfully sued, or, in practical terms, through them onto their insurers. In turn all such expense is no doubt reflected in the premiums which all citizens pay for liability insurance, and, it may be, for other species of insurance also. 79. 80. 81. 82. 83. 84. The Solicitors’ client care letter in the present case was in terms drafted for them by, and required by, the claims handlers. In the first paragraph to deal with costs it refers to the agreement which is being entered into as “...a CFA (often known as ‘No Win, No Fee’)”. In fact, the argument in this case resolves into an issue whether the agreement was a “no own-side fees except in case of client’s default”

agreement. As Waller LJ explains, this issue arises because if this CFA meets the test created by Regulation 3A(1) of the 2003 Regulations, the statutory duties to advise the client on the suitability of insurance and to declare any interest in the policy recommended are removed. It is perhaps curious, given the importance of insurance to the current version of a CFA, that these duties should have been removed. But I am unable to see that this is any guide to whether or not the words ‘or otherwise’ in Regulation 3A(1) include recovery through insurance. Regulation 3A(1) makes the test for qualification under the 2003 Regulations the nature of the agreement as to own-side costs. It says nothing about other-side costs. Even if “or otherwise” is limited to money extracted from the other side and excludes the proceeds of insurance, so that to qualify the CFA must waive the client’s liability for own-side disbursements in a lost case, there will still usually be vital insurance in order to cover other-side’s costs. Nevertheless, the effect of these Regulations is to remove from a qualifying CFA the need for advice on insurance or declaration of interest relating to it. It may well be that the reason for this was a wish to limit the scope for technical challenges to the validity of CFAs, which were and are usually mounted by defendants rather than by the claimant clients whom the regulations sought to protect. But whatever motivated the introduction of the 2003 Regulations, I agree, for the reasons explained by Waller LJ, that the concluding words of Regulation 3A(1) “or otherwise” include recovery via insurance, here ATE. The test created by Regulation 3A(1) focuses on own-side costs. It says nothing about other-side costs. I agree that the expression “fees and expenses” in Regulation 3A(1) includes own-side disbursements. Of course there is for some purposes a significant distinction between fees, expenses and disbursements, but in the context of this Regulation the inclusion of disbursements seems to me the clear natural meaning of the words; there appears to have been no issue between the parties about this until a late stage in the written submissions to this court on second appeal. Thus the test is, in effect, whether the agreement taken as a whole, including the insurance contemplated by it, removes the risk of the client having personally to pay own-side costs other than in the limited cases listed in Regulation 3A(5). If so, the agreement is within the 2003 Regulations and is, in the vernacular, a “CFA lite”. The suggestion that the agreement as a whole does not have this effect has been advanced against the solicitor in these proceedings, as in other similar cases, not by the client but by the defendants to the action which the client brought. That that is the source of the contention cannot, however, alter the construction of the agreement. The contractual position as between the solicitor and the client must be the same whoever takes the point. The ATE insurance in the present case provided indemnity only in the event that the claimant was not successful in her action. By the terms of the master certificate which governed the policy, ‘successful’ meant recovering damages from the defendant whether by court order or agreement or otherwise, so ‘not successful’ meant recovering no damages. In that event she was covered for (1) being ordered to pay the other side’s costs, (2) own-side disbursements, (3) the ATE insurance premium and (4) any loan interest. The limit of cover was £25000. The premium was £850. The significance of the client care letter 85. The letter and the CFA were sent together to the client. The client care letter is an

essential part nowadays of the contractual relationship between solicitor and client. This letter purports to explain, and advise upon, the CFA and the arrangement between the parties generally. Although in fact drafted by the claims handlers, it came from and was signed by the solicitors. It begins: "The purpose of this letter is to set out the terms of our engagement..." It enclosed the claims handlers' printed standard-form CFA, albeit in rather small print. It referred to the CFA as "fully" setting out the terms of this arrangement. The printed agreement in turn referred to and had attached to it some standard terms headed 'Law Society Conditions', albeit without the numbering referred to in the body of the printed agreement. The client was asked by the letter to sign both letter and agreement, and if she had read the agreement she would have found in it a warning that she should read it carefully. It is apparent that the letter and printed agreement traverse much of the same ground, but not in identical terms. The reality is that a lay client will, if she reads the printed agreement at all, at the very least read the two together, and is to be expected to take the letter as an explanation and summary of, and advice upon, the agreement. That position is not altered by the fact that it appears from the letter that the solicitors arranged for one of them to telephone the client "to ensure that you understand the contents" of the agreement. What was actually said to her on this occasion is not in evidence. 86. 87. I respectfully agree with my Lord that the letter and agreement together constitute the CFA. The representations and warranties in the letter induced the signature to both it and the agreement, and once both were signed, as they were, the statutory requirement that a CFA be in writing signed by both parties is satisfied. I also agree that the clear meaning of the letter, to any ordinary lay person putting herself into the hands of a professional solicitor, is that in the absence of default by her and so long as she does not withdraw her instructions, she will not have to bear any liability for own-side costs; if payable at all, they will be covered by insurance. Taken, as they must be, in their context within the letter, which is set out in the judgment of Waller LJ and which I do not repeat, that meaning seems to me to emerge from the following statements: i) ii) iii) iv) 'Providing you comply with your requirements under the CFA and do not withdraw instructions, we will not charge you for our services unless we are successful whereupon we will receive our costs from the losing party.' 'Our disbursements.....In a case of this nature these fees can be very substantial and if your case is not successful these fees will be met by the insurance.' 'Other party's costs and disbursements..... If your case is not successful you may be ordered to pay the other party's costs which again, for a case of this nature, can be very substantial. If you lose, the insurance will pay any award.' 'Success fee.....this success fee is recoverable from the other side upon the successful conclusion of your case however, if all or part of the success fee is disallowed, we waive our right to come to you for the balance which means that there will be no deduction from your damages or a bill for you to pay if any of our own costs are unrecovered.' 88. 89. 90. 91. 92. Although the last of those statements appears under the heading 'Success Fee' the closing words, beginning 'which means that', clearly go beyond the success fee and, by their own terms, extend to 'any of our costs.' For a number of reasons, those clear statements in the letter do not properly reflect the terms of the printed agreement. Mr

Morgan QC has pointed to several ways in which, on the terms of the printed agreement, the client may remain exposed to the risk of having to pay some own-side costs. First, Law Society condition 4 contains a waiver by the solicitors of any claim for own side costs in a won case except to the extent they are agreed or allowed on assessment by the court. As Mr Morgan points out, the waiver does not extend to costs allowed by the court but not paid by the defendants, for example if they become insolvent. Like Waller LJ, I am quite satisfied that the letter constitutes a waiver in such a case of any claim for own-side costs not actually obtained from the defendants. No doubt the solicitors and claims handlers both had it in mind that the defendants would be insured. The same condition 4 refers to the statutory power of the court in a won case to disallow part or all of the success fee as against the defendants but to allow it as between solicitor and client. By the printed agreement, the solicitors thus waive the excess success fee but not if the court rules it payable between solicitor and client. For the same reasons, however, the letter constitutes a waiver whether the court so orders or not. Law Society condition 5 refers to the lost case and provides that the solicitors will make a claim on the client's behalf under the ATE insurance. Mr Morgan rightly points out that that does not, in that condition, constitute any warranty by the solicitors that the insurance cover will be high enough, and that if it should not be, the client will be exposed to liability for the shortfall. But once again, the terms of the letter are different and give an assurance that "if you lose, the insurance will pay any award"; that is a warranty that the insurance is sufficient. There is more difficulty about the termination provisions in the printed agreement. For present purposes it is necessary to examine three provisions which, on the terms of the printed agreement, allow the solicitors to terminate the agreement. They are contained in Law Society condition 7(b). In each case, the consequence of termination is that the client has some liability for own-side costs. Moreover, if the agreement is terminated, there will be no insurance cover because this policy contains the following conditions: "3(b) The certificate will become void Assured's....conditional fee agreement is terminated. if the

5. It is a condition precedent to Underwriters' liability hereunder that the Conditional Fee Agreement relating to the proceedings is in force during the course of the proceedings and is not terminated for any reason whatsoever." 93. By Law Society conditions 7(b)(i) and 2 the solicitors are entitled to terminate if the client does not observe his responsibilities to give instructions, or asks the solicitors to work in an improper manner, or misleads them, or fails to co-operate, or fails to attend an expert examination or court hearing. In all those situations, however, the client's default would be within Regulation 3A(5), because it would involve a failure to co-operate with his legal representatives. That the CFA provides for liability for own- 94. 95. side costs in such a situation does not prevent it from qualifying as a CFA lite under the 2003 Regulations, 3A(1). By Law Society condition 7(b)(ii) the solicitors are entitled to terminate if they think the client is unlikely to win. By 'win' is meant recover damages: see the definition condition 3. In that event the client is by condition 7(b)(ii) liable to pay own-side disbursements. I agree that that would then be a lost case, but not that any liability for own-side costs would be met by the insurance, because there is no insurance

cover if the CFA is terminated – see paragraph 21 above. However, the letter says nothing at all about this provision, however obliquely. It certainly gives no warranty that the client's claim will succeed, and no client could expect such. But it does give a clear assurance that if it does not, the client will be saved harmless from costs, at least in the absence of default by her. It seems to me inescapable that by this letter the solicitors have waived any right to claim disbursements if they terminate because the prospects of success are not high enough, at least in the absence of misleading or unco-operative conduct by the client. Another way of putting the same conclusion is that to the extent that the letter fails to warn the client of the potential liability it constitutes a promise that there will be no such liability. Accordingly, this provision in the printed agreement does not, in this case, cause the CFA to fail the Regulation 3A(1) test. By Law Society condition 7(b)(iii) the solicitors may terminate the agreement if the client rejects their advice about settlement with the defendants. The client is to be given the opportunity to take a second opinion from a different solicitor, but at her own expense. The agreement imposes no responsibility on the solicitors to accept that second opinion, if different from their own, nor to continue with the CFA. In the event of such termination, the client is liable for the solicitors' own charges, and for any own-side disbursements, and indeed remains liable for the solicitors' success fee if she continues with the case via other solicitors or on her own and recovers damages (it would seem any damages, whether more or less than any offer). Those are, from the point of view of the client, onerous, not to say draconian, provisions. They give to the solicitors complete control over the decision whether or not to accept an offer made by the defendants, however low, subject, of course, to the constraints which one would expect to be imposed by professional standards, and to the legal possibilities of an action for professional negligence or a report to the Law Society. The practical reality of the solicitors' position in a CFA case is that there is inevitably some risk of a conflict of interest when an offer is made, since their success fee will be payable if the offer is accepted, but may be lost if it is refused; under this CFA it would indeed be lost if an offer were refused and not beaten at trial (see page 1 of the printed agreement). On any view, the decision at point of offer is potentially a very difficult one to make for even the most careful and responsible solicitor. I agree that it is clear that two reasonable people might easily come to different conclusions on such a question. That would be so if they were both solicitors; even allowing for the danger of the client being too close to his case to think objectively, it remains also true if one is the solicitor and the other the client. 96. The letter says nothing at all about this very important topic. It gives the assurances which I have already set out, but I am, for myself, not persuaded that they are to be read as warranting that no liability for own-side costs will fall on the client in the event of a disagreement about an offer. Although the clear meaning of the letter is that in the absence of default on the part of the client there will be no exposure to own-side costs, it plainly does tell the client that she must comply with her duties under the agreement. The letter is simply silent on what those are in this important area. It seems to me that that silence is itself arguably negligent, at least unless the solicitors drew the client's attention to what might happen and fully explained it. They may of course have done so; there is no evidence either way. But, assuming for the moment that there was a failure to explain the

rules relating to offers, one must look to see what would have been the position if the right advice had been given. In that event, the client would have known what the agreement says, and would either have entered into it in that knowledge, and been bound by it, or would have declined to do business on those terms at all. One thing which would not have happened is that the CFA was entered into but without the termination provisions relating to offers. Nor would the CFA have ended up modified to provide that the liability for own-side costs in the event of refusal of an offer applied only if the client's decision was unreasonable. For that reason, I regret that I am for myself unable to see how the effect of the letter and agreement together can be to modify the agreement in this way, attractive as such a provision would have been if the parties had chosen to agree it. However, the question for us is whether the CFA, taken as a whole, does or does not satisfy the test imposed by Regulation 3A(1). The printed agreement stipulates that the solicitors shall have complete control of the decision on any offer. That seems to me to carry the consequence that if the client disagrees, however reasonably, she is not co-operating with the solicitors. The case is then within Regulation 3A(5) and not prevented by this stipulation from qualifying under 3A(1). If, however, and contrary to my view, the letter does contain a warranty that there will be no potential liability for own-side costs even in the event of a disagreement about an offer, then in that case also the CFA would still qualify under 3A(1), precisely because the client would have no liability. The remaining reason advanced why this CFA is outside Regulation 3A(1) was that there remains the possibility that the insurance policy might be avoided by the insurers and then the client would have an uninsured liability for own-side disbursements. I agree that that possibility does remain. I am unable to see that the letter, construed as I have construed it, can possibly constitute a warranty by the solicitors that the client will not have brought avoidance of the policy upon herself, nor can I see that any reasonable client could so understand it. But such avoidance of the policy would involve, as it seems to me, non-disclosure or similar default on the part of the client. Since the insurance policy is part of the package with the CFA, that would be likely to involve failure to co-operate with the solicitors within Regulation 3A(5). In any event, I respectfully agree that the question whether the CFA qualifies under 3A(1) falls to be answered when it is entered into; the possibility of subsequent avoidance by the insurers does not seem to me to prevent it qualifying. For these reasons I would hold that this CFA, taken as a whole, did fall within Regulation 3A(1). It follows that I would allow the appeal. If I were wrong about that, and the issue of compliance with Regulation 4(2)(e)(ii) were to arise, I should answer in the same manner as Waller LJ, and for the same reasons, that the solicitors did have an interest and did not disclose it. 97. 98. 99. 100.

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Prepared on 28 October 2026 · Esheria