Neutral Citation Number: [2011] EWHC 2661 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/10/2011

Before :

MR JUSTICE BURTON

- -

Between :

Case No 1: 2010 Folio 614

(1) CHRISTINE BROWN-QUINN — **First Claimant**

(2) WEBSTER DIXON LLP — **Second Claimant**

-and-

(1) EQUITY SYNDICATE MANAGMENT LTD — **First Defendant**

(2) MOTORPLUS LTD — **Second Defendant**

Case No 2: 2010 Folio 622

WEBSTER DIXON LLP — **Claimant**

-and-

(1) EQUITY SYNDICATE MANAGMENT LTD — **First Defendant**

(2) ACM ULR LTD — **Second Defendant**

Case No 3: 2010 Folio 1429

(1) JANINE BAXTER

First Claimant

(2) WEBSTER DIXON LLP

Second Claimant

-and-

(3) EQUITY SYNDICATE MANAGMENT LTD

First Defendant

(4) MOTORPLUS LTD

Second Defendant

Colin Wynter QC and Thomas Cordrey (instructed by **Webster Dixon LLP**) for the **Claimants**

Dr Mark Friston (instructed by **Horwich Cohen Coghlan**) for the **Defendants**

Hearing dates: 7 & 8 October 2011

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE BURTON

MR JUSTICE BURTON :

1. There have been before me three Part 8 claims, which are effectively sample or test proceedings. The claims are ostensibly by or in respect of three clients of Webster Dixon ("WD"), a firm of solicitors, against two insurance companies, Equity Red Star at Lloyd's and ULR Norwich ("the Insurers"), who offer Before The Event ("BTE") legal expenses insurance.

2. The three clients, Mrs Christine Brown-Quinn ("CBQ"), Ms Christine Jones ("CJ") and Ms Janine Baxter ("JB") had various claims against other parties (in this case all employment and discrimination claims), for which they wished to bring or continue proceedings with the benefit of the BTE insurance, using the services of WD, in respect of whom the following description is given in the Agreed Statement of Facts:

> "*1.* [WD] *is a London-based firm of solicitors, established in 1998. Amongst other areas,* [WD] *specialises in employment law. It is situated in the City of London …*
>
> *2.* [WD] *is rated at Band Three (employment) in Chambers and Partners and is noted therein as being "tailored to suit the*

> *needs of City professionals, bankers, accountants, traders, lawyers, IT specialists and directors". It is also rated at Band Three in Legal 500 as a Claimant firm acting in the field of employment law; in the recent past it was described therein as having "a focus on acting for executives and professionals, tailoring advice to their needs"; it is currently described as being a firm that "takes on complex cases involving multiple strands of discrimination, unfair dismissal and TUPE".*"

3. The Insurers, in circumstances which I shall describe, were not prepared to accept that the clients were covered for WD's fees.

4. In the event, CBQ's costs were paid by the other side, her former employers, as part of a settlement, but WD, who were joined as Claimants in her action, have nevertheless continued the proceedings, and CJ, who entered into a confidential compromise agreement in August 2008 with her former employer, has never been a claimant in "her" proceedings, in which WD were and remain the sole Claimants. Although objection was made as to WD's locus by Dr Mark Friston of Counsel on behalf of the Insurers, particularly once it was clear that the relief sought in these proceedings was limited to declaratory relief he did not pursue any such objection: plainly WD have a significant interest in the decision in this case (and I understand there are at least 17 others pending) as to whether their clients are entitled to recover under their BTE insurance the fees which they are liable to pay WD.

5. The issues that arise in respect of the entitlement of those insured under BTE insurance to instruct solicitors of their own choice and expect that their reasonable fees will be covered under that BTE insurance apply more generally than to these three cases, and there was a submission made by the Law Society to the Jackson Review of Civil Litigation Costs, which was recited by Jackson LJ at paragraph 6.2 and described at 6.3 as forming part of an argument which had "*considerable force*", that "*Claimants wishing to take advantage of* [their] *BTE policy either instruct their own solicitors and are refused funding unless they agree to instruct a panel solicitor, often in a different part of the country, or are referred direct* [there] *by their insurer.*" Similar concerns were expressed by the Court of Appeal in **Sarwar v Alam** [2002] 1 WLR 125 at para 44. BTE insurers traditionally, as did these Insurers, retain a panel of solicitors, with whom they have been able to negotiate reasonable, and no doubt discounted or reduced, fees for acting for their insured, in return for an expectation of receiving a quantity of such work, through clients being referred to them on a regular basis. I have not seen evidence of what these rates are, but I shall call them '*panel rates*'.

6. In the case of CJ, she instructed a non-panel solicitor, WD, from the beginning. CBQ and JB were both referred to panel solicitors by the Insurers from the outset, but in each case the case-handler left the panel solicitor, and joined WD, and the clients wished to 'follow' the case-handler to WD, and thus to transfer their instructions to WD. Different arguments were addressed before me with regard to cases where, as with CJ, there is a wish by the insured at the outset to instruct a non-panel solicitor ('*outset cases*') and those cases where, as with CBQ and JB, there is a transfer of instructions ('*transfer cases*').

7. The position taken by the Insurers was that, so far as *outset* and *transfer* cases were concerned, they were entitled to insist that if an insured did not wish to instruct a panel solicitor, any other solicitor of the insured's choice must not charge more than the rates prescribed by their "*Terms of Appointment for Non … Panel Solicitors*". These included the following provision:

> "*Your entitlement to recover reasonable costs in cases will be subject to:*
>
> *(a) an hourly rate of £125 plus VAT which is expected to be fully inclusive of any relevant mark up;*
>
> *(b) letters out and in at one tenth and one twentieth of the hourly rate respectively;*
>
> *(c) travelling and waiting time to be charged at two thirds of the agreed hourly rate.*"

In the case of CBQ and JB, this rate of £125 was increased to £139. I shall call them "*non-panel costs*".

8. There were two significant constituents:

   i) There was a fixed hourly rate, irrespective of the importance or complexity of the matter.

   ii) It was a flat rate chargeable in respect of whoever should carry out the work on behalf of the firm, be it partner, associate, assistant or trainee. The rates which WD have sought to charge are very much more than that, in respect respectively of a claim against a very substantial global investment bank for redundancy, unfair dismissal and sex discrimination (CBQ), race discrimination, constructive unfair dismissal, victimisation, breach of Part Time Workers Regulations and breach of Flexible Working Regulations against a very large foreign investment bank (CJ) and unfair dismissal and disability discrimination against her former employer, an educational establishment (JB). WD put forward hourly rates for a partner or associate (Grades A/B) of £274, for a solicitor £210 and for a trainee solicitor £105.

9. In each case the dispute about these rates became apparent at the outset. It is part of the Agreed Statement of Facts (paragraphs 27 and 29) that the Insurers informed WD that they would not agree to their acting for JB or CBQ, and similarly so (paragraph 45) in respect of CJ. In the event, WD continued to act for the three clients and, at any rate in the case of CBQ and CJ, achieved satisfactory settlements on their behalf. I have not been told what occurred in relation to JB.

10. Colin Wynter QC and Thomas Cordrey on behalf of the Claimants rest their case on the effect of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 SI 1990 No 1159, which brought into effect, in materially identical terms, the provisions of Article 4 of EC Council Directive 87/344/EEC of 22 June 1987, which has itself now been re-enacted, without material difference, as Article 201 of EU Directive 2009/138/EC. Regulation 6 reads as follows:

"*Freedom to choose lawyer.*

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

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

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

11. The Regulations were considered in **Erhard Eschig v UNIQA Sachversicherung AG** [2009] KC-119/08 ("**Eschig**"), a case in which the legal expenses insurers refused to cover a litigant who wanted to use his own lawyer rather than join a group action, whose lawyers would inevitably charge at a lesser rate, and the decision of the court was:

> "*Article 4(1)(a) of* [the] *Council Directive … on the co-ordination of laws, regulations and administrative provisions relating to legal expenses insurance must be interpreted as not permitting the legal expenses insurer to reserve the right, where a large number of insured persons suffer loss as a result of the same event, itself to select the legal representative of all the insured persons concerned.*"

12. The particular passages of the European Court's judgment relied upon by Mr Wynter were as follows:

> "*45. As is apparent from the entirety of Articles 4, 6 and 7 of* [the] *Directive … the rights of insured persons recognised by those Articles seek to broadly protect the interests of the insured person without being restricted to situations in which a conflict of interests arises.*
>
> …
>
> *59. It should be noted … that whilst Article 5 of* [the] *Directive … authorises the Member States to provide exemption from the application of Article 4(1) … to certain cases arising from the use of road vehicles, that exemption to the right to freely choose one's representative must be interpreted restrictively and cannot therefore serve as a basis for a reasoning by analogy.*"

13. The provisions in the policies relating to the three clients in these cases, which are in materially the same terms [and are not necessarily in the same terms as those used by other legal expenses insurers or in other policies], are as follows:

> "***Definitions***
>
> ***COSTS and EXPENSES***
>
> *Legal and professional fees for which you are responsible, including reasonable fees, costs and expenses incurred by the Appointed Representative acting for you in connection with the pursuit or defence of legal proceedings.*
>
> [There is a limitation to such costs and expenses of a maximum of £50,000, provided for by the Terms and Conditions.]
>
> ***APPOINTED REPRESENTATIVE***
>
> *A solicitor, firm of solicitors, barrister or any other suitably qualified person appointed to act on your behalf.*
>
> ***General Conditions***
>
> *1. You* [defined in the Definitions section as "*You, the insured*" (plus certain dependants)] *must:*
>
> *1.1 Keep to the terms and conditions of this policy.*
>
> *1.2 Take reasonable steps to keep any amount we have to pay as low as possible.*
>
> *…*
>
> *2.3 If we agree to start legal proceedings and it becomes mandatory for you to be represented by a lawyer, or there is a conflict of interest, you can choose an appointed representative by sending us the suitably qualified person's name and address. We may choose not to accept the choice of representative, but only in exceptional circumstances. If there is a disagreement over the choice of appointed representative another other suitably qualified person can be appointed to decide the matter. Before you choose a lawyer, we can appoint an appointed representative.*
>
> *2.4 An appointed representative will be appointed by us and represent you according to our standard terms of appointment. The appointed representative must co-operate fully with us at all times.*
>
> *…*

> *5. If an appointed representative refused to continue acting for you or if you dismiss an appointed representative, the cover we provide will end at once, unless we agree to appoint another appointed representative.*
>
> …
>
> *7. If we and you disagree about the choice* [of] *appointed representative … we and you can choose another suitably qualified person to decide the matter. We and you must both agree to the choice of this person in writing. Failing this we will ask the President of a relevant national Law Society to choose a suitably qualified person …*"

14. The position originally taken by the Insurers was that they would not cover these clients in respect of their proposed claims and proceedings if they were to instruct WD, unless WD agreed the *non-panel costs*. Thus:

    - To WD on 16 November 2007: "*If you are not able to agree these terms, then you will need to agree some other method of funding with your Client, as we would not be able to fund the matter*".
    - To WD on 12 January 2010: "*The … file … will not be transferred to WD … The reason is that the insured is required to use the panel solicitors under the terms of the policy.*"
    - To CBQ on 14 January 2010: "*I should be aware that I will* [lose] *funding of legal costs going forward*".
    - To WD on 20 January: "*We are happy to arrange the transfer of these files*" and on 1 February 2010 "*we can confirm that we will agree the appointment of yourselves*", in each case "*subject to non-panel terms being agreed.*"

15. This was expanded on 12 January 2010 to CBQ by the statement that "*the Regulation does not apply once the legal proceedings have started*" and, in an undated letter to WD, received on 14 January 2010, that "*As you will no doubt be aware, proceedings have already been commenced in all of the cases for which you now seek indemnity and as such, your clients have already had the opportunity to exercise their right to select a solicitor of their choosing*".

Outset Cases

16. That position is no longer taken by the Defendants so far as concerns *outset cases* (I shall return below to the *transfer cases*), and Dr Friston, in the course of the hearing before me, expressly abjured any case that:

    i) the Regulations do not apply once proceedings have commenced.

    ii) the Claimants are not entitled to be covered under the insurance if they instruct solicitors (such as WD) who have not accepted the non-panel terms.

iii) the Claimants are restricted to recovery of solicitors' fees at the rate of £125 or £139 per hour.

17. The Defendants' case is now that they are only obliged to cover under the policy such fees as are (in the absence of agreement) assessed pursuant to an assessment under CPR part 48.3, which reads as follows:

> "*1. Where the court assesses (whether by the summary or detailed procedure) costs which are payable by the paying party to the receiving party under the terms of a contract, the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which –*
>
> *(a) have been reasonably incurred, and*
>
> *(b) are reasonable in amount, and the court will assess them accordingly.*"

18. The Defendants do not contend that, in this case, the policy "*expressly provides otherwise*". They submit that, by reference to the policy, the starting point should be the rate of £125 (or £139) as contained in the *non-panel costs*, and the assessment of what is reasonable should take place in the light of and by reference to those figures, effectively such that they should only be departed from if such rates can be shown to be unreasonable, and they rely on Clause 1.2 of the General Conditions set out above, so as to keep the fees "*as low as possible*". The Claimants contend that this amounts to a fetter upon the right of the client to choose his solicitor, in breach of the Regulations, similar to that disapproved in **Eschig**.

19. The rival contentions that underlie the parties' submissions are as follows:

    i) The Claimants submit that the Regulations are plainly applicable, because otherwise there will be a substantial fetter on his freedom to choose a suitable solicitor for a particular case, local or in the City of London as appropriate, specialist or qualified to assess and pursue a claim against, at least in the case of CBQ and CJ, substantial international institutions, and in relation to complex claims of employment or discrimination law, with which many firms might be unable to deal. Although the Defendants have resiled from a complete declinature of cover, their present position that the entitlement of the client to recover his legal costs and expenses under the policy must depend not upon their reasonableness on the *ordinary basis*, but their assessment on the *policy basis*, will leave the client at substantial risk of liability for uninsured fees if he were to instruct a non-panel firm which was not prepared to accept the *non-panel costs*. This is the very concern which the Law Society expressed to Jackson LJ, as referred to in paragraph 5 above. Not only do they rely on **Eschig**, but also on the decision of HH Judge Seymour QC in **Pine v Das Legal Expenses Insurance Co Ltd** [2011] EWHC 658 QB, in which the insurers sought to say that their insured was not covered for the fees of a barrister instructed by direct access, first on the basis that such barrister was alleged not to be a lawyer within the terms of the policy, and secondly – by reference to a clause similar to our Clause 2.3 – that such arrangements

amounted to "*exceptional circumstances*", such as to allow the insurer not to accept the insured's choice of representative. Such arguments were rejected by Judge Seymour, who, obiter (at paragraph 43), opined that a case in which an insured wished to instruct solicitors who were not prepared to enter into a standard form of agreement with the insurer would also not amount to "*exceptional circumstances*". Mr Wynter submits that, even though the Defendants in this case do not now pursue such a suggestion, the same logic would apply to the argument which the Defendants now put forward.

ii) The Defendants raise three fundamental points:

a) The Court should not take steps to discourage BTE insurance in circumstances where access to justice is being continually restricted to litigants in respect of all other forms of funding: legal aid is almost unavailable, and the Jackson Report, if, as seems likely, it is put into effect, will result in the two other methods of funding of clients' costs, After the Event ("ATE") insurance and Conditional Fee Agreements ("CFAs") becoming considerably more unattractive, and hence likely to become progressively more unavailable.

b) The premiums have been calculated on the basis of special rates being negotiated with panel firms, and the non-panel firms being required to agree to *non-panel costs*; and to allow non-panel firms to be instructed and to have their fees covered under the insurance on a basis simply restricted by the usual concepts of reasonableness/assessment under CPR Part 44, is bound to render it uneconomic for insurers to continue with BTE insurance, at any rate without a considerable increase in the premiums.

c) The existence of a cohort of claimants in the fortunate position of having BTE insurance, who would, if instructing a non-panel firm, be entitled to claim under the policy the non-panel firm's reasonable fees just as if they were a (solvent) paying party, will render that cohort a substantial target for predatory solicitors, who will take steps to snap them up, so as to be in a position to charge their usual rates, with the confidence that such clients, unlike the majority, will be able to pay.

iii) Further Dr Friston refers to **Stark v DAS Oesterreiche Algemeine Rechtsschutzversicherung AG** [2011] Case C-293/10 ("**Stark**"), a case produced by the Claimants. In **Stark** there was an Austrian legislative provision in their Law on rates for lawyers' fees, which validated a clause included in the insurance entitling the legal expenses insurer to limit benefits under that cover to reimbursement of the amount normally claimed by a lawyer established in the place of the court before which the relevant proceedings had been brought; with the result that the client in question was left, in a position in which his lawyer would be appearing in an "*away*" court, for which he was charging higher fees, with such additional fees irrecoverable under the insurance. **Stark** was, submitted Dr Friston, plainly a case in which the European Court was allowing a similar fetter on the freedom of a client to choose his own lawyer. Mr Wynter however pointed out that what was in issue in **Stark** was the validity of a national provision, and in paragraphs 31 to 33 of

its judgment, the Court, addressing **Eschig**, recorded that "*the Member States remain free to determine the body of rules applicable to* [legal expenses insurance contracts]*, on condition that those comply with EU law, and in particular with Article 4 of Directive 87/344*". The Court's conclusion was that Article 4(1)

> "*… must be interpreted as not precluding a national provision under which it may be agreed that a person covered by legal expenses insurance may select ... only persons professionally authorised to represent parties who have their chambers at the place of the court or administrative authority having jurisdiction at first instance, on condition that ... that restriction relates only to the extent of the cover by the legal insurance provider in respect of costs linked to the involvement of a representative and that the reimbursement actually provided by that insurer is sufficient, this being a matter for the referring court to determine.*"

20. Both parties addressed the policy provisions, from which the following can be deduced:

    i) There is an obligation on the insured to "*take reasonable steps to keep any amount* [the Insured has] *to pay as low as possible*". I do not accept Dr Friston's submission that there is an obligation thereby which also applies to the Appointed Representative: it is plainly "*you*" [the insured] as defined in the Definitions, and as opposed to the Appointed Representative (also as there defined), who must do so. I consider that it relates primarily to the obligation of the client not to overload the solicitor with instructions, or overtask him, and not to the selection of the solicitor at the outset (or for that matter on transfer). There is an obligation to have the Appointed Representative's costs and expenses taxed if required by the insured (Clause 4.1). The entitlement of the insured under these policy provisions is to recover *reasonable fees*, as per the definition of Costs and Expenses in paragraph 13 above. There may be cases in which the obligation might extend to restricting cover for the instruction of 'Rolls Royce' solicitors on 'Rolls Royce' fees, but such would in any event not be likely to be '*reasonable*' fees.

    ii) By Clause 2.4, the Appointed Representative will be appointed by the insured (subject to the provisions of Clause 2.3) and will represent the insured "*according to our standard terms of appointment*". Such Terms of Appointment are not annexed to the Policy. I consider it wholly unlikely that they would ever be seen by the insured, certainly not in the absence of an express request, which would appear unlikely. There is no reference to the fact that such "*Standard Terms of Appointment*" contain any costs provisions which have any impact on the Insured.

21. I take into account the following factors:

    i) The powerful submissions of the Defendants, set out in paragraph 19(ii) above, are of obvious importance. It is plainly the case that the premiums are set at

present by reference to an expectation that the reduced charges of panel solicitors, and the *non-panel costs* of non-panel solicitors, will keep down the quantum of legal costs and expenses (always subject to the limitation of £50,000).

ii) *Non-panel costs* are bound to be less than the usual rate charged by such solicitors, i.e. less than the *reasonable* costs assessed in accordance with CPR 44, even taking account of the fact that there may be some swings and roundabouts involved in the flat rate (insofar as trainees are used) and in the favourable provision for their being able to charge for letters in.

iii) Subject to the point that Mr Wynter makes, as set out in paragraph 19(i) above, I note what the European Court said, at paragraph 33 of **Stark**:

> "*Consequently, freedom of choice, within the terms of Article 4(1) of Directive 87/344, does not mean that Member States are obliged to require insurers, in all circumstances, to cover in full the costs incurred in connection with the defence of an insured person, irrespective of the place where the person professionally entitled to represent that person is established in relation to the court of administrative authority with jurisdiction to deal with a dispute, on condition that that freedom is not rendered meaningless. That would be the case if the restriction imposed on the payment of those costs were to render de facto impossible a reasonable choice of representative by the insured person. In any event, it is for the national courts, if an action is brought before them in this regard, to determine whether or not there is any such restriction.* "

iv) Dr Friston submits that, if, as the Claimant submits, the test is simply to be that which is reasonable (what he calls the "*ordinary basis*"), as opposed to that which is provided for in the contract ("*the policy basis*") then the Court will be rewriting the contract under the guise of making an assessment of costs due pursuant to CPR 48.

22. Two matters appear to me to be significant:

i) As a result of the proper concession by Dr Friston that the Claimants are not bound by, and the Defendants are not entitled to insist upon, the £125 or £139 per hour, the assessment under CPR 48 must in any event inevitably move away from the express provisions of the Terms of Appointment for non-panel solicitors, and be assessing reasonableness of the hourly rate on some basis – albeit a basis which Dr Friston contends should, by reference to his reliance upon Clause 1.2 of the General Conditions be far less generous than the test of "*mere reasonableness*", as he puts it, under CPR Rule 44.

ii) So far as the Claimants' case on absence of fetter on freedom of choice is concerned, there must inevitably be in any event a risk for the insured which he accepts in choosing his own solicitor, even if Mr Wynter's arguments were

to succeed in their entirety, given that the insured would be renouncing a situation in which, by accepting a panel solicitor, or a solicitor on the basis of *non-panel costs*, he would not be at any risk of having to pay any excess of fees, while, by selecting his own solicitor, even if there were an assessment on a CPR 44 basis, he would (subject to his own right to challenge it on a solicitor-client basis) be at risk of being left with some excess to pay. Thus, such an exercise of choice cannot be risk-free.

23. I conclude that the correct position on the wording of these policies is closer to that contended for by Mr Wynter, namely that the Claimants' entitlement to recover legal costs (and thus WD's expectation of receiving fees covered under the Insureds' policies), will fall to be assessed, in the absence of agreement, under CPR 48.3, not as restricted to the provision for £139 or £125 per hour, but taking it into account. The submission of Dr Friston was, as referred to above, that Clause 1.2 of the General Conditions could be relied upon in such an assessment in order to argue that the mere fact of an insured choosing his or her own lawyer amounted to an unreasonable step. Mr Wynter wished to submit that it should be made plain that the choice of his or her own lawyer by an insured "*shall not under any circumstances constitute the taking of an unreasonable step*". I conclude that the correct approach is rather to conclude that the choice of his own lawyer by an insured "*shall not <u>of itself</u> constitute the taking of an unreasonable step*". It seems to me both inevitable and right that there should be consideration of the reasonableness of the fees charged by the lawyer selected by the insured by reference to the existence of the panel of solicitors prepared to act at *panel rates*, and to the existence of the *non-panel costs*, coupled no doubt with evidence that there have been (if there have been) many solicitors ready and willing to act on that basis and/or that, in the instant case, there are or were suitable solicitors who had been offered to the insured but rejected, who would have been prepared to act on that basis. This however will be part of a comparative exercise which can be carried out as part of the CPR 48 assessment.

24. It is plain from **Eschig** that an insured is entitled to conclude that he would rather have his own solicitor than be part of a group at discounted rates, and I agree with Mr Wynter that the analogy is a close one, though not identical, to a situation in which an insured prefers to have a solicitor of his own choice rather than one imposed upon him at panel rates or non-panel costs. However the significant difference is that, as a result of the concession referred to in paragraph 16 above, the Defendants are no longer seeking to <u>prevent</u> the Insured from taking that course, but only to pay for the consequences of doing so. I take into account Mr Wynter's submissions that **Stark** is addressing a national legislative provision, but it was still necessary for the European Court to consider whether that provision offended against Article 4; and I find helpful the consideration referred to in paragraph 33 of the European Court's judgment as to whether a restriction, or in this case a fetter, would render "*de facto impossible a reasonable choice of representative by the Insured person*". I also take into account the commercial background of the need for availability of BTE insurance on the basis of economically viable but reasonable premiums.

25. My judgment accordingly is that, in the absence of agreement between the Insurer and the firm which will have been accepted *de facto* as Authorised Representative but will not have accepted the Insurer's *non-panel costs*, any assessment of costs due pursuant to CPR 48 will address the *non-panel costs*, not as a starting point, but as a

comparator. As I have concluded, it will be necessary and right for the Court assessing the costs to take into account the availability of any other suitable firms on lesser rates negotiated with the Insurers, but there will also fall to be taken into account (and both sides can draw assistance in this regard from the words of Kennedy LJ in **Wraith v Sheffield Forgemasters Ltd** [1998] 1 WLR 132 at 142:

i) The location of the chosen solicitors:

ii) Their specialisation, and in particular any special qualifications for taking on the instant claim:

iii) The complexity of the claim:

iv) The importance of the claim to the insured:

v) The substance and strength of the proposed defendant to such claim:

vi) The nature of the work required to be carried out, in particular whether it should sensibly be carried out by senior solicitors or partners, whose rates would inevitably be likely to be greater than the hourly rate provided for in the *non-panel costs*.

This to my mind leaves open a sufficient ambit for the interplay (necessary within these policy provisions) between the recovery of '*reasonable fees*' and the requirement that the insured keep the costs '*as low as possible*'.

26. In carrying out such an assessment, and in bearing in mind the comparator of the *non-panel costs*, the fact that the *non-panel costs* include a flat fee for whoever is doing the work will inevitably be considered. It does not seem to me that it matters whether the Court assessing the costs carries out a normal assessment, by reference to who has in fact done the work, with an allocation of an appropriate hourly rate, or whether, having done that assessment, the Court then arrives on an average or aggregate basis at a flat rate. The difference in approach between specifically charging for letters in and allowing for them in the reasonable rate, does not seem to me to lead to any different result.

27. The end product consequently is a hybrid, neither an *ordinary* assessment, only taking account of the factors in CPR 44, nor an assessment specifically adopting the £139 and only moving away from it if persuaded to do so, which was the basis of Dr Friston's submission. The assessment will be one in which the existence of the lower rates as reasonably available will need to be established, and, once established, they can and will be used as a comparator by reference to what in fact happened. I suspect that in this case, where the Insured made a choice of specialist solicitors, in London, fully qualified to meet the difficult issues in dispute with substantial defendants, an assessment would be likely to treat such comparator as of less weight.

28. So far as the *outset cases* are concerned, therefore, and in the light of the concessions made as set out in paragraph 16 above, the declaratory relief sought by the Claimants is substantially appropriate. Subject to any redrafting that may be carried out by the parties in the light of my judgment, it would seem to me that the following relief, by

reference to paragraph 16 of the Particulars of Claim, is appropriate in the individual cases, namely that:

i) The Insured has validly chosen, as her lawyer, to act in and about her claim, WD.

ii) WD is and has been since (the appropriate date) for the purposes of and within the meaning of the policy, the "Appointed Representative" appointed to act under the Policy in and about the Insured's claim.

iii) The Insurer is not entitled under the Regulations or otherwise to decline to accept the Insured's choice of lawyer to act for him under the Policy on the basis that the said lawyer's rates of remuneration are in excess of those stipulated by the Insurer in its "Terms of Appointment for non-panel solicitors".

iv) The fact that WD's rates of remuneration are and were in excess of those stipulated by the Insurer in such Terms of Appointment does not constitute "exceptional circumstances" within the meaning of the Policy such as might permit the Insurer to decline to accept the appointment of WD as Appointed Representative.

v) WD's fees for acting as such Appointed Representative are to be assessed pursuant to CPR Part 48, in accordance with the terms of the Policy, not restricted by the *non-panel costs* provided for in such Terms of Appointment, but such that:

    a) Reference may be made in the course of such assessment to such *non-panel costs*, if and as appropriate, in the course of the assessment of the reasonableness of WD's fees.

    b) The choice of WD by the Insured shall not of itself constitute the taking of an unreasonable step by the Insured or a breach of any term of the policy.

Transfer Cases

29. This relates to the cases of CBQ and JB (and any other case, subject to its precise facts) in which there was first the instruction of a solicitor on non-panel terms (or for that matter instruction of a panel solicitor) and then a change or proposed change of solicitor by the Insured to another firm, which firm was not prepared to accept the *non-panel costs*. Here the Defendants' case is that, if such new solicitor is prepared to accept the *non-panel costs*, then they would agree to accept such solicitor as Appointed Representative in place of the original solicitor, but that would be a matter of choice by them, in that the insured has no entitlement to change solicitors and expect the fees of the new solicitor to be covered, even on the basis which I have now concluded to be appropriate, as set out above, in respect of *outset cases*. The most relevant condition is Clause 5, set out in paragraph 13 above. That clause is relied upon by the Defendants to assert that, if the insured dismisses the first Appointed Representative, the cover ends at once, unless there is agreement. Whereas the concessions were made, as set out in paragraph 16 above, in relation to *outset cases*,

that there was no cesser of cover if the insured refused the proffered solicitor and chose his own, such case was pursued by the Defendants in respect of a transfer. Dr Friston's case is effectively that there is only one "election", and thereafter there is no longer the freedom of choice which he has accepted there has to be, by virtue of the Regulations, at the outset. I ignore for the purposes of this consideration the possible factual issue, whereby it is said that JB never in fact elected to instruct the original solicitors, but rather acquiesced in their acting for her.

30. This dispute as to *transfer cases* was not really apparent in the pleadings, and not materially identified in the skeleton arguments, and, as a result of my request on the first day, issues were put together, with rival formulations from each side, which I have cobbled together into the following list:

> "*Under the 1990 Regulations and in the context of these Policies:*
>
> 1. *Is the provision under Clause 5 an enforceable provision in the light of the right to choose a lawyer as expressed in the 1990 Regulations? Is the freedom to choose a lawyer limited to one choice?*
>
> 2. *On the facts of this case, was the Insurer's refusal to agree to JB's choice of WD unlawful?*
>
> 3. *Pursuant to Clause 6(2) of the Regulations, had a conflict of interest arisen because of the Insurer's interest in preventing the transfer of the case to WD and the interest of JB in maintaining continuity of representation? If so, was the refusal to agree to JB's choice of lawyer unlawful?*
>
> 4. *Is there an implied term to the insurance policy that there will be no unreasonable refusal by the Insurer to accept the transfer of a case to another Appointed Representative? If so, on the facts of the case, was the Insurer in breach of that implied provision, if found, to refuse to agree JB's choice of WD?*
>
> 5. *As a matter of fact, did the Defendant's agree to appoint WD as another Appointed Representative of JB, thereby affirming the policy and waiving any right under the policy to refuse to pay WD's costs, subject only to assessment of those costs?*"

31. The last of these issues was effectively not pursued by Mr Wynter, and certainly not argued, although I gave him the opportunity to do so, and I answer it in the negative.

32. As for the balance of the issues, I am content to reach a conclusion by reference to the facts of these cases. There may be a case in which it might be appropriate for an insurer to argue that there is no breach of the Regulation (and no conflict of interest) in refusing to accept a substitute Appointed Representative. I am however entirely satisfied that to stand on an alleged absolute right to cancel by reference to Clause 5

does amount to a breach of Regulation 6. I see no basis upon which the Directive or the Regulations can be interpreted to arrive at a conclusion that the freedom of choice of the client is limited to one selection or 'election' at the outset. There may be all kinds of scenarios in which it is appropriate and reasonable for a client who has selected (or had imposed upon him) a panel firm, or a non-panel solicitor who has accepted *non-panel costs*, and subsequently decides to change. That firm may cease to exist, or may close its relevant department or make members of it redundant: there may be a substantial and reasonable disagreement between the client and the solicitor, not ascribable to any breach by the client of his obligations under the General Conditions: or there may, as here, be a situation in which the case-handler leaves the firm and the client wishes that case- handler to carry on acting for him in a new firm.

33. I am satisfied that it is appropriate to read into Clause 5 an implied term that such agreement will not be unreasonably refused, both by virtue of the restrictions imposed upon the insurer by Regulation 6 and also at common law, by virtue of the perfectly normal interpolation of an obligation of reasonableness in relation to the giving of a consent; also by cross reference to the provisions of Clause 2.3 (set out in paragraph 13 above) which substantially limits the right of the insurer to refuse approval to an Authorised Representative chosen by the insured at the outset.

34. It would seem to me that there are matters which a reasonable insurer could seek to raise on a request to change Appointed Representative, such as the avoidance of any duplication of costs which might be caused by an unnecessary transfer, but certainly in a case such as those before me, where the reason for the transfer was indeed because the case-handler was changing firms, on the one hand it does not seem to me to begin to be reasonable for the Insurer to refuse, and in any event there would be no such duplication. An objection simply on the basis that it would cost the insurer more would seem clearly to result in a conflict of interest within Regulation 6(2).

35. Accordingly, on the facts of these cases and by reference to the issues, I conclude as follows:

    i) The freedom to choose a lawyer is not limited to one choice.

    ii) Clause 5, as it stands, is in breach of Regulation 5, both in respect to the imposition of an absolute right to refuse and by reference to its failure to take into account the provisions of Regulation 6(2) with regard to a conflict of interest arising.

    iii) Clause 5 is to be construed so as to incorporate an implied term that the insurer's agreement to the new Appointed Representative cannot be unreasonably refused.

    iv) On the facts of this case, continued refusal by the Defendants in the case of JB (and insofar as it arises in the case of CBQ) is and was unreasonable.

    v) Insofar as JB's case (and/or CBQ's case) has been treated differently as a *transfer case*, the same principles are to apply in such case (or cases) to an assessment as are set out in paragraphs 25 to 27 above, in that questions of duplication of costs, which might be relevant in other cases, will not arise.