NCN: [2026] EWHC 1523 (SCCO)
Case No: SC-2023-BTP-000206

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 19/06/2026

Before:

SENIOR COSTS JUDGE ROWLEY

- -

Between:

Mr Peter Evans	**Claimant**
- and -	
Fletchers Solicitors Limited	**Defendant**

- -
- -

Mark Carlisle (of **JG Solicitors**) for the **Claimant**
John Meehan (instructed by **Fletchers Solicitors Limited**) for the **Defendant**

Hearing date: 1 July 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SENIOR COSTS JUDGE ROWLEY

Senior Costs Judge Rowley:

Introduction

1. The claimant instructed the defendant to represent him in a personal injury claim arising from a road traffic accident in 2017. The claim was successfully pursued and a compromise in the sum of £250,000 was recorded in an order dated 14 July 2021. The costs were agreed between the parties and the defendant in these proceedings rendered an invoice to the claimant in the sum of £61,615.13 inclusive of a success fee of £30,365.13 capped at 25% of the relevant damages – the so-called "Jackson Cap".

2. The claimant has brought proceedings pursuant to s70 Solicitors Act 1974 seeking an assessment of the defendant's bill of costs. There are challenges to the individual items in the bill as well as a challenge to the agreement of the costs between the parties. It may in due course be necessary to have a further hearing or hearings to deal with such matters. But it seems clear that the central argument between the parties relates to the question of whether the case should have been funded by legal expense insurance ("LEI") rather than a Conditional Fee Agreement ("CFA"). If it had been, the claimant argues, he would not have been charged a success fee (or indeed an After the Event ("ATE") premium). This issue is the subject of this judgment.

Background

3. Challenges by unsuccessful defendant paying parties as to the claimant's methods of funding began in earnest almost as soon as CFAs became prevalent following the introduction of the Access to Justice Act 1999 (amending the Courts and Legal Services Act 1990) and the CFA Regulations 2000. These provisions made success fees and ATE premiums recoverable from an opponent and the use of them was therefore a more expensive option from the paying party's point of view.

4. The requirements of the CFA Regulations overlapped with regulatory requirements for solicitors to consider with their clients the options for funding their case. A failure to comply with the regulations resulted in the CFA being unenforceable by the solicitor against their client and consequently no indemnity against such costs needed to be provided by the opponent.

5. Much of the difficulty with compliance was finally removed by the revocation of the CFA Regulations in 2005, but the need to advise the client of possible funding options remained as a matter of professional conduct. Arguments by paying parties in between the parties' assessments are generally available to clients of solicitors in Solicitors Act assessments.

Events in 2017

6. The claimant signed a CFA on 24 April 2017. As part of the signing up process the claimant, via his wife, completed a form regarding possible funding options. He confirmed that he had the benefit of family legal expense insurance taken out as part of his home insurance with Zurich Insurance Company ("Zurich").

7. In many cases, the signing of the CFA is delayed until it is clear whether any Before The Event ("BTE") legal expenses insurance can be used. For, since the end of recoverability of success fees and ATE premiums in 2013, the use of BTE insurance has generally been seen as a preferable approach for claimants because there is thought to be no need for their solicitor to charge a success fee to protect against the risk of losing in similar cases and no need to take out ATE insurance. Some solicitors, as occurred here, take the view that it is simpler to sign up the client to a CFA and then to unwind the arrangement if necessary once checks as to BTE insurance have been completed.

8. The claimant produced a witness statement setting out his evidence in this case. For the defendant, there were statements from Gary Ratcliffe, the defendant's Head of Costs – Technical and Compliance, and Charlotte Mackulin who had conduct of the case from 2019. None of these statements assist the court as to what enquiries were made in 2017 as to BTE Insurance. The claimant could not know whether any enquiries were carried out by the defendant and neither Mr Ratcliffe nor Ms Mackulin say anything about what occurred in 2017. Plainly, they did not have any first-hand experience of what happened but they would both have had access to the defendant's files of papers. The obvious inference to be drawn is that the defendant has no record of any enquiries having been made of either the Zurich, as the home insurer or, as it transpired, DAS who were the legal expenses insurers. To the extent it is necessary to make any factual finding about this, I therefore find that no such enquiries were made in 2017.

Events in 2019

9. Ms Mackulin took over the case given its potential value on 9 May 2019. According to her witness statement, she took the view that court proceedings would be required and so she contemplated the insurance position and established that no ATE insurance had been taken out. She decided to make enquiries and so she asked her assistant to write to various entities set out in the LEI checklist form completed by the claimant's wife in 2017.

10. The responses received are described in Ms Mackulin's witness statement and some documents are also exhibited. Ms Mackulin says that Cox Braithwaite confirmed on 24 June 2019 that they did not insure the claimant's property. That runs contrary to the LEI checklist where Cox Braithwaite is described as being the home buildings insurer and a policy number is recorded.

11. Commercial Legal, apparently writing on behalf of One Call Insurance, said that the client's name did not appear on their system and requested further details. A response was sent on behalf of Ms Mackulin pointing out that the relevant details had been provided on the first occasion and reiterated them. No further response was received from Commercial Legal. It appears that the One Call insurance cover related to a vehicle but seemingly not the motorcycle on which the claimant had been travelling and for which a different insurer was named.

12. In respect of the Zurich, Ms Mackulin says that she "eventually" received a response on 23 July 2019, which had been dated 26 June 2019. Ms Mackulin summarises that letter as not confirming that BTE cover was available, but instead directing her to a policy booklet that was said to have been attached, but which was not received. Her

assistant wrote a reply to the Zurich on 23 July 2019, again requesting confirmation that cover was available to the claimant. The letter confirmed that the policy booklet had not been received, but other than in respect of this point, the reply appears to be essentially identical to the original letter sent to the Zurich. It set out a number of bullet points which requested confirmation that the Zurich would agree to the defendant acting under the policy, if appropriate, and that the Zurich would meet the defendant's legal costs including any shortfall in recovery of costs from the opponent. The defendant also sought confirmation that, if unsuccessful, the Zurich would be expected to meet the defendant's costs as well as those of the insured's opponent. A schedule of charges was attached together with a statement that if no response had been received from the Zurich within 14 days, the defendant would advise the claimant that he should purchase an after the event ("ATE") insurance policy in order to avoid the risk of adverse costs.

13. The response from the Zurich referred to above, said the following:

> "Dear Catherine [Ms Mackulin's assistant]
>
> Further to your recent communication, we can confirm that we acknowledge receipt of your letter dated 18/06/2019. Please find enclosed the policy booklet for the above policy, the information regarding legal expenses and making a claim can be found on page 7.
>
> If we can provide any further assistance, please call our Customer Services Department on 0800 092 7288 between 8am – 6pm Monday – Friday, 9am – 1pm Saturday, where one of our experienced advisers will be happy to help you.
>
> Yours sincerely"

14. Ms Mackulin took the view that she had been unable to establish that the BTE policy did cover the claimant after reasonable enquiry and so wrote to the claimant to set this out. According to the claimant's evidence, he was content that the defendant was making the enquiries but was then discontented to hear that the policy did not cover his claim and that ATE insurance would be required and which was incepted shortly thereafter.

Events in 2022

15. Following settlement of the claim, the claimant sought advice from JG Solicitors in respect of the fees he had been charged by the defendant. His new solicitors made enquiries of the Zurich and DAS.

16. A copy of a renewal pack was received by JG Solicitors which related to the insurance in place at the time of the claimant's accident. It confirmed that the claimant had previously had the benefit of Family Legal Expenses cover managed by DAS Legal Expenses Insurance Company Limited and provided a reference number if DAS needed to be contacted.

17. Under the heading "Personal Injury" the following was set out:

> "What is covered – A specific or sudden accident that causes your death or bodily injury to you.
>
> What is not covered – A claim relating to the following: (a) illness or bodily injury that happens gradually…
>
> (d) clinical negligence"

18. The booklet then describes the clinical negligence cases that are covered – an identified surgical accident or procedure performed negligently – and those which were not e.g. a failure of diagnosis.

19. JG Solicitors also made enquiries of DAS directly. A Mr Charles Hazel confirmed by email on 7 February 2022 that DAS had no record of being contacted by the defendant, either in 2017 or 2019. In respect of other questions asked, he said:

> "For the remaining questions, it is difficult to confirm on a hypothetical scenario without knowing the full circumstances and a full claim assessment being made, therefore we cannot confirm for sure either way, I'm afraid. Certainly any legal fees that may be trying to be recovered would be not be possible as DAS has not consented to them."

20. JG Solicitors then wrote to the defendant regarding the appropriateness of the charge to the claimant of the success fee and ATE premium. This prompted Gary Ratcliffe to make enquiries which then formed a central part of his witness statement and exhibits.

21. Mr Ratcliffe started from the point of view that, in his experience, cover provided by Family Legal Expenses insurance attached to a home insurance policy did not cover accidents arising from RTA's. He could not recall the DAS family legal expense insurance policy to have covered any claims arising from the use of a motor vehicle, whether for the driver, rider or passenger.

22. He then looked at the FAQ section of the DAS website and utilised the so-called "Way back machine" to look at past iterations of that website. Under the question, "Will this insurance cover motor disputes? The answer was:

> "No, family legal expenses insurance will not cover any motor -related matters, such as contract disputes related to motor vehicles claims such as these could be covered by motor legal expenses insurance."

23. It appears that the wording of this answer was the same between 2020 (which was as far back as the way back machine would go) and the date of Mr Ratcliffe's statement in October 2022.

24. Mr Ratcliffe then corresponded with Charles Hazel of DAS, i.e. the same person that James Green had corresponded with earlier. Despite pressing the point, Mr Hazel was not prepared to provide a definitive answer as to whether or not coverage would have been provided. Mr Hazel's final comment was:

> "I understand your query, however, in the absence of a full legal expenses claim being registered, we would never be in a position to fully confirm whether cover would have been available at the time. Such claims need to be made much nearer to the date of incident."

25. On the basis that neither the Zurich nor DAS were able to confirm that coverage would have been provided if the approach had been made in 2017, Mr Ratcliffe, on behalf of the defendant, declined to provide the requested refund of the monies charged.

Step 1 – Was Ds approach to the enquiries into alternative funding unreasonable?

26. At the very beginning of the so-called costs wars in 2001, the Court of Appeal in Sarwar v Alam [2001] EWCA Civ 1401 considered the proper practice for a solicitor enquiring about BTE cover. That case involved a very modest injury and the court said that, in such cases, the solicitor was not obliged to embark on "a treasure hunt" to seek the insurance policies of every member of the client's family in case, by chance, they contained relevant BTE cover which the client might use.

27. Nevertheless, even in that modest situation, what was described, at paragraph 45, as proper modern practice dictated that a solicitor should normally invite a client to bring to the first interview any relevant motor insurance policy, household insurance policy, or any stand-alone BTE insurance policy belonging to the client and/or any spouse or partner living in the same household as the client. That practice would enable the solicitor to read through the policy and consider the suitability of the insurance. Subsequently, in Garrett v Halton Borough Council [2006] EWCA Civ 1017, the Court of Appeal gave guidance that the solicitors should generally make enquiries of potential BTE insurers, even where the client was unclear as to whether any such cover was available. This led to the point where a failure to ask suitable questions, even in circumstances where it was later established that there was no LEI available, was found to be inadequate in seeking to establish the availability of any alternative funding.

28. Given this context, it seems to me that the enquiries in this case were lacking in numerous respects. The most obvious deficiency was to fail to make any enquiries at all for more than two years after the accident. Thereafter, the letter from the Zurich in response to the enquiry was, in my view, completely miscategorised as one which simply refused to indicate whether cover was available and which justified a repeat letter being sent. A telephone number in bold print in the Zurich's letter was put forward if any further assistance was required and yet there is no evidence to suggest that any phone call was made to the Zurich about the apparent absence of the booklet and / or to discuss the likely coverage of the LEI in question.

29. Specialist personal injury solicitors, such as the defendant, are aware (or, at least, ought to be) that the company dealing with the LEI is not the same as the company dealing with e.g., the home contents insurance, since this was made perfectly plain in Sarwar. The Insurance Companies (Legal Expenses Insurance) Regulations 1990 require the management of claims under legal expense insurer contracts to be carried out by an undertaking having a separate legal personality from the insurer providing the main insurance policy.

30. Consequently, it seems to me, that making desultory enquiries of the Zurich, and without getting to the LEI company at all, cannot be said to be making any form of reasonable enquiry. The fact that the enquiry was being made two years after the accident could hardly be said to have helped matters. If anything, it seems to me that a more concerted effort to establish the position was required given the delay in doing so. In fact the correspondence, in my view, is drafted in a way which sought to encourage a lacklustre response from any potential LEI insurer so that the existing CFA arrangement was not disturbed by any putative BTE cover.

31. It is noteworthy that when JG Solicitors made enquiries some years later, they seem to have had little difficulty in establishing the LEI insurer as distinct from the Zurich itself.

Step 2 – Was there LEI for the Claimant to use?

32. If reasonable enquiries had been made, would there have been any LEI for the claimant to use? There can be no absolute answer to this question, but it seems to me, from the information before the court, that on the balance of probabilities, there was such insurance available. The plain words of the Zurich's home solutions policy provided that personal injury claims were covered by the LEI option.

33. Mr Ratcliffe's evidence seeks to undermine those plain words by giving evidence of his experience of coverage. It may be the case that not all home policies allow for accidents arising out of road traffic accidents to be covered, but it seems to me that Mr Ratcliffe's evidence of what would have been the case is inevitably, at this distance from the material events, of only modest weight. If the correspondence to the Zurich is anything to go by, the seemingly stock letter enquiring about the possibility of BTE cover was designed to produce a negative response. Whether that was actually by design or not, in my view, its impact would be to limit the number of occasions on which the defendant would have ever been instructed by a BTE insurer. Consequently, Mr Ratcliffe's experience of his firm using such cover would inevitably have been more limited than might otherwise be the case.

34. It is no criticism of Mr Ratcliffe's evidence that he was unable to obtain confirmation that the FAQ answer applied at the time of the claimant's accident. But it leaves some room for doubt and that doubt is fortified by Mr Hazel's comments, in my judgment. It would have been simple for him to say that family LEI cover could not be used in motor accidents if there was a blanket exclusion in this respect. But he did not make that statement despite being pressed by solicitors on both sides and maintained the more nuanced position that it would depend upon the policy wording in the individual case. That can only mean, as far as I am concerned, that some family legal expenses insurance did cover motor accidents, or at least that Mr Hazel suspected that it might have done.

35. In order to seek some more disinterested evidence, I consulted the preliminary report of Lord Justice Jackson regarding his Review of Civil Litigation Costs in May 2009. At paragraph 2.2 of Volume 1 on page 152 he said the following:

> "2.2 Add-ons to house or contents insurance. BTE is an optional extra on house and contents insurance policies. The cost is usually in the region of 5% of the total premium. A

> typical additional premium for BTE in many household insurance policies is £15-£20. [The insured] is covered in respect of a number of claims that might be made against him: for example, claims by visitors who suffer injury and possibly claims by persons who [the insured] negligently injures away from the home. [The insured] may also be insured in respect of legal expenses for certain claims which he brings as claimant: for example, property disputes with the neighbour, claims re goods or services received, employment claims or even (depending upon the terms of the policy), personal injury and clinical negligence claims."
>
> In many of these cases the BTE insurers pay the claimant's solicitors on a conventional hourly rate basis, recovering costs from the other side if they win and paying out adverse costs if they lose. For obvious reasons, insurers like to have such cases conducted by panel solicitors, in whom they have confidence (and with whom they will have negotiated rates)."

36. The terms of the Zurich's home solutions policy covers personal injury cases in the manner described by Lord Justice Jackson. In any event, I prefer the plain words of the policy to Mr Ratcliffe's evidence in this respect. Jackson LJ's description of the market simply reinforces that preference.

37. A separate point made by Mr Meehan was that, even if LEI was available, the solicitors would not have recommended it, given the policy wording. I reject that argument. I do not think that the points made by Mr Meehan regarding the alleged constraints imposed by the LEI policy held much weight since they were, in my experience, no more than the sort of wording generally used in such policies.

38. Furthermore, Mr Meehan's submissions lacked any evidence on which to base the criticisms given that no evidence was given by either Ms Mackulin or Mr Ratcliffe that any such objection to the terms of the policy would have been raised in the event that enquiries had been made sufficiently to establish that it was available.

Step 3 – Would using the LEI mean there would have been no deduction?

39. It has been something of an article of faith in the costs world that if a party was able to use BTE insurance, then they would not suffer any reduction in their damages by way of paying for irrecoverable success fees or ATE insurance premiums. Mr Meehan's skeleton queried whether that was actually the case.

40. His first argument was that the claimant had failed to establish that the case would have been taken on without any deduction. It seems to me that there is no evidence on this point that helps either side. The fact that the defendant is claiming a success fee and ATE policy in the bill before the court is merely a reflection of the facts that actually occurred. If BTE insurance had been available which covered the claimant's solicitors' costs as well as the opponent's, then there is no obvious need for either a success fee or an ATE policy.

41. It is not clear, in my view, why the claimant is said to have the burden of proving a negative here. The claimant's case is simply that the defendant's activities (or lack of them) has meant that the claimant could not avail himself of insurance he had purchased before the accident. On the face of it, using such insurance would mean a private paying agreement with the solicitor would be backed by an indemnity from the LEI insurer. That arrangement would not require either a success fee or an ATE premium. It seems to me that the defendant ought to be demonstrating that, in such circumstances, they would use a CFA with a success fee and (possibly) some ATE insurance and which the claimant would be required to meet. But, as I say, there is no such evidence from the defendant any more than there is evidence from the claimant about the supposed inevitably of deductions.

42. In order further to highlight the uncertainty as to whether any deductions would have been necessary, I return to the following passage from paragraph 2.2 of the preliminary report of Lord Justice Jackson:

> "In many of these cases the BTE insurers pay the claimant's solicitors on a conventional hourly rate basis*, recovering costs from the other side if they win and paying out adverse costs if they lose. For obvious reasons, insurers like to have such cases conducted by panel solicitors, in whom they have confidence (and with whom they will have negotiated rates)."

43. The asterisk in this quotation reflects the fact that there is a footnote (numbered 15) in the report which says "Without a CFA". This express description of retainers which do not involve a CFA and therefore do not contain a success fee demonstrates that there is no certainty of any deduction being claimed by a solicitor.

44. A subsidiary argument of Mr Meehan's which, to my mind, potentially had more weight, was that the level of indemnity of £50,000 for the LEI was insufficient and that therefore it could not have been utilised in the first place. Since the LEI is meant to cover both sides' costs, its limit of indemnity is conceptually burned through at twice the rate (more or less) of an ATE policy which is only responsible for protecting against the opponents' costs as well as the insured's disbursements.

45. The claimant's claim settled for £250,000 and was obviously a significant personal injury claim. To that extent, the defendant's argument is well made in that the BTE cover would not have been sufficient to reach trial and that would have been apparent at the outset. There are, however, two difficulties with the defendant's argument in my view, which mean that ultimately it is not one which prevails.

46. The first is that the ATE insurance actually taken out, and whose limit of indemnity was £100,000, was also insufficient to take the case to trial. A simple addition of the disbursements in the claimant's approved budget of £20,280.40 (incurred) and £57,645 (estimated) together with the defendant's claimed budgeted costs of £73,464 (or even just the claimant's offer in respect of that figure of £66,714) proves that the £100,000 limit of indemnity would have been insufficient to go to trial. That conclusion could have been drawn at the outset of the case if the appropriate approach would be simply to consider the amount of cover required to reach a trial.

47. Consequently, it is not an answer, in my view, simply to look at the limit of indemnity of the LEI to decide whether it was an appropriate funding method. Most cases, in fact, settle much earlier, and therefore within the limit of indemnity.

48. The second difficulty is the existence of so-called "top up" ATE insurance which has been available for many years and this is so, whether or not the original insurance was BTE or ATE. On the basis that top up cover would have been required, whichever policy was originally used should the case have reached a trial, it seems to me that the lower level of indemnity is not a factor which militated against the use of BTE cover if its availability had been established.

Step 4 – Would the claimant have used it if it was available?

49. The defendant says that, even if there was BTE insurance which the claimant potentially could have used, this is not sufficient for the claimant to obtain a reduction in the defendant's bill. As Mr Meehan's skeleton argument puts it:

> "C is required to prove that if he had received reasonable advice as to funding, he would have acted upon this, so as to achieve a more beneficial outcome. In other words, it is a basic requirement that C proves loss."

50. Mr Meehan relies upon dicta approved by the Supreme Court in Perry v Raleys Solicitors [2019] UKSC 5 in support of this proposition. That case dealt with a claim in negligence against the defendant solicitors by the claimant and Mr Meehan particularly relied upon paragraphs 19 and 20 of that decision which fall under the heading "the law about causation in professional negligence cases."

51. These paragraphs of the judgment discuss a regular problem of the claimant in establishing what he or she would have done but for the negligent act of their solicitor. It is a counterfactual situation in that the claimant has already had to prove successfully that their solicitor was negligent in order to consider what might have been. It is therefore likely that the situation will be uncertain in terms of proof. Consequently, rather than the court deciding a binary yes / no conclusion on the balance of probabilities, it is often the case that the claimant will receive some but not all of the damages that might flow from the negligence on the basis of a loss of chance.

52. The thrust of Mr Meehan's various arguments about whether the policy actually covered the claimant's personal injury claim; whether it would have been recommended given its terms; and whether, in fact, it would have avoided the claimant having any deduction from his damages were all aimed, to some extent, at reducing the extent of the loss of chance element.

53. By contrast, Mr Carlisle submitted that all the claimant needed to show was that, on the balance of probabilities, if the claimant had been properly advised he would have taken a different option, i.e. he would have used the BTE insurance. In support of this, Mr Carlisle relied upon several paragraphs in the claimant's witness statement, for example, paragraph 61, in which he said:

> "If I had been made aware that instructing a solicitor associated with my legal expenses policy through Zurich would have resulted in no money (or less money) being deducted from my damages than instructing Fletchers, there is no doubt in my mind that I would have taken that course of action."

54. It is inevitably the case that any such statement is likely to appear to be self-serving. After all, there is now no prospect of the claimant actually using the BTE policy and so can safely say that he would have used it in any event. Nevertheless, I have no reason to doubt Mr Evans' evidence and there is no evidence which can be put forward by the defendant to contradict his evidence.

55. This is not a professional negligence case and it seems to me that the so-called "Kitchen discount" (from the case of Kitchen v RAF [1958] 1 WLR 563) regarding the use of a loss of chance to reflect the vagaries of a counterfactual situation in professional negligence cases simply does not apply. The attraction of using BTE policies has waxed and waned over the last 25 years depending upon other funding options. But since 2013, and the general elimination of the recoverability of success fees, the use of BTE as a method which would not be expected to require a success fee and ATE insurance to be taken out, is something which weighs heavily in the balance. It does not seem to me that it takes much to persuade the court that if that option were available, then the claimant was likely to avail himself of it. After all, he had paid a fee for that insurance and could be expected to use it unless he was unable to do so.

56. Consequently, I am satisfied on the balance of probabilities, that the claimant would have used the BTE insurance policy, whether that was by requiring Fletchers to do so or to have instructed another firm who would have been willing to do so.

Step 5 – What are the consequences?

57. Having decided on the balance of probabilities that there was BTE insurance available which the claimant would have used, what effect does that have on the costs payable by the claimant to the defendant?

58. The claimant contends that all of the defendant's base costs as well as the success fee (and the ATE premium) should be disallowed.

59. There are two strands to the claimant's argument regarding the reduction in the base costs. The first is that I should follow the approach of Hickinbottom J, when upholding Senior Costs Judge Gordon-Saker's disallowance of all base costs in the case of McDaniel & Co (a firm) v Clarke [2014] EWHC 3826 (QB). The second strand is that the claimant ought to receive some benefit from the £50,000 limit of indemnity in the LEI by having that sum deducted from the bill which he now faces.

60. In McDaniel, the solicitors accepted that they had not advised the claimant properly as to alternative methods of funding. In particular, Ms Clarke was a member of a trade union and there was evidence to confirm that the trade union would have backed her claim. On that basis, the judge decided that none of the costs claimed against Ms Clarke were reasonably incurred and so assessed the bill at nil.

61. I do not accept that there is any direct comparison between this case and McDaniel. If the claimant had been able to use the BTE insurance, then he would still have been liable for the solicitors' base costs: the LEI simply providing an indemnity. That is a very different situation from where a trade union backs its member and the member has, in effect, no direct responsibility. I do not see any scope for the argument that the base costs are not recoverable in principle by the solicitor based on McDaniel.

62. Nor do I think there is any weight to the second argument regarding the use of the LEI's limit of indemnity. The claimant has been successful in his case and therefore would expect to recover costs from his opponent. All of the costs reasonably incurred would be recoverable. Only those costs which were unreasonable either in the manner in which they were incurred or in their amount would not be recoverable from the opponent. Such unreasonable costs would also not be recoverable under the LEI policy. There might arguably be a reasonably incurred disbursement which was not recoverable, but there is certainly nothing to suggest that the entire limit of indemnity ought to be set against the costs incurred by the claimant in the manner contended for by Mr Carlisle.

63. Nevertheless, based on the reasoning throughout this judgment, it is clearly my view that the success fee would not have been incurred if the BTE policy had been utilised. On that basis, I disallow the success fee in its entirety. The same reasoning would apply to the ATE policy but that item does not strictly fall for assessment within these proceedings.