Case 49
Edwards and Others

v

Slater and Gordon UK Ltd; Raubenheimer

v

Slater and Gordon UK Ltd

[2022] Costs LR 861

Neutral Citation Number: [2022] EWHC 1091 (QB)
High Court of Justice, Queen's Bench Division
11 May 2022

Before:
Ritchie J, sitting with Costs Judge Simon Brown as an assessor

Keywords:
ATE premiums, disclosure, security for costs: Part 18 requests, Solicitors Act 1974

Headnote

In proceedings under the Solicitors Act 1974 for detailed assessment of the defendant solicitors' costs, where deductions had been made for fees from the damages recovered by the client from the tortfeasor in the action in which the firm had been instructed, the issue for the court was whether disclosure under CPR Part 31 applied. It did: the rule applied in principle to Part 8 costs proceedings and, whilst it ought not necessarily be the normal order in

detailed assessment proceedings, it was appropriate to make such an order given that the issue under consideration was whether there had been "informed consent" and that standard disclosure went to the heart of that issue. It followed that the solicitors would be required to give disclosure of the retainers and the audio recordings of the signing of those retainers and all other documents relating to the pleaded issues. In respect of a request that had been made under Part 18, the solicitors would be required to answer in respect of the question of commissions arising from the taking out of After-the-Event insurance policies in order properly to facilitate the efficient handling of the next case management hearing. The ATE premium appeared in the cash account and if there was an issue regarding it, and therefore in the cash account, that issue needed to be resolved in order to determine whether any refunds to the claimants in the assessment were due. That would give the judge a proper grasp of the issues, it would enable the claimants to determine whether there was anything to worry about, whether it was all a storm in a teacup, and the defendant could consider whether to fight or settle the claims for alleged secret commissions. No security for the defendant's costs under CPR Part 25 would be appropriate as there was no evidence that the solicitors who were acting for the claimants, having given them indemnities for their costs, would be unable to meet an adverse costs order.

Cases Cited

Abdulle v *Comm of the Police* [2015] EWCA Civ 1260
Badaei v *Woodwards Solicitors* [2019] Costs LR 1253; [2019] EWHC 1854 (QB)
Belsner v *Cam Legal Services Ltd* [2020] Costs LR 1371; [2020] EWHC 2755 (QB)
Caledonia North Sea v *London Bridge Engineering* [2000] Lloyds Reports IR 249
Chartwell Estate Agents Ltd v *Fergies Properties SA and Another* [2014] 3 Costs LR 588; [2014] EWCA Civ 506

From Costs Law Reports 2022/3, published by Class Legal
www.classlegal.com

Clearway Drainage Systems Ltd v *Miles Smith Ltd* [2016] EWCA Civ 1258
Re Digital Satellite Warranty Cover [2011] EWHC 122 (Ch)
R (Factortame and Others) v *Secretary of State for Transport* [2002] 3 Costs LR 467; [2002] EWCA Civ 932; [2003] QB 381
FHR v *Mankarious* [2011] EWHC 2308 (Ch)
Forest v *ISG* [2010] EWHC 322 (TCC)
Fuji Finance v *Aetna Life* (1997) Ch 173
Geraghty & Co v *Awwad and Another* [2000] 1 Costs LR 105; [2001] QB 570
Giles v *Thompson* [1994] 1 AC 142
Grizzly Business v *Stena Drilling* [2017] EWCA Civ 94
Herbert v *HH Law* [2019] EWCA Civ 527; [2019] 1 WLR 4253
Hurstanger v *Wilson* [2007] 1 WLR 2351
ING Bank v *Ros Roca* [2011] EWCA Civ 353
Kellar and Carib West Ltd v *Williams* [2005] 4 Costs LR 559; [2004] UKPC 30
Larrinaga Steamship v *R* [1945] AC 246
Macdougall v *Boote Edgar Esterkin (a Firm)* [2001] 1 Costs LR 118
Mannion v *Ginty* [2012] EWCA Civ 1667
Marac Life v *Commissioner of Inland Revenue* (1986) 1 NZLR 694
Mitchell v *News Group Newspapers Ltd* [2013] 6 Costs LR 1008; [2013] EWCA Civ 1537; [2014] 1 WLR 795
Morris and Another v *London Borough of Southwark* [2010] 4 Costs LR 526
Pittman v *Prudential Deposit Bank* [1896] 13 TLR 110
Prudential Insurance v *Inland Revenue* (1904) 2 KB 658
Razaq v *Zafar* [2020] EWHC 1236 (QB)
In re RBS Rights Litigation [2017] EWHC 463
Royal & Sun v *T & N* [2002] EWCA Civ 1964
Sibthorpe and Morris v *London Borough of Southwark* [2011] 3 Costs LR 427; [2011] EWCA Civ 25
Thai Trading Co (a Firm) v *Taylor* [1998] 1 Costs LR 122; [1998] QB 781

From Costs Law Reports 2022/3, published by Class Legal
www.classlegal.com

Trendtex Trading Corpn v *Credit Suisse* [1980] QB 629
Vitpol v *Samen* [2008] EWHC 2283 (TCC)
Wallersteiner v *Moir (No. 2)* [1975] QB 373

Judgment

RITCHIE J:

The Parties

1. The claimants are members of the public who all suffered different personal injury accidents, wished to bring civil claims and did so through the claims Portal.

2. The defendant is a large firm of solicitors who handle, inter alia, personal injury claims. The defendant represented each and every one of the claimants in their individual personal injury claims. It submitted bills once requested by the claimants and made deductions from the damages awards achieved by and for the claimants.

Bundles

3. For the appeals hearing I had a digital bundle of documents for each appeal and one bundle of authorities. I was also provided with the audio recording of the sign up phone call made between the defendant and Mr Turnbull (deceased), one of the lead claimants.

Terminology Used in This Judgment

4. PI: personal injury.
5. PSL: pain, suffering and loss of amenity.
6. ACOs: adverse costs orders.
7. URCs: unrecovered costs.
8. BTE: before the event insurance against ACOs.
9. ATE: after the event insurance against ACOs.
10. RTA: Road Traffic Act.
11. SOCA: solicitor-own client costs assessment.
12. CJ: Costs judge.
13. Retainer: the contract made between a lay client and her/his lawyers for the lawyers to perform legal services work.
14. CFA: conditional fee agreement made between a claimant and a

solicitors firm for the solicitors to conduct the claimant's PI claim on a no-win-no-fee basis.

15. CLL: Clear Legal Ltd – the claimants' solicitors instructed to bring these claims for assessment of the defendant's bill of costs and certification of the cash account.

16. SOC: Statement of Claim.

17. FSMA: Financial Services and Markets Act 2000.

18. SC: the Solicitors Code of Conduct for solicitors firms.

19. SRA FCBR: the SRA (Financial Conduct of Business) Rules.

20. CCR: Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

21. UTR: Unfair Trading Regulations 2008.

The Appeals

22. The defendant in Edwards & Ors appeals the decisions made by CJ Rowley (the judge) on 15 September 2021 whilst managing the interlocutory stages of the claims. All the claims were brought by the claimants under CPR Part 8 for SOCAs of the defendant's bills to challenge the deductions made by the defendant from the claimants' damages.

23. The challenged decisions of the judge in Edwards are:

(1) the order requiring the defendant to provide standard disclosure relating to the pleaded issues;
(2) the judge's refusal to stay the claims or to order the claimants' solicitors to provide security for costs of £700,000 or less;
(3) for the defendant to pay the costs of the applications.

24. The claimant in Raubenheimer appeals the costs judge's refusal to order Part 18 replies to requests made by the claimant.

The Issues

25. At the root of the disclosure application appeal is the issue of whether in a Part 8 claim for a SOCA the CJ has power to order disclosure. In addition the defendant asserts disclosure should not have been ordered.

26. At the root of the defendant's appeals relating to the applications for a stay and for security for costs lay the issue of whether the retainer between CLL and each of the claimants was an

illegal/unlawful/unregulated insurance contract and/or was champertous and whether CLL were impecunious.

27. At the root of the appeal over the Part 18 request is the claimant's (Raubenheimer's) desire for answers from the defendant as to the *secret commissions* allegedly paid by a certain ATE insurer (now in liquidation) as a result of the ATE policy taken out in his personal injury claim by the defendant on his behalf.

Appeals: Review of the Decision Below

28. Under CPR rule 52.21 every appeal is a review of the decision of the lower court, unless the court rules otherwise or a practice direction makes different provision, it will not hear oral evidence or new evidence which was not before the lower court.

Appeals on Findings of Fact

29. I take into account the decision in *Grizzly Business* v *Stena Drilling* [2017] EWCA Civ 94, at paras 39–40, which was that any challenges to findings of fact in the court below have to pass a high threshold test.

Appeals on Case Management Decisions

30. Appeals from case management decisions have a high threshold test, see *Royal & Sun* v *T & N* [2002] EWCA Civ 1964.

> "37. … We were reminded, properly, by counsel for T & N that these are appeals from case management decisions made in the exercise of his discretion by a judge who, because of his involvement in the case over time, had an accumulated knowledge of the background and the issues which this court would be unable to match. The judge was in the best position to reach conclusions as to the future course of the proceedings. An appellate court should respect the judge's decisions. It should not yield to the temptation to 'second guess' the judge in a matter peculiarly within his province.
>
> 38. I accept, without reservation, that this court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

31. I also take into account that in *Abdulle* v *Comm of the Police* [2015] EWCA Civ 1260 Lewison LJ ruled that:

> "26. In *Mitchell* v *News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 WLR 795 at [52] this court said:
>
> > 'We start by reiterating a point that has been made before, namely that this court will not lightly interfere with a case management decision. In *Mannion* v *Ginty* [2012] EWCA Civ 1667 at [18] Lewison LJ said: "it has been said more than once in this court, it is vital for the Court of Appeal to uphold robust fair case management decisions made by first instance judges."'
>
> 27. The first instance judge's decision in that case was to refuse relief against sanctions and her refusal was upheld by this court. But the same approach applies equally to decisions by first instance judges to grant relief against sanctions. In *Chartwell Estate Agents Ltd* v *Fergies Properties SA* [2014] EWCA Civ 506; [2014] 3 Costs LR 588 Davis LJ said at [63]:
>
> > 'the enjoinder that the Court of Appeal will not lightly interfere with a case management decision and will support robust and fair case management decisions should not be taken as applying, when CPR 3.9 is in point, only to decisions where relief from sanction has been refused. It does not. It likewise applies to robust and fair case management decisions where relief from sanction has been granted.'
>
> 28. In my judgment the same approach applies to decisions by first instance judges to strike out, or to decline to strike out, claims under CPR 3.4(2)(c). In a case in which, as the judge himself said, the balance was a 'fine' one, an appeal court should respect the balance struck by the first instance judge. As I have said I would have found that the balance tipped the other way; but that is precisely because in cases where the balance is a fine one reasonable people can disagree. It is impossible to characterise the judge's decision as perverse."

32. I take into account the judgment of Mrs Justice Yip in *Razaq* v *Zafar* [2020] EWHC 1236 (QB):

> "2. … the appeal proceeds in the usual way as a review of the decision below. It follows that this court can only intervene if it is demonstrated

that the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the court below.

3. As the Court of Appeal has reinforced on many occasions, an appellate court will not lightly interfere with case management decisions or the exercise of judicial discretion. Further, it has been said that it is vital that appellate courts uphold robust case management decisions by first instance judges. See *Clearway Drainage Systems Ltd* v *Miles Smith Ltd* [2016] EWCA Civ 1258, the test in considering an appeal against a decision of this nature was neatly encapsulated at para 68:

> 'The fact that different judges might have given different weight to the various factors does not make the decision one which can be overturned. There must be something in the nature of an error of principle or something wholly omitted or wrongly taken into account or a balancing of factors which is obviously untenable.'"

Background

33. In the old days, when the world was young, the Government provided legal aid to injured claimants in most personal injury claims and that, along with Union funding, paid the claimants' lawyers to fight PI cases. If the cases were won the defendants paid the claimants' lawyers costs, if the cases were lost the Legal Aid Board or the Unions paid the claimants' lawyers.

34. Legal Aid for PI claims was withdrawn in 1999/2000 and thereafter a system was set up for claimants to be able to contract with their lawyers under regulated conditional fee agreements (CFAs). These so called "no-win-no-fee" agreements meant that the claimants could sue without much or any risk of having to pay ACOs. Success fees for claimant lawyers were allowed to offset the risks of losing the more risky cases, but those are not the subject of these appeals and so I move on. CFA ATE insurance was created so that claimants could take out ATE policies to insure against the risk of losing and having to pay ACOs. Thus claimants were protected from the downside risks of litigation.

35. At first the law allowed claimants to recover the success fees charged by their lawyers in their CFAs from the defendants if they won their claims. In addition they were permitted to recover their ATE premiums from the defendant as well. Later the law was changed to prevent recovery from defendants in most (but not all) PI claims so

that the claimants themselves had to pay their lawyers success fees out of damages. There was a cap placed on the amount of success fees which could be deducted from the damages recovered of 25% of the past loss and the PSL awards. A small mark-up was created at the same time so that a 10% increase on awards of PSL was meant to offset or mitigate the deduction. In addition claimants had to pay their own ATE premiums in most cases. Many PI solicitors chose the business model called "CFA Lite" under which they did not take their URCs from the clients' damages.

36. Throughout the whole of these regulatory changes claimants' lawyers were always permitted to deduct their unrecovered costs (URCs) from the claimants' damages awards so long as the relevant legal protections for their clients – the claimants, had been satisfied. If there were challenges made by claimants to their lawyers' bills of costs, either to the validity of the retainer or the entitlement to make deductions, the process for making such challenges was by Part 8 claim leading to solicitor-own client costs assessments: SOCAs.

37. In 2010 the Portal was created initially to cover small RTA PI claims. The limit for RTA claims was up to £10,000 in total value (maximum £5,000 for PSL) but that was increased to £25,000. It also covers employers' liability claims which are not relevant in this appeal. Fixed costs were introduced so that insurers were not overburdened in such claims with claimants' legal costs, to streamline the process and to eradicate costs assessment in Portal claims. A new electronic, paperless process was created for the Portal to make it efficient. Evidence was carefully controlled and limited. Efficiency was required. The Portal had and has three stages:

(1) Stage 1: submission of the Claim Form.
(2) Stage 2: evidence for the claim and then settlement.
(3) Stage 3: trial of the claim and an award of damage or dismissal of the claim and a fixed costs order.

38. The costs allowed to be paid to the claimants' solicitors for Portal claims were fixed at each stage. Claimant firms had to adapt their business models to be able to operate at a profit when running PI claims through the Portal. CFAs are used by many firms to fund PI claims in the Portal. ATE insurance was arranged by some firms to pay the downside risk for claimants of the litigation: namely ACOs.

39. The Portal covers various types of PI claim and includes those

under the Pre-action Protocol for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents (official title: the RTA Small Claims Protocol), which I shall refer to as "the Protocol".

40. Some solicitors firms (the defendant being one of these) who do Portal work consider that they do not make sufficient profit from the work without taking a deduction from the client's damages to make up the shortfall between the work done on the claims on an "hourly rate" basis and the fixed fees recoverable under the rules from the defendants when the claims are settled or won. These deductions are for unrecovered costs: URCs. They are sums deducted from claimants' damages which are kept by the claimants' solicitors to pay the solicitors' fees over and above what the solicitors receive from the losing defendants.

Undisputed Facts in These Appeals

41. The defendant signed up the claimants on their standard form CFAs for their individual PI claims and all the claims were run through the Portal. I do not know whether all stayed in the Portal or some exited. All were won or settled. Damages were payable to each claimant. The defendant deducted from each claimant's damages various sums relating to Slater and Gordon's URCs and the ATE premiums.

42. The claimants were dissatisfied with the defendant's URC deductions from their damages settlements or awards and all retained CLL to request the defendant to submit bills of costs and then to bring Part 8 claims for SOCAs of the defendant's bills. The claims were all issued and now there are approximately 150 claims in which the claimants seek to challenge the deductions made by the defendant. Mr Raubenheimer and the Edward's claimants also challenged the placing of the whole ATE figures in the Cash Accounts suspecting that *secret commissions* have been paid to Slater and Gordon which should be credited to the claimants.

Procedure, Statement of Claim, Reply, Case Management and Applications

43. Each individual claim for a refund of a deduction is comparatively modest and as a result the courts need to manage the cases in a proportionate manner.

From Costs Law Reports 2022/3, published by Class Legal
www.classlegal.com

44. I was informed by counsel that none of these claims has yet been made the subject of a SOCA order.

45. By an order made by CJ Rowley on 14 April 2021, ten lead claims were selected (five by each party). The other 140 cases are stayed pending the resolution of the lead claims. In the Edwards claim the claimant was ordered to draft and serve a Statement of Claim and the other nine claimants were permitted either to adopt that or to plead themselves by 12 May 2021. The defendant was ordered to serve a Statement or Statements of Reply by 2 June 2021.

46. I have seen only the SOC (dated 14 May 2021) in the Edwards claim but it is expressed to be from "the claimants" plural. I do not know if this was adopted by the other nine lead claimants. In it, in summary:

(1) the claimants relied on the audio recordings of the sign up process with Mr Turnbull, who is now sadly deceased and whose claim is now continued by his personal representative "Piper". I am informed a full refund has been paid and the claim is therefore settled.
(2) The claimants pointed out that the relevant documents on the defendant's files had not yet been disclosed and challenged the validity of the retainers inter alia on regulatory grounds and consumer legislation grounds.
(3) The claimants asserted that the defendant received on each claim a "pecuniary award or advantage" (which in this judgment I shall refer to as the *secret commission* allegations) as a result of arranging the ATE insurance to cover the risk of ACOs on losing each claim. The claimants referred to a Part 18 request made for details of the alleged *secret commission* received by the defendant on each claim. The claimants pleaded that they were entitled to a refund of any *secret commission* on various legal grounds: fiduciary duty, the SC (Rule 5.1), the SRA FCBR (Rule 16) and the FSMA s 327. The claimants asserted that any *secret commission* should be set out in each claimant's "Cash Account". That is a defined term to which I shall return below.
(4) The claimants asserted that the retainers were void due to breaches of the CCR, the UTR, the CRA and due to multiple failures to comply with the Solicitors Code relating to providing best

information to clients before the signing of their CFAs and before making deductions from damages.

(5) Furthermore, the claimants asserted that the defendant's written retainers: its CFAs, were ambiguous and unclear as to the URCs deductions which it would make from the damages recovered by each claimant and failed to comply with CPR r 46.9(2) and (3). So the claimants asserted that under *the Solicitors Act 1974* s 74(3) and due to a lack of "informed consent" the defendant was not permitted to deduct any URCs from damages.

(6) Furthermore, the claimants asserted that the sign up process the defendant used was not fair and they were not properly or adequately "informed" in relation to URC deductions. In relation to Mr Turnbull (deceased) the written text in the CFA relating to URCs was in very small font and was on pages 8 and 14 and yet the signing process involved the defendant's agent sending an e-document link in an email whilst Mr Turner was on the phone, and requesting him to "click" a link which opened a digital document and then requesting him to "click" a box which meant the CFA was signed by the claimant. All this occurred within less than one minute from opening the e-document so Mr Turnbull had no time to read the detailed small print. The claimants assert that this process gave none of the claimants sufficient time to read the small print relating to URC deductions in the long digital CFA e-documents.

47. In the Reply (dated 4 June 2021) in summary:

(1) The defendant complained that the SOC lacked particularity; that the claimants had all relied on the Turnbull CFA, not their own CFAs; denied carrying any fiduciary duties or breaching them in any event; denied breaches of regulatory or consumer legislation; alternatively asserted such breaches were not issues for SOCA assessment; pleaded that the defendant did recommend ATE and the CFA provided for the defendant to apply for it on behalf of the claimants.

(2) In relation to the *secret commission* allegation the defendant pleaded:

> "13.4 If the claimant might instead want to refer to the Raubenheimer claim, it is denied that there has been any receipt of

> any commission (as that term is properly understood); rather, if this is a reference to what has been called a 'commission' in that claim, it was in fact a **legitimate claims-handling fee for services payable to a separate group company** who was appointed by the ATE Insurer to provide claims handling services and **manage the claims fund**. Further there have not been other unexplained payments." (The bold and underlining are mine.)

(3) In relation to the CFA terms the defendant pleaded they expressly provided for deductions from damages of URCs up to 25% of the damages and that the requirements of informed consent were complied with and that the defendant had provided each claimant with the best possible information and there was no omission of material information given to the claimants.

48. CLL are the claimants' solicitors in these claims. Having been challenged on their retainer, the defendant challenged back by applying on 26 May 2021 for a stay of all of the claims on the basis that the CLL retainers with the claimants were unlawful insurance contracts and/or that CLL were acting in a champertous manner by providing indemnity to the claimants for ACOs and by taking their fees out of any sum recovered. The defendant also applied for security for costs on the basis that CLL were funding the claims and were impecunious and could not afford to honour the indemnities.

49. On 14 June 2021 the claimants applied for disclosure from the defendant of documents on their files or in their possession, custody and power relevant to the pleaded issues including the audio files of each lead claimant's sign up process.

50. The hearing before CJ Rowley in Edwards & Ors took place on 7 July 2021. Judgment was given on 15 September 2021. The defendant's appeal notice was filed on 27 September 2021. A stay pending appeal was granted by Saini J on 28 September 2021 in relation to the costs order and the disclosure order and permission to appeal was granted by Martin Spencer J on 16 December 2021.

51. On 3 February 2022 at the request of the parties I ordered both appeals in *Edwards* v *S&G* and *Raubenheimer* v *S&G* to be heard together and (not by consent) I set aside the stays. On 2 March 2022 Bennathan J re-imposed the stay on the disclosure order but left the costs order in force. I assume it has been paid by Slater & Gordon.

From Costs Law Reports 2022/3, published by Class Legal
www.classlegal.com

52. On 18 June 2021 CJ Rowley gave judgment on the claimant's Part 18 application in Raubenheimer refusing the application. The order was made on 16 July 2021. That order is also appealed by that claimant.

53. I heard the appeals with a CJ sitting as an assessor to whom I am grateful for his wisdom and guidance. However the judgment herein is my own and I do not purport to make rulings on his behalf.

The Judgments Below

54. To summarise again: in Edwards CJ Rowley granted the claimants' disclosure application and rejected the defendant's applications for a stay of the claims and for security for costs against CLL. In Raubenheimer CJ Rowley rejected the claimants' Part 18 application. Those decisions are appealed.

55. In **Edwards** my summary of the reasoning in the 15 September 2021 judgment is as follows.

56. The claimants applied for standard disclosure under CPR Part 31 because the usual process for assessment on a solicitor and own client basis was inadequate, omitting as it does any express disclosure requirement. In the alternative the claimants invited the court to exercise its general case management powers so to do. The judge noted that in a Part 8 claim CPR rule 46.10 did not provide for disclosure because in most Part 8 SOCAs there was minimal dispute as to the facts. Although the judge noted that in such assessments the judge may hear limited oral evidence or accept written evidence on factual issues. The judge noted the defendant's objection to disclosure and assertion that there was no power in CPR rule 46.10 or elsewhere expressly for disclosure. The judge noted that the defendant accepted that a Part 8 claim is a claim but asserted that once assessment was ordered it was an assessment not "a claim" and submitted that CPR Part 31 did not apply to assessments. At para 16 the judge noted that the defendant accepted that the CPR applied to *Solicitors Act* proceedings. The judge rejected the defendant's floodgate arguments, took into account the limited jurisdiction under Part 8 and that Part 8 proceedings should not generally be used where Part 7 proceedings were more appropriate – for instance for professional negligence claims. The judge noted that Part 8 claims were treated as allocated to the multitrack. The judge noted that disclosure on a standard basis would be limited to the issues identified in the pleadings and specifically mentioned the audio

recording of the sign up of Mr Turnbull and his belief, on the evidence, that the defendant had audio recordings for the other lead claimants which would be relevant.

57. At para 27 the judge ruled that he had jurisdiction and power under CPR Part 31, to order standard disclosure and even if he did not have that power he had the power under his general case management powers and that the proceedings did involve "claims".

58. In relation to the application for a stay the judge noted that the defendant was not asserting that the claimants were companies that were unable to pay, they were individuals, nor that they were outside the jurisdiction. The judge noted the defendant's application was a full frontal attack upon CLL based upon champerty and alleged unlawful insurance provision. The judge went on to consider the evidence from the defendant in relation to CLL's Welcome Pack and no win–no fee agreements and the indemnity provided within those against ACOs. The judge carefully considered the charging rates set out in the witness statement of Mr Carlisle and the assertion that the hourly rates were higher than the court's Guideline Hourly Rates due to various stated factors. The first was "legal specialism" in the area. The second was the provision of the indemnity against ACOs. The judge analysed Mr Carlisle's evidence on the three different types of CFA retainer under which various of the claimants were contracted. The first being an old retainer with no deduction from the claimants' sums recovered and with no success fee but with an indemnity against ACOs. The second being the same but with a higher hourly rate and the third being the same but with no indemnity. The judge noted that Mr Carlisle asserted that there was no causal connexion between the indemnity and the hourly rates because the hourly rates were not lower in the retainers where there was no indemnity when compared to the retainers where there was an indemnity. The judge also noted that in a very limited category of cases, where the claim would be won but no order for costs would be made, CLL could recover their costs out of the sums awarded, capped at a maximum of 20%.

59. The judge rejected the defendant's submission that because Mr Carlisle's witness statement had been provided a mere five days (three working days) before the hearing it should be excluded and took into account that the defendant did not ask for an adjournment and did not put before the court any submission that they were so disadvantaged that they could not deal with it without an adjournment.

From Costs Law Reports 2022/3, published by Class Legal
www.classlegal.com

60. The judge then went on to deal with the defendant's assertion that CLL had inadequate capital and hence were unlikely to be able to pay out on the indemnities they had given to the claimants. The judge accepted that if CLL were providing unlawful insurance without regulation that would be a highly relevant matter for the stay.

61. The judge specifically considered Mr Carlisle's evidence about the lack of an ATE market for ACOs in SOCAs and that CLL had stepped in to plug the gap in the market by providing the indemnity themselves.

62. At para 55 the judge considered *Morris* v *Southwark* [2010] 4 Costs LR 526 and *Sibthorpe* v *Southwark* [2011] EWCA Civ 25, and the decision by Mr Justice MacDuff (sitting with assessors) on first appeal. The judge noted that the indemnity and CFA provisions in those claims were characterised as legal services contracts with an indemnity clause and not as insurance contracts. The judge noted that on appeal the Master of the Rolls stated in his judgment that he rejected the renewed application for permission on the unlawful insurance point and stated that he considered that Mr Justice MacDuff's decision was right on that point. The judge then considered the defendant's assertion that the ruling in *Sibthorpe* should be distinguished. He rejected that submission. He considered the text of *MacGillivray on Insurance Law* and the old definition of insurance contracts in *Prudential Insurance* v *Inland Revenue* (1904) 2 KB 658 by Mr Justice Channell. The judge went on to consider contracts with mixed elements: both insurance and non-insurance related. He also considered the text *Collinvaux's Law of Insurance* and *Fuji Finance* v *Aetna Life* (1997) Ch 173, and *Marac Life* v *Commissioner of Inland Revenue* (1986) 1 NZLR 694. In addition the judge considered the defendant's submissions in relation to *Re Digital Satellite Warranty Cover* [2011] EWHC 122 (Ch) in which Mr Justice Warren doubted whether the "principal object" test was the appropriate test in mixed contracts. Preferring, as he did, an analysis to distinguish between "principal objects" and "ancillary or minor elements". The judge specifically considered whether the principal object (singular) test was too narrow and should be expanded to the plural or altered.

63. In his ruling at paras 82 to 112 the judge ruled that the CLL CFA was not an insurance contract. He ruled that it was a contract of legal services and the indemnity provision was peripheral.

64. In relation to champerty and also impinging on the issue of

alleged unlawful insurance, the judge considered the evidence in relation to the lack of ATE insurance for ACOs in solicitor and own client assessments and also considered CLL's specialism in the area and the hourly rates they charged. He noted that CLL charged the same hourly rate in CFAs where the indemnity was not provided as in CFAs where the indemnity was provided. At para 108 the judge referred to his own experience in the SCCO of cases involving CLL being overwhelmingly Part 8 claims for SOCAs which were often resolved before any hearing took place. With the recovery of sums generally being modest and which he regarded as relatively low risk claims in his experience. At para 109 the judge came to the conclusion that the CLL model of business in this field was similar to the field for CFAs for dilapidations claims in *Sibthorpe* and rejected the suggestion that the CLL indemnity would lead to substantial payouts generally.

65. When considering whether there was, as a fact, inherent within the indemnity, evidence that the structure of the indemnity was akin to an insurance contract, the judge considered whether there was a premium or other sum or money passing from the claimants to CLL. At para 110 he described it as:

> "Difficult for there to be any conclusion that there is a payment of a sum of money or some corresponding benefit which is sufficient to provide consideration for a contract of insurance."

66. In relation to the application for security for costs, under CPR 25.14, the judge rejected the claimants' assertion that s 70(1) of the Solicitors Act 1974 stood as a bar to any application for sums to be paid into court. The judge ruled that the bar on making a Payment In order at the time of ordering the assessment did not extend to the whole of the assessment proceedings. I stop there to say that this decision was not appealed by the claimants so I am not asked to reconsider it in these appeals.

67. The judge noted that there was no application for security for costs by the defendant against the claimants themselves. This was an application for security against a third party: CLL. The judge identified that the real issue was whether CLL were providing the indemnity in return for a share of any money which the claimants might recover in the proceedings. At paras 134 and 137 the judge rejected the defendant's assertion that because, in the small minority of cases, where there was a no costs order, CLL could recover their

hourly costs out of the sums recovered (capped at 20%), that recovery could be regarded as "taking a profit share from the proceedings". Likewise at para 133 the judge ruled that mere recovery of costs in the SOCAs from the defendant in a successful claim could not be regarded as a share in the claimants' winnings.

68. In relation to whether it would be just to order security for costs the judge considered the evidence in relation to CLL's accounts. He ruled that there was insufficient information publicly available for any in depth analysis. The judge was clearly not prepared to accept the defendant's estimated adverse costs total of £700,000 and at para 151 preferred the sum of £135,000. At para 153 the judge rejected the assertion that CLL could be characterised as motivated by a "commercial" interest in the proceedings and the judge's ruling at para 156 was that the gateway in CPR rule 25.14 was not made out in relation to the assertion that CLL had contributed to the claimants' costs.

69. **In Raubenheimer** the judge found the following facts. The defendant's cash account dated August 2020 showed a payment for the ATE premium of £258.87 made in October 2017 and a later refund of £4.63. CLL communicated with the administrators of Elite Insurance (the ATE providers to the defendant) who admitted that payments were made by Elite to unknown persons relating to the claimant's claim as follows:

> "A claims handling commission of GBP 30.00 and a claims fund contribution of GBP 176.13 would fall due."

70. The judge noted (at paras 7 and 9) that:

> "7. In support of the application, three witness statements from Mark Carlisle, the fee earner with conduct of the case at the claimant's costs lawyers, have been served. Within the exhibits to those witness statements there are communications between Mr Carlisle and the administrators of the ATE insurers, Elite Insurance. It is the claimant's case that payments appear to have been made by Elite insurance to the defendant but such payments were not disclosed to the claimant. The claimant says that the defendant has, or at least appears to have, breached its fiduciary duty not to make a secret profit from its role as a fiduciary. …
>
> 9. The defendant says that the claimant is wrong to draw the inferences

> that he does in respect of the communications between his lawyer and the administrator of the ATE provider. The defendant has not spelt out why the claimant is in error in a response to the Part 18 request. It has not done so on the basis that it says the claimant is simply not entitled to make the request in these proceedings. The claimant responds that the defendant has no argument to oppose providing the information requested save for this alleged jurisdiction point."

71. The judge noted that the defendant relied on the judgment of the Master of the Rolls in *Herbert* v *HH Law* [2019] EWCA Civ 527, in which the court ruled that in Solicitors Act 1974 SOCAs the CJ cannot assess the amount of the ATE insurance premium and the claimant cannot challenge it. Such challenges must be brought in separate proceedings.

72. The claimants submitted that the Cash Account was to be assessed or approved in the SOCA and to that extent the ATE premium had to be considered and that the information would help to decide whether to pursue another claim. The judge rejected the second submission and then considered the Cash Account submission.

73. In relation to the novel issue of whether in a SOCA the CJ can assess the ATE premium after the assessment of the bill of costs when the CJ has to consider the Cash Account and certify the final sum due between the claimant and the solicitors, the CJ ruled against the claimant [para 38]. An exposition of the history of SOCAs and how they focus on the solicitor's bill of costs and disbursements and how those items are different from the solicitor's Cash Account for the claimant, which contains a record of receipts and payments relating to the claimant's case, is in paras 15–21 of the judgment. The judge considered the Court of Appeal's decisions in *Herbert* v *HH Law* and compared an action for an account involving CPR r 40 and PD 40A with assessment of a bill of costs involving CPR Part 46 and noted the differences specifically in relation to the evidence needed for a claim for account in the Chancery Division. Finally the judge rejected the claimant's submission that there was inherent jurisdiction in a SOCA to require the defendant to disclose commissions relating to the ATE premium and that this was not an onerous request.

74. The judge ruled that there was no room or jurisdiction for a CJ in a SOCA to consider the composition or adequacy of the ATE

premium [paras 51–53], and stated in relation to the Cash Account that:

> "50. Whichever description is taken, a cash account is no more than a ledger showing receipt of monies during the retainer, invoices rendered and the payment of items such as damages or purchase monies to others. The payment of an insurance premium to the ATE provider fits into this category. The client has taken out the insurance and the solicitor, as his agent, pays for it by sending money to the ATE insurer, often at the end of proceedings upon receipt of monies from the losing opponent. …
>
> 52. When looking at the nature of the cash account, I have given the example of a solicitor paying out monies to another party on behalf of the client. There is no possibility, in my view, of the court in Solicitors Act proceedings, making any enquiries as to the adequacy of that sum of money. The remedy of the client if the monies paid out had in some way be[en] in error would be to bring proceedings against the solicitor for breach of one of a number of potential duties. I can see no reason to distinguish between the ATE premium and any other cash account payment in this respect."

Grounds of Appeal

75. **In the Edwards case**, in the defendant's grounds of appeal it asserts that CLL's indemnities were unlawful and champertous; that the judge was wrong to apply the decision in *Sibthorpe*; the judge was wrong to hold that the indemnity was subsidiary to legal services; that public policy requires the indemnity to be characterised as an insurance contract and that the impact of the indemnities would be substantial, not minimal, on CLL's business.

76. The defendant further asserted that there was consideration for the indemnities and that CLL had an excessive interest in the outcome of the claims, not least because if they won the claims they would not have to pay out on the indemnities. In addition they had control over the claims.

77. The second ground was that security for costs should have been granted and that it was just to do so based on CLL's lack of assets. The defendant complained that the judge should not have investigated the defendant's own accounts and ought to have ordered security of £700,000 or less.

78. The third ground of appeal was that the disclosure order was

wrong because the judge had no jurisdiction to order disclosure under CPR rule 31 which did not apply in Part 8 claims and the Statement of Claim was not sufficiently particularised to do so.

79. The fourth ground of appeal was that the judge should have excluded the witness statement of Mr Carlisle because it was late and evasive.

80. In the defendant's skeleton argument, which I shall not summarise other than in the most general way here, the grounds for appeal were expanded. Defence counsel relied on the statements made by CLL in their documentation to the effect that the hourly rate charged under the CFAs was calculated taking into account many matters but also the indemnities that they provided to claimants. In his submissions defence counsel stated that the correct test for the court to apply to characterise these CFAs as an insurance contract would be simply to ask whether they had "an insurance element" within them. Defence counsel relied on the text of *Colinvaux's Law of Insurance* at para 14-040 which he submitted suggests that it does not matter that the insurance element of the contract is not the predominant element when characterising the contract as an insurance contract. The defendant relied on the PERG (FCA) Guidance at paras 6.3.3 and 6.3.4 and the judgment of Mr Justice Warren in the *Digital* case in 2011.

81. The defendant asserted that the decision in *Sibthorpe* of Mr Justice MacDuff was not binding on this appeal court but did not concede that it was binding on the CJ despite being a decision of an appellate court. The defendant asserted that the judgment of the Master of the Rolls on appeal in *Sibthorpe* could not be cited or relied upon as a result of the Practice Direction in 2001 relating to the citing of authority, stating that decisions on permission to appeal could not relied upon. The defendant submitted that because the indemnity looked like legal expenses insurance it was indistinguishable from legal expenses insurance, had that been purchased separately by CLL. The defendant raised what it submitted was a substantial risk to the claimants that they were being "misled" into believing they had cast iron indemnities when the likelihood was that these cases would be lost, £700,000 worth of adverse costs would be incurred and CLL would not be good for the money to fund the loss. Defence counsel dressed up the application for a stay as something in the best interests of the claimants because they had been misled into believing that the

indemnities were certain to be honoured when on the defendant's submission they would not be. I do not consider that submission to have merit.

82. Defence counsel asserted that consideration for the indemnity was given by the claimants entering into the CFAs and in particular by the higher hourly rates charged as a result of providing the indemnity. Remarkably, in my judgment, taking into account the fact that the defendant refused to provide documentation in the Part 8 claims between themselves and their previous clients relating to either the retainer or the audio recordings relating to their retainers, defence counsel submitted that the defendant required CLL to provide disclosure and the details of each of their retainers funding the claims made under Part 8.

83. In relation to champerty the defendant submitted that although the CFAs were not champertous the CLL indemnities were champertous. Although the decision in *Sibthorpe* was contrary to that submission, defence counsel sought to distinguish that case. It was suggested that CLL had too much of a commercial interest in the outcome of these claims and that it would be in the public interest for solicitors firms offering such indemnities to backup CFAs to be regulated by the insurers regulator.

84. In relation to security for costs, the oral submissions ran along the lines set out in the written skeleton including the repetition that the filed asset statements which showed more than £3 million worth of assets owed by a group company to CLL were, on the defendant's case, illusory and inadequate to meet any liability which would arise under the indemnities. Complaint was made that no further disclosure of CLL's financial circumstances had been provided by Mr Carlisle.

85. In relation to the application for disclosure the defendant submitted that SOCAs were carried out under a discrete regime which did not include CPR 31 and it was not right for the judge to take into account issues such as breach of fiduciary duty and the various regulatory and consumer protection allegations, all of which should only be dealt with under a Part 7 claim not in Part 8 proceedings. Stopping there, firstly I was not impressed by the contradiction the defendant propagated in this approach. It challenged the CLL retainers before the judge (thereby asserting he had jurisdiction to hear that challenge) relying on regulatory insurance law, but asserted the reverse could not occur if the claimants challenged the defendant's retainer

relying on regulatory and consumer law. Secondly I asked both counsel to draw up a Word document setting out the issues and indicating which they agreed could be dealt with in a Part 8 SOCA and which could only be dealt with under Part 7. They did so and it is appended to this judgment at Appendix 1.

86. Defence counsel also submitted to the judge that because there is no statement of truth on the Statement of Claim it should be struck out. This was a matter which the judge rejected in the judgment and was not appealed in the grounds of appeal.

Claimants' Submissions

87. Claimants' counsel submitted simply that the judge was right in relation to disclosure, the refusal of a stay and the refusal to order security for costs. The thrust of the claimants' response was that the defendant was making a song and dance in relation to these Part 8 claims and was intentionally running up the costs unnecessarily at the same time as refusing to provide either to the court or the claimants the retainers, the audio recordings relating to the retainers or any other documents which could prove the case which it had itself pleaded, namely that the clients had given them "informed consent" for the URCs deducted from the bills. The burden of proof being on the defendant to show informed consent, it was, in effect, shooting itself in the foot.

88. In relation to unlawful insurance the thrust of the claimants' submissions was that the process that I should go through should take the following steps:

(1) Determine whether the indemnity on its own can be properly characterised as an insurance provision by reference to the two necessary factors: (a) does the insurer style party have to pay out money or money's worth on the future occurrence of some fortuity. (b) does the insurer style party receive a premium in money or money's worth whether it be up front or delayed?
(2) Next, if the answer to the first question is: there is no insurance provision, no further analysis is required. If the answer to the first question is: this is an insurance provision, then this court should consider the various factors necessary to determine whether or not the whole contract is to be characterised as an insurance contract and hence needs to be regulated by the insurers' regulator. In this

step the court should take into account whether there is a single purpose for the contract or multiple purposes. Put another way whether there is a single objective or multiple objectives. If the contract is a single purpose contract, so the provider seeks to provide insurance for profit, then the court doesn't need to go any further. However if the contract has multiple purposes or objectives then further analysis is required properly to categorise the contract.

(3) What factors are to be taken into account when characterising a mixed purpose contract? Claimant counsel's submissions were that the purposes and objectives of the parties needed to be taken into account. In addition the risk needs to be considered and all other factors need to be considered, marketing, the details of the services being provided, the business terms, the regulators of the parties (if any) etc.

(4) Once those factors have been considered it is for the court to determine whether the main purpose or purposes, objective or objectives of the contract is/are insurance business or whether those purposes are in fact the supply of goods, like washing machines with a guarantee or warranty, or the supply of services, like legal services with an indemnity. Then the court has to determine whether the indemnity is a mere adjunct to or is peripheral to or is ancillary to the main purposes of the contract.

89. The claimants relied on *MacGillivray on Insurance Law* at para 1-008. The claimants also relied on the decision in *Sibthorpe*.

90. In relation to champerty the claimants relied on the decision in *Sibthorpe* in the Court of Appeal, which the claimants submitted was binding on this court. In particular the judgment of Lord Neuberger at paras 42 to 44. The claimants submitted that CLL were not making any financial gain out of the indemnity, quite the opposite, they faced an element of risk of loss. CLL were not in business to sell indemnities. CLL would prefer not to provide indemnities at all. Their difficulty there was that no ATE market was available so, to assist in CLL's marketing for such claims based on CFAs, they offered indemnities to clients against the known ACO risks. CLL also relied on the submission that by providing these indemnities they were expanding access to justice.

91. In relation to the application for security for costs against a third party (CLL) the claimants submitted that the judge was right in

his decision and that the criteria in CPR 25.14(2) were not fulfilled. Relying on a decision of Mr Justice Hildyard in *RBS* [2017] EWHC 463, at para 19, the claimants asserted that the relevant factors were not in place for a security for costs order. CLL were not running this litigation for commercial profit (other than mere legal fees on an hourly rate), they were running it so that they could do legal work and recover their normal hourly rates. Indeed they might not even recover their normal hourly rates: firstly if they lost they would get nothing; secondly, even if they won they would only recover the rates allowed by the court on assessment, which might be lower than their normal hourly rates; and thirdly they contracted to make no recovery of unrecovered costs in most claims.

92. In relation to disclosure, which the claimants asserted the judge was right to order, it was submitted that the court had the power under CPR 31.5 or inherently, to order disclosure and it was correct to do so. The documents to be disclosed were relevant to the issues and could be examined by the parties and later by the court.

Disclosure in SOCAs

The Law

93. SOCAs are created pursuant to the Solicitors Act 1974. The relevant sections in these appeals, which were all brought within one month of the delivery of the bills of costs, follow. They are set out in the Supreme Court Practice (SCP) Vol. 2 with helpful notes.

> "70 **[F1Assessment] on application of party chargeable or solicitor.**
>
> (1) Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be [F2assessed] and that no action be commenced on the bill until the [F3assessment] is completed. …
>
> (5) An order for the [F6assessment] of a bill made on an application under this section by the party chargeable with the bill shall, if he so requests, be an order for the [F6assessment] of the profit costs covered by the bill.
>
> (6) Subject to subsection (5), the court may under this section order the [F7assessment] of all the costs, or of the profit costs, or of the costs other than profit costs and, where part of the costs is not to be

[F8assessed], may allow an action to be commenced or to be continued for that part of the costs.

(7) Every order for the [F9assessment] of a bill shall require the [F10costs officer] to [F11assess] not only the bill but also the costs of the [F9assessment] and to certify what is due to or by the solicitor in respect of the bill and in respect of the costs of the taxation. …

(10) The [F17costs officer] may certify to the court any special circumstances relating to a bill or to the [F18assessment] of a bill, and the court may make such order as respects the costs of the [F18assessment] as it may think fit.

(11) F19. …

(12) In this section 'profit costs' means costs other than counsel's fees or costs paid or payable in the discharge of a liability incurred by the solicitor on behalf of the party chargeable, and the reference in subsection (9) to the fraction of the amount [F20of the reduction in the bill] shall be taken, where the [F21assessment] concerns only part of the costs covered by the bill, as a reference to that fraction of the amount of those costs which is being [F22assessed]."

94. It is clear from this section that a SOCA is an assessment of the bill of costs not the Cash Account. The bill of costs contains the solicitors' fees and the disbursements properly so characterised. At the end the CJ has to certify what sums are due from the solicitor to the claimant or vice versa. To do so the Cash Account must be considered.

95. Section 72 states:

"**72 Supplementary provisions as to [F1assessments].**

(1) Every application for an order for the [F2assessment] of a solicitor's bill or for the delivery of a solicitor's bill and for the delivery up by a solicitor of any documents in his possession, custody or power shall be made in the matter of that solicitor. …

(4) The certificate of the [F9costs officer] by whom any bill has been [F10assessed] shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered by it, and the court may make such order in relation to the certificate as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."

96. This provision makes it clear that in a SOCA the CJ can order delivery up by the solicitor of any documents in his possession, custody or power. I did not hear submissions on the scope of this provision from either counsel in relation to the disclosure application.

97. Section 74 states:

"**74 Special provisions as to contentious business done in county courts.**

(1) The remuneration of a solicitor in respect of contentious business done by him in [F1the county court] shall be regulated in accordance with sections 59 to 73, and for that purpose those sections shall have effect subject to the following provisions of this section.

F2(2) …

(3) The amount which may be allowed on the [F3assessment] of any costs or bill of costs in respect of any item relating to proceedings in [F4the county court] shall not, except in so far as rules of court may otherwise provide, exceed the amount which could have been allowed in respect of that item as between party and party in those proceedings, having regard to the nature of the proceedings and the amount of the claim and of any counterclaim."

98. This provision prevents a solicitor from recovering URCs from the client unless the Civil Procedure Rules allow such when the bill of costs relates to contentious business. I heard no argument on the definition of contentious business. That it will be relevant to the legal issues which will be before the CJ in the SOCAs in relation to the defendant's power to make deductions from the claimants' damages awards of their URCs. If the claimants' claims in the Portal are contentious business then the section is engaged.

99. The PI Small Claims Protocol states:

"**Preamble General**

2.1

(1) This Protocol applies where a **claimant** who has suffered personal injuries (including but not limited to **whiplash injuries**) because of a **road traffic accident** wishes to make a claim for compensation and the amount claimed for their injuries is not more than £5,000 and for their overall claim is not more than £10,000. This would mean that,

if the **claim** was dealt with by a court, it would be normally be allocated to the small claims track and dealt with as a small claim.

(2) The Protocol describes the behaviour expected from both parties before starting court proceedings. It establishes a process to help the parties to reach a fair settlement in respect of any **claim** to which the Protocol applies.

(3) The Protocol also deals with the first steps the parties must take if they are unable to reach a settlement and the **claimant** wishes to start court proceedings. **Claims** can leave the **Portal** for the court to determine specific issues such as liability, then return to the **Portal** for later steps as directed by the court.

(4) The Civil Procedure Rules 1998 enable the court to consider costs sanctions where this Protocol is not followed."

"**The Portal**

2.2 A key feature of this Protocol is the use of an online **Portal**. The **Portal** is an online service through which the parties communicate. The **Portal** is used to make a **claim**, to exchange information and documents, and to negotiate a settlement or start court proceedings. An **unrepresented claimant** also uses the **Portal** to obtain any medical report in support of their **claim**.

The Guide to Making a Claim

2.3

(1) This Protocol should be read together with the Guide to Making a Claim Under the RTA Small Claims Protocol, which provides more information about when and how to use this Protocol. The **Guide to Making a Claim** can be found at:

https://www.officialinjuryclaim.org.uk/

Copies may also be obtained from the **Portal Support Centre**.

(2) For the avoidance of doubt, **if anything in the Guide to Making a Claim conflicts with the provisions of this Protocol, this Protocol takes precedence.**"

(The bold is in the original text, the underlining is mine).

100. I understand from counsel in this appeal that in *Belsner* v *Cam Legal* [2020] Costs LR 1371, an appeal to the Court of Appeal may be

considering whether the Portal claim involved was contentious business or not. I do not understand how that can be so when at para 42 of the judgment Lavender J stated:

> "42. Although no claim form was issued in the present case, and although there appears to have been a dispute about this point before the district judge, it was not disputed before me that s 74(3) applies in the present case, except insofar as rules of court may otherwise provide."

101. I consider that the underlined words make it clear that the Portal deals with "claims". I tend to the view that in these claims for damages for PI the claims are contentious business, the contentions being liability and quantum. But I did not hear argument on this point and in any event I do not need to rule upon this issue on these appeals. I need to be aware of it as part of the background to the issues relating to the recoverability of URCs and the deduction of them from the claimants' damages by the defendant.

Procedure and Jurisdiction in the CPR

102. Turning then to the Civil Procedure Rules on SOCAs. Part 67 governs proceedings relating to solicitors.

103. Pursuant to CPR r 67.3 a claim for SOCA *must* be made under CPR Part 8 (or in existing proceedings). Claims under Part III of the Solicitors Act 1974 (in which ss 70–74 are placed) may be determined by a Master, costs judge or High Court judge. The Practice Direction to CPR 67 gives some guidance on SOCAs being issued in the Senior Courts Costs Office. So, as I understand matters, these claims could be listed before a High Court judge who could decide any Part 7 and Part 8 elements together, perhaps sitting with an assessor.

104. CPR r 67.2 empowers the court, on the application of the client, to order a solicitor to produce a Cash Account to a client and a bill of costs as well. Any application for those must be made under Part 8. If the solicitor alleges he has a claim for costs against the client who applies under r 67.2 the court may make an order for detailed assessment and an order securing payment of the costs.

105. The notes in the Supreme Court Practice (SCP) state (at 67.2.1) that it is quite common on such applications for disputed evidence to be tried by the CJ in the Part 8 application, with directions governing the evidence required in relation to the nature of the bill of costs: see *Badaei* v *Woodwards* [2019] EWHC 1854. That was a food poisoning

PI claim in which the solicitor terminated the CFA retainer due to considering it was not a winner (the client's credibility was apparently damaged by photos posted on the internet) and then issued a bill. There were issues over whether there was a breach of the retainer by the client. Separate Part 7 and Part 8 proceedings were issued and on appeal O'Farrell J ruled that the factual issues could be tried within the first issued Part 8 claim and stayed the Part 7 claim, reasoning as follows:

> "48. It is now common ground between counsel, and correct, that the Part 8 proceedings were proper proceedings to be issued. There is nothing to stop the court determining all of the issues that have arisen between the parties under Part 8, in the same way that those matters could be determined under Part 7.
>
> 49. The Part 8 proceedings were started first in time, and although that is not a conclusive matter, it is certainly a factor that the judge should have taken into account when considering whether or not the Part 8 proceedings were effectively an abuse of process, which is what she found. Further, if the district judge considered that a sensible case management of this matter was by determining the breach of contract matter first under Part 7, that could have been accommodated by a stay of the Part 8 proceedings and/or reserving the costs. …
>
> 50. For those reasons, I have no hesitation in allowing the appeal, reinstating the Part 8 proceedings, and setting aside the costs order made by the district judge in relation to the Part 8 claim.
>
> 60. However, on balance, I consider that that could be accommodated fairly readily within the Part 8 proceedings. There already are the relevant CFA documents. There are contemporaneous documents, including the declaration signed by the appellant. There are the photographs that were posted on her Instagram page.
>
> 61. Therefore, the scope of any dispute is relatively narrow. I accept that there may be the need for factual witness statements and some limited cross-examination. I accept that there will be a need for detailed skeleton arguments and submissions, but they are not so cumbersome, so as to remove the clear advantages of dealing with this as part of the Part 8 proceedings."

106. Taking into account that on a number of occasions in the

defendant's skeleton argument and in court the defendant asserted that many of the issues raised in the claimants' Statement of Claim were outside the jurisdiction of the court on a Part 8 claim, I raised with defence counsel at the appeal hearings whether the defendant wished a hybrid hearing within Part 8 going forwards or for the identified issues to be transferred to the Chancery Division under Part 7. The defendant declined to request a hybrid hearing going forwards at this time or for the Part 7 issues to be transferred by me at the end of the judgment. So this will be a matter for future case management.

107. Under gateway 1, Part 8 of the CPR is used generally for claims in which there is unlikely to be "a substantial dispute of fact", see this gateway in CPR r 8.1(2)(a).

108. However there is a second gateway in CPR r 8.1(6) which is expressly an alternative to gateway 1. Gateway 2 states that a rule or practice direction may require or permit the use of Part 8 and disapply or modify any rules of court set out in Part 8 to those proceedings. I note that CPR r 67 requires the use of Part 8 for SOCAs so CPR r 8.1(6) is engaged.

109. The question then arises: to what extent (if at all) does the first qualifying gateway for Part 8: claims with limited factual disputes, impinge upon or pollute the second qualifying gateway: claims where a rule requires Part 8 to be the procedural route? The notes do not make that clear. The case law on this is not fully developed but is summarised inter alia in the SCP in the notes at para 8.0.1.

110. In *Vitpol* v *Samen* [2008] EWHC 2283, the ruling of Coulson J (at paras 18–19) favoured a flexible and sensible approach to developing issues in Part 8 claims, allowing them to be switched between Part 8 and Part 7, without cumbersome procedural formality, in the TCC. I take on board his guidance and agree that procedure needs to serve the needs of the case rather than itself becoming the dominant element. Procedure is the servant of justice, not the master.

111. In *Forest* v *ISG* [2010] EWHC 322, a decision of Ramsey J about the first gateway, he ruled thus (para 30):

> "This court is also prepared to deal with certain limited factual issues which might arise on a Part 8 claim and does so by way of a hybrid procedure involving an element of fact finding. In those cases a short hearing can dispose of any disputed fact based on a decision after hearing oral evidence: see the observations of Coulson J in *Vitpol*

> *Building Service* v *Michael Samen* [2008] EWHC 2283 (TCC) at [18(b)]."

112. The limited factual dispute gateway was considered in *ING Bank* v *Ros Roca* [2011] EWCA Civ 353, per Stanley Burnton LJ at paras 77–78, in which the factual dispute about the fee due under a construction agreement involving an issue of estoppel was held to take the claim outside Part 8 qualification through the first gateway: CPR r 8.1(2)(a) but the case did not involve the second gateway: CPR 4.8.1(6) so it was not considered. Stanley Burnton LJ stated:

> "77. This case proceeded under CPR Part 8. In general Part 8 proceedings are wholly unsuitable for the trial of an issue of estoppel. Once such a claim is disputed, save in exceptional cases, the proceedings will cease to comply with CPR r 8.1(2)(a), since they will cease to be proceedings in which the parties do not seek the court's decision only on questions which are "unlikely to involve a substantial dispute of fact". A disputed claim of estoppel should be carefully pleaded. I strongly endorse the contents of the note at para 8.0.2 of Civil Procedure 2011 (vol. 1):
>
> > 'In essence, the Part 8 procedure is in general terms designed for the determination of relevant claims without elaborate pleadings. If the procedure is misused, the defendant can object and equally the court of its own motion, and as part of its function to manage claims, will order the claim to proceed under the general procedure and allocate a track and give appropriate directions.'
>
> 78. In the present case, the parties should have agreed or applied for directions for the exchange of pleadings on the estoppel issue. Pleadings would have clarified precisely how Ros Roca put its case and what facts were in dispute. In the event, this court has been able to determine the issue of estoppel on the basis of the judge's findings of fact. However, his determination of the factual issues would have been easier, and the risk of injustice less, if the parties had pleaded their respective cases."

113. So far as I can find the case law, an analysis of the limits of the second gateway in CPR r 8.1(6) has not been so clearly analysed as the scope of the first gateway. However, when dealing with a SCCO case concerning a SOCA by a costs judge it seems to me that the first gateway (limited factual issues) has in the past in practice been interpreted as affecting the CJ's case management decisions about

where and how the issues raised in the issued Part 8 claim should be considered. Whether it should be depends on the experience and scope of expertise and the jurisdiction of costs judges. Perhaps also on the Rules Committee and how they would like to approach allocation of work since the decision in *Herbert*. So what issues should be dealt with in the assessment by the CJ? What should be dealt with in Part 7 proceedings by a High Court judge? Which grade of judge should decide which issues (should a High Court judge deal with the SOCA and the Part 7 issues)? whether there should be pleadings or not? and as I will refer to below, whether there should be disclosure or not. These are case management decisions and if they arise in a Part 8 claim, issued in the SCCO before the assessment order (or after), they still need to be case managed fairly, proportionately and efficiently.

114. After the issue of the Part 8 claim form, at a case management hearing or on paper, an order for an assessment (which in these claims will be a SOCA) will be made by the CJ (for Part 8 claims issued in the Costs Office). The usual procedure for SOCAs is set out in CPR r 46.10. The solicitor serves a bill of costs with the breakdown thereof; the client usually inspects the file and then must serve points of dispute; the solicitor serves a reply and either party then requests a hearing date for the assessment.

115. However, it is clear that in some SOCAs some pleadings will be needed and in those claims some evidence may also be needed and some limited cross examination at the assessment hearing too. I can see why it makes sense for the issues to be identified before the assessment order is made so the scope of the issues is clear and the scope of the assessment is also made clear.

116. I note that CPR r 8.6 provides that no written evidence may be relied upon at the Part 8 hearing unless served in accordance with r 8.5 or the court gives permission. Rule 8.5 requires written evidence to be filed with the claim form. None was filed in these claims. I understand evidence, if needed, is usually agreed or ordered at the first directions hearing.

117. In relation to pleadings in Part 8 claims, CPR r 8.9 dispenses with them and the claim is treated as allocated to the multi-track. However, properly in my judgement, in this case the CJ made an order for quasi pleadings and this has been complied with. No appeal is made from that decision. It was a wise one for it has clarified the issues between the parties and those are now set out in a list in Appendix 1.

118. One narrow question I have to consider is whether disclosure orders can be made at all in Part 8 proceedings. The other is whether the Part 18 request arising from the pleadings should also be ordered. Some of these have arisen before the assessment orders (SOCAs) are made but some after. I am informed that SOCAs have been made in Raubenheimer; Riley, Roy, Finney, Bateman and Hoskins before they were transferred to the SCCO.

119. Once a SOCA has been ordered, CPR r 46.10 gives the general procedure as set out above. But I see and know of no reason why pleadings or other case management directions should not be given after the SOCA order, should the CJ consider them necessary then.

120. CPR r 46.9 sets out the basis of the assessment. It states at (2) that there is a bar on the recovery of URCs as set out in the Solicitors Act 1974 s 74(3) which applies unless the solicitor and the client have entered a written agreement which expressly permits the solicitor to recover URCs from the client. As set out above this only applies to contentious business and that is in issue, or may be, in these claims.

121. In any event CPR r 46.9(3) applies to every claim and states that:

> "(3) Subject to para (2), costs are to be assessed on the indemnity basis but are to be presumed –
>
> (a) to have been reasonably incurred if they were incurred with the **express or implied approval of the client;**
>
> (b) to be reasonable in amount if **their amount was expressly or impliedly approved by the client;**
>
> (c) to have been unreasonably incurred if –
>
> (i) **they are of an unusual nature or amount; and**
>
> (ii) **the solicitor did not tell the client that as a result the costs might not be recovered from the other party.**"

(The underlining and bold are mine.)

122. It became apparent during the appeal hearings that the issue of informed consent is at the root of the defence to the claims. I shall look at the case law below in more detail. However in summary, to use lay persons' language, the question is whether under a "no-win-no-fee agreement" (a CFA) the solicitor has to inform the client if the CFA is

in fact a "yes-win-but-fee-deduction agreement" and whether Slater and Gordon did.

Analysis and Ruling on the Appeal About Disclosure

The Power to Make a Disclosure Order

123. I have carefully considered the arguments put forwards by the defendant on this appeal relating to disclosure in relation to the court's powers. I reject them.

124. I note here that in the CPR there is no express rule set out in Part 8 dispensing with the disclosure provisions of CPR Part 31. So the defendant's submission that Part 31 does not apply to the claimants' Part 8 claims for SOCAs rests on the exclusion of CPR Part 31 by an implication of some sort.

125. I take into account that the CPR generally and the Solicitors Act 1974 (as amended on countless occasions) do not expressly exclude the court's powers given under CPR Part 31 to order disclosure in Part 8 claims or in SOCAs.

126. I take into account that under CPR r 8.9 some specific Civil Procedure Rules are expressly excluded from applying to Part 8 claims for SOCAs but Part 31 is not expressly excluded. It seems to me that the terms of these specific exclusions give the lie to the defendant's submissions. Also Part 31 is specifically excluded in other areas: see r 76.26(1), 79.22(1) and 80.22(1) which all feature clear wording such as:

> "Part 31 (disclosure and inspection of documents), Part 32 (evidence) and Part 33 (miscellaneous rules about evidence) do not apply to any proceedings to which this Part applies."

127. I take into account that CPR r 31.1 states that it applies to all "claims". The defendant submits that the claimants' claims are not claims they are SOCAs. I rule that these Part 8 claims are "claims". The procedure for handling the claims is to use SOCAs but that does not change the nature of the claims. I reject the appeal made on this issue. That deals with claims which are all at the stage before a SOCA order is made, but I also hold that the claims remain "claims" even after the SOCA is ordered.

128. The defendant has applied for security for costs against CLL under CPR 25.14 and asked for disclosure of CLL's retainers (but made no application). Thus the defendant asserts that Part 31 applies

to their application in this Part 8 claim. In *In re RBS Rights Litigation* [2017] EWHC 463, Hildyard J ruled that CPR Part 31 applied so as to allow the court to order disclosure relating just to the application for security made against a third party funder. If the power to order disclosure exists in the defendant's own application herein it would be bizarre for it not to exist in the main claim.

129. On policy grounds I take into account that it is in the interests of the parties to a Part 8 claim and the interests of the courts and of justice, that the judges dealing with such claims can make whatever case management decisions they should need to make so as fairly to elicit the issues and to permit the parties to prove their claims and to achieve justice in accordance with the overriding objective in CPR r 1.1. I also consider that the power to order disclosure is useful, for the purpose before a SOCA is made, of determining whether a hybrid hearing is needed within Part 8 or a transformation order should be made (transforming part or all of the Part 8 claim into a Part 7 claim) and to identify the scope of the issues and to decide which judge should hear which issues. Disclosure should not be the normal order in SOCAs because it is not usually needed and this judgment should not be taken as a licence to apply in all Part 8 claims.

130. I rule that CPR Part 31 (the power to order disclosure) does apply to the Part 8 claims by these claimants and the judge was right so to conclude.

Should a Disclosure Order Have Been Made?

131. Applying this ruling to the issues in this case, to determine whether a disclosure order should have been made, I must consider the main issue of "informed consent" to which the disclosure would apply.

132. Paragraph 6 of CPR Practice Direction 46 concerns the assessment of solicitor and own client costs and relates, among other things, to CPR r 46.9. It provides, so far as relevant to this appeal, as follows:

> "6.1 A client and solicitor may agree whatever terms they consider appropriate about the payment of the solicitor's charges. If however, the costs are of an unusual nature, either in amount or the type of costs incurred, those costs will be presumed to have been unreasonably incurred unless the solicitor satisfies the court that the client was informed that they were unusual and that they might not be allowed on

an assessment of costs between the parties. That information must have been given to the client before the costs were incurred.

6.2 Costs as between a solicitor and client are assessed on the indemnity basis. The presumptions in rule 46.9(3) are rebuttable."

133. In *Herbert* v *HH Law* [2019] EWCA Civ 527, the issue of informed consent was considered. This was a simple rear end collision in which a bus rear-ended the claimant's car. Despite the lack of risk in the claim (liability had been admitted on linked files) the solicitors charged a 100% success fee. This was limited by statute to be capped at a deduction from damages recovered at 25% of past loss and PSL. The client agreed. The claim produced a settlement offer which was accepted of £3,400. HH deducted the ATE premium of £349 and their success fee of £829. The claimant accepted the settlement and challenged the deduction of the success fee. In the Part 8 assessment the district judge found the success fee was "unusual" because it did not reflect the risk and so was not in line with the way most success fees were calculated. He reduced it to 15% of base costs and awarded the costs of the assessment to the claimant. He ruled that the ATE premium was a disbursement and was wrongly placed on the Cash Account. On appeal Soole J agreed. The Court of Appeal ruled, through the lead judgment of the Master of the Rolls: Sir Terence Etherton, that once the issue of lack of informed consent had been raised by the client, the burden of proof was on the solicitor to satisfy the court that consent which was properly informed had been provided. Only then could the solicitor recover URCs and deduct them from damages (para 38). He also ruled that the ATE premium was not a disbursement stating:

"71. I appreciate that the consequence is that the client will not be able to challenge the amount of an ATE insurance premium through the convenient mechanism of an assessment under the Solicitors Act 1974, s 70. That is not, however, a good reason to decline to apply the principle, which is clearly binding on us, in the light of the limited evidence before us, and so create a precedent which both undermines the coherence of the principle and may have unforeseen implications in other and different cases. No doubt, if this outcome is considered unsatisfactory within the profession, the Solicitors Regulation Authority and the Law Society can consider what could be done to bring an ATE

> insurance premium within the principle as to what is a solicitor's disbursement."

134. The effect of this decision is that the ATE premium goes into the Cash Account and comes out of the bill of costs and is not "assessed" within the SOCA. I shall return to this below.

Belsner

135. In the notes to CPR r 46 in the SCP at 46.9.3, the editors summarise that the signing of the CFA requires the client's agreement with "informed consent" and the solicitor's ability to deduct URCs from damages requires the client's approval thereto with "informed consent". The case relied upon for that text is *Belsner* v *Cam Legal* [2020] EWHC 2755, a decision of Lavender J made on appeal from a district judge relating to a low value PI claim made through the Portal. Thus the facts are similar to the claims in the appeals before me. On the SOCA the DJ allowed the solicitor to recover a success fee and URCs, but on appeal Lavender J did not.

136. The ratio of the judgment of Lavender J was that the solicitor owed the client a fiduciary duty to provide the client with the necessary information for the client to give "informed consent" to the CFA and under CPR r 46.9(2) the same was required. To be properly informed the client had to have enough and adequate information about the URCs that would be deducted from damages to make the decision. In particular, in Portal claims, the amount of the deduction, compared to the amount of damages, needed to be made clear in advance for informed consent to have been given.

137. At para 34 Lavender J noted the editors of *Snell's Equity* advised that the solicitor had a fiduciary relationship to the client which involved providing full and frank disclosure of all material facts. Material facts were ones which would or may have affected the client's decision. The sufficiency of the information given depended to an extent on the sophistication and intelligence of the client and the facts of each case. He reviewed *FHR* v *Mankarious* [2011] EWHC 2308, a decision of Simon J [paras 81–82]; and the decision of Tuckey LJ in *Hurstanger* v *Wilson* [2007] 1 WLR 2351, and he found those relevant by analogy [para 39].

138. He then considered cases directly upon SOCAs under the Solicitors Act 1974 and the CPR r 46.9. He reviewed *Macdougall* v *Boote* [2001] 1 Costs LR 118, in which Holland J ruled that

"informed" approval was required and the solicitor had to satisfy the judge that it was obtained following a full and fair "exposition" of the factors relevant to the consent, so that the lay person client could reasonably be bound by it. He considered *Herbert* v *HH* [2019] 1 WLR 4253 (Court of Appeal), and noted that the Court of Appeal had upheld the decisions of DJ Bellamy and, on appeal, Soole J that no informed consent had been given by the client and the success fee should be assessed down to 15% of damages (sic – the report is wrong it was 15% of base costs). The Court of Appeal ruled that once the client had raised the consent issue in a SOCA the burden lay on the solicitor to prove informed consent had been given.

139. Lavender J ruled (para 91) that the general terms used in the solicitor's documents in that case did not provide the information necessary for the client to have given informed consent. The client did not know how large the success fee and URC deduction was going to be.

140. The law on clients challenging retainers goes back for hundreds of years. CJs in SOCAs deal with such challenges regularly. In the claims concerning these appeals the main challenge is based on the informed consent point. In these appeals the defendant accepts that the CJ has power to judge an attack on a retainer on informed consent and more generally, because it attacked the claimants' retainers with CLL before the judge.

141. The claimants sought standard disclosure of the Slater and Gordon retainers and the audio recordings of the signing of the retainers and all other documents relating to the pleaded issues. The judge granted it. The defendant did not want to give any of these and appeals the order for standard disclosure. Should I grant the appeal on the grounds that disclosure is not usually ordered in Part 8 claims? I see no reason in justice to do that. Should I grant the appeal on the basis that there is no power to order disclosure? I have already ruled that the court had such power. Should I interfere with a case management decision on the basis that I disagree with it? I do not disagree with it. In addition I have taken into account the case law on my powers in appeals set out above and dismiss this ground of appeal. The disclosure order stands and should be complied with in my judgement.

From Costs Law Reports 2022/3, published by Class Legal
www.classlegal.com

Unlawful Insurance

142. The facts are set out in the judge's judgment at paras 30–43. No appeal is made on the findings save that the defendant asserts that the judge's ruling on the facts that there was no discernible premium paid by the claimants to CLL for the indemnities was wrong.

143. In summary CCL provided an indemnity to the claimants should they lose their claims and suffer ACOs as part of the CFA terms.

144. The editors of *MacGillivray on Insurance Law* admit that the definition of a "contract of insurance" is elusive (para 1-001). It is an important decision, as they state, because it is used to determine regulatory scope. It also has many other consequences too. The editors state that a useful working definition can be found in the old case *Prudential Insurance* v *Inland Revenue* [1904] 2 KB 658:

P664: per Channell J:

> "A contract of insurance, then, must be a contract for the payment of a sum of money, or for some corresponding, benefit such as the rebuilding of a house or the repair of a ship, to become due on the happening of an event, which event must have some amount of uncertainty about it, and must be of a character more or less adverse to the interest of the person effecting the insurance."

145. There are two elements in this definition: the premium and the obligation on the insurer to pay out on the future happening of an event, the likelihood of which is uncertain and the financial consequences of which are unknown.

Premium

146. The editors of *MacGillivray* state (at 1-002) that the purpose of insurance is to spread the cost amongst many policy holders to pay for the few happenings of adverse events causing losses. Thus the premium is not the actual cost of the payouts by insurers (if any) but the estimated future cost of the uncertainties split between the prospective customers who seek insurance, see para 1-002:

> "This characteristic distinguishes contracts of insurance from certain others. Thus a contract by which an engineer undertakes to repair a machine whenever it breaks down is clearly not a contract of insurance if the engineer is to be remunerated in accordance with the amount of work done. If, however the remuneration is fixed without regard to the

> amount of work done it is a consideration of the type of an insurance premium and the contract may be one of insurance. Premium need not necessarily be payable before any claim is made. A promise to reimburse a mutual insurer for sums paid to indemnify a member of an employer's mutual society had been described as a form of premium."

147. The judge found at para 110 that it was:

> "Difficult for there to be any conclusion that there is a payment of a sum of money or some corresponding benefit which is sufficient to provide consideration for a contract of insurance."

148. The defendant asserts that the premium paid by the claimants was the entering of the CFAs by the claimants. That enabled CLL to earn their fees in the claims if they were won.

149. I take into account here the advice from the editors of *Colinvaux's Law of Insurance* who described the test for ascertaining whether there was a premium thus (12th ed. 1-044):

> "(FSA), the predecessor in title of the two current insurance regulators, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA), has published guidelines on the meaning of 'insurance'. The guidelines, which have been adopted by the FCA, are not designed to be exhaustive or binding, and for the most part adopt the principles set out in the cases."

Under "relevant factors" the guidance states:

> "(a) A contract is more likely to be regarded as a contract of insurance if the amount payable by the recipient under the contract is calculated by reference to either or both of the probability of occurrence or likely severity of the uncertain event."

150. I agree that for the payment to the alleged insurer to be categorised as a premium it should be calculated by reference to the risk of the adverse event occurring and the size of the likely loss.

151. Analysing the defendant's submission on the asserted premium, I consider that it quickly falls apart.

152. If CLL approached an insurer and said:

(1) "Please indemnify my claimants". When asked: "what premium will you pay?" the response would be: "if the claims are lost, you will pay out the ACOs we will pay you nothing at all."

(2) When asked: "what if you win the claims?", the response would be: "you will receive an uncertain but small part of the hourly rate we receive for the legal work we had done on the claims to enable us to win them".
(3) If then asked: "do you mean the full hourly rate in the CFA?" the answer would be: "well no, not exactly, that may be reduced on assessment by the court to a lower hourly rate."
(4) When asked: "well how much of your awarded fees are you going to pay us?" the answer on the evidence would be: "we are not sure but a small percentage, we have to cover our fluctuating staff costs, the property costs, the power and other services costs, our business overheads, the unrecovered costs incurred in the cases we lose and other costs."

153. This analysis shows how difficult it is to identify any premium in the hourly rates. The focus on the words used by CLL in their marketing and contractual material in the Welcome Pack to the effect that the hourly rates take into account the indemnity is unavoidable and no doubt correct but it can only make up a speculative and small part of the costs of running the legal firm.

154. I rule that there was no discernible premium paid by the claimants to CLL and uphold the judge's implied finding on that matter.

155. I have no difficulty in finding that the second part of the definition of insurance contract is made out: namely that the agreement was to pay out on the future happening of an adverse event.

156. It seems to me that the indemnity is more akin to a business expense used for marketing purposes than an insurance contract term. The evidence before the CJ was unopposed and to the effect that there was no ATE market for insuring ACOs in SOCAs. So CLL stepped up and took on the possible expense but not as an insurer, as a business person.

157. I have also considered the regulatory side of the issue. Indemnities attached to CFAs were given the all clear in 2011 by the Court of Appeal approving the indemnity provisions by the solicitors in *Sibthorpe*. In that appeal the claimant was supported by the intervention of the Law Society. After the case on the evidence before the judge, the Law Society did not further regulate such indemnities provided by solicitors from 2011 onwards, nor advise solicitors to

approach the insurance regulator to ask whether to be regulated when solicitors offered such indemnities attached to CFAs. Nor, on the evidence, has the insurance regulator issued any guidance on these solicitors' indemnities.

158. One evidential matter which was not raised in the appeal or before the judge was whether CLL's professional insurance would have covered their liabilities under the indemnities, should they go bust in future. It seems to me that this might have been a relevant factor. However the defendant, who should have understood the scope of solicitors' insurance, did not take the point that it would not cover the loss or give evidence upon it to the judge.

159. I rule that the CLL indemnity was not an insurance provision.

160. If I am wrong about the characteristics of the indemnity, I should consider the overall characteristics of the whole CFA with the indemnity. Should that be characterised as an insurance contract?

161. This issue arose in *Morris & Sibthorpe* v *Southwark* [2010] 4 Costs LR 526. MacDuff J, on appeal from Deputy Master Hoffman, was required to consider whether two similar CFAs, with an indemnity clause in each against ACOs, were insurance contracts or champertous. The claims related to housing disrepairs. The Master found the arrangement champertous but not unlawful insurance. MacDuff J allowed the claimants' appeal on champerty. The defendant cross-appealed asserting the arrangement was unlawful insurance. MacDuff J dismissed that ground. In relation to unlawful insurance he ruled thus:

> "45. I have been referred to the following extract from *MacGillivray on Insurance Law*. I do not apologise for quoting it, word-for-word, reflecting as it does my own view:
>
> > 'It is sometimes necessary to decide, in the context of fiscal or regulatory legislation, whether a contract containing insurance and non-insurance elements should be classified wholly or partly as a contract of insurance. The inclusion of indemnity provisions within a contract, or the supply of services, neither makes the indemnifier an insurer, nor justifies describing the contract as wholly or partly one of insurance. Where a contract for sale, or for services, contains elements of insurance, it will be regarded as a contract of insurance only if, taking the contract as whole, it can be said to have as its principal object the provision of insurance.'

> 46. In my judgment, this, on any view, was a contract for the provision of legal services. The indemnity clause, whether looked at individually or as part of the contract, was a subsidiary part of the contract. In his oral submissions, Mr Bacon adopted what might be called 'the bystander test'. Anybody, he submitted, looking at this agreement, would say, 'Well, this is really providing insurance'. With respect, I would beg to differ; the bystander looking at this agreement, would say to himself or herself that this was a contract for the provision of legal services, with an indemnity clause whereby the solicitor undertook to pay the opponent's costs, in the event that that became necessary. To characterise it as a contract of insurance, albeit that the indemnity created some principles similar to an insurance contract, is to go too far. I appreciate that that does not do full justice to Mr Bacon's long and careful argument. But in my judgment this could not be characterised as a contract of insurance, and albeit delivered with brevity, the Deputy Master's judgment was entirely accurate and cannot be faulted."

162. The cases went to the Court of Appeal and were reported as *Sibthorpe* v *Southwark* [2011] EWCA Civ 25. Lord Neuberger MR; Lloyd and Gross LJJ, ruled in favour of the claimants on the champerty decision and refused permission to appeal on the unlawful insurance decision, so the appeals were dismissed. The Master of the Rolls gave the lead judgment. On unlawful insurance the ruling was as follows:

> "58. That leaves the issue on which Waller LJ refused permission to appeal, namely whether the CFA is rendered unenforceable because, owing to the inclusion of the indemnity, it is a contract of insurance within the meaning of article 10 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544). If it is, then the indemnity, and hence, it is said, the CFA, could only have been entered into by an authorised or exempt person by virtue of s 19 of the Financial Services and Markets Act 2000, and, as the solicitors were not authorised or exempt, the CFA is said to be void by virtue of s 26(1) of the 2000 Act.
>
> 59. I am of the view that permission to appeal this point should not be granted. I think that the judge was right in his view and reasoning on the point, which he expressed in the following terms [2010] 4 Costs LR 526, paras 45–46: …"

From Costs Law Reports 2022/3, published by Class Legal
www.classlegal.com

163. Now it is said by the defendant that the judge should not have and I should not rely on this decision as authority, because such is banned by the Practice Direction on citing authorities dated 2001 because it is a decision on permissions to appeal. I cannot be wilfully blind to the words of the Master of the Rolls in a Court of Appeal judgment. Nor do I consider that MacDuff J's judgment on this was wrong, quite the contrary.

164. The defendant sought to distinguish *Sibthorpe* on the basis that housing repair claims are easy to run and low risk and, in comparison, that the claimants' claims are bound to be lost in large numbers and so the indemnities provided by CLL are of a different order of magnitude. The judge dealt with that submission partly from his own experience of such SOCAs issued in the Supreme Court Costs Office and I am not going to attempt to question the experience of CJ Rowley when I have no such experience. As to the assertion by Slater and Gordon, through their counsel, that housing repair claims are easy and low risk, no evidence was provided in support of that. As to the assertion that the current claims by the claimants will fail in droves, one only has to listen to the audio recording of the sign up process for Mr Turnbull to feel uncomfortable about lack of informed consent for the URC clauses in the CFA. I reject that submission.

Classification of Mixed Contracts

165. The editors of *MacGillivray on Insurance Law* deal with the classification of mixed contracts containing insurance provisions and other provisions at paras 1-008 and 1-009 as follows:

> "**Problems in classification** It is sometimes necessary to decide [in] the context of fiscal or regulatory legislation whether a contract containing insurance and non-insurance elements should be classified wholly or partly as a contract insurance. The inclusion of indemnity provisions within a contract for the supply of services neither makes the indemnifier an insurer nor justifies describing the contract as wholly or partly one of insurance. when a contract of sale or for services contains elements of insurance it will be regarded as a contract of insurance only if, taking the contract as a whole, it can be said to have as its principal object the provision of insurance."

The footnotes to this text refer to *Larrinaga Steamship* v *R* [1945] AC 246 at 256, a case relating to a time charter party; and *Caledonia*

North Sea v *London Bridge Engineering* [2000] Lloyds Reports IR 249 at 263, 287 and 291; and also [2002] 1 Lloyd's Reports 553 HL. They also refer to *Sibthorpe* and the fact that their text was approved therein.

> "The 'principal object' test is not however, appropriate where the contract in question does not have distinct insurance and non-insurance elements, and the question at issue is whether it is properly to be characterised as insurance. In *Fuji Finance* v *Aetna Life Insurance* the question was whether a single premium capital investment bond in the form of a life assurance policy was a contract of life assurance, or merely an investment contract. Given that the element of investment is a common feature of modern life assurance policies it was not a case of contract containing distinct insurance and non-insurance elements, and the Court of Appeal held that the correct approach was to characterise the contract as a whole and then see if it came within the definition of life assurance, which it did."

> "1-009 In its Perimeter Guidance referred to above, the former Financial Services Authority, now the FCA, departed from the principal object test it had used as the criterion for determining whether a contract containing both insurance and non-insurance elements is to be treated as a contract of insurance, and substituted for it the test of whether the contract contains 'an identifiable and distinct obligation that is, in substance and insurance obligation'. 'Insurance obligation' is shorthand for an assumption for valuable consideration of an obligation to pay money or to provide a benefit in response to an uncertain event adverse to the interests of the recipient."

The footnotes to those pieces of text refer to the Perimeter Guidance at paras 6.3.4 and 6.6.7(2).

166. Defence counsel ran his submissions along the lines that no principal object/s test applied.

167. Having read the *Larrinaga* v *R* and *Caledonia North* cases, I gain only minor assistance from the paragraphs highlighted in the footnotes to *MacGillivray*, in that they were cases seeking to determine subrogation rights from either primary or secondary status of indemnities.

168. The FSMA (RA) Order 2001 at s 3 states:

> "'contract of insurance' means any contract of insurance which is a

contract of long-term insurance or a contract of general insurance, and includes –

(a) fidelity bonds, performance bonds, administration bonds, bail bonds, customs bonds or similar contracts of guarantee, where these are –

(i) …

(ii) not effected merely incidentally to some other business carried on by the person effecting them; and

(iii) effected in return for the payment of one or more premiums; …"

169. So I note that in dealing with contracts of guarantee the order seeks to define insurance contracts by virtue of an analysis of whether a premium is paid and whether the guarantee is merely incidental to the business carried on or not. I note that in s 10 the definition of effecting and carrying out contracts of insurance is as follows:

"**10. Effecting and carrying out contracts of insurance**

(1) Effecting a contract of insurance as principal is a specified kind of activity.

(2) Carrying out a contract of insurance as principal is a specified kind of activity."

170. Schedule 1 article 17 sets out that one of the specified areas of insurance contracts which is a "specified activity" is:

"**17. Legal expenses**

Contracts of insurance against risks of loss to the persons insured attributable to their incurring legal expenses (including costs of litigation)."

171. The PERG guidance states:

"**PERG 6/4** www.handbook.fca.org.uk Release 8, Jun 2021

6.3 Background

The business of effecting or carrying out contracts of insurance is subject to prior authorisation under the Act and regulation by the FCA and PRA. (There are some limited exceptions to this requirement, for example, for breakdown insurance.)

> The Regulated Activities Order, which sets out the activities for which authorisation is required, does not attempt an exhaustive definition of a 'contract of insurance'. Instead, it makes some specific extensions and limitations to the general common law meaning of the concept. For example, it expressly extends the concept to fidelity bonds and similar contracts of guarantee, which are not contracts of insurance at common law, and it excludes certain funeral plan contracts, which would generally be contracts of insurance at common law. Similarly, the Exemption Order excludes certain trade union provident business, which would also be insurance at common law. One consequence of this is that common law judicial decisions about whether particular contracts amount to 'insurance' or 'insurance business' are relevant in defining the scope of the FCA's authorisation and regulatory activities, as they were under predecessor legislation.
>
> 6.3.3 The courts have not fully defined the common law meaning of 'insurance' and 'insurance business', since they have, on the whole, confined their decisions to the facts before them. They have, however, given useful guidance in the form of descriptions of contracts of insurance.
>
> 6.3.4 The best established of these descriptions appears in the case of *Prudential* v *Commissioners of Inland Revenue* [1904] 2 KB 658. This case, read with a number of later cases, treats as insurance any enforceable contract under which a 'provider' undertakes:
>
> (1) in consideration of one or more payments;
>
> (2) to pay money or provide a corresponding benefit (including in some cases services to be paid for by the provider) to a 'recipient';
>
> (3) in response to a defined event the occurrence of which is uncertain (either as to when it will occur or as to whether it will occur at all) and adverse to the interests of the recipient."

172. Any court placing reliance on PERG, when PERG itself relies in part on a summary of the common law, is of course circular. However I am assisted by the way in which the regulator focuses on the classic elements of an insurance contract when seeking to define the scope of its own field of regulation and takes into account the words "incidental to some other business".

173. Looking at the case law beyond *Prudential*, some assistance is

gained from *Fuji* v *Aetna* [1996] LRLR 365. The Court of Appeal were determining the character of a life insurance policy and capital investment contract. This is therefore a different field of mixed contract and different principles may apply or they may directly assist this court. The trial judge had applied the test of looking at the overall position of contracts with more than one element (p. 184D). He then agreed with the "principal object" test stated in the then current 8th edition of *MacGillivray*. The judge ruled that it was not a contract of life insurance. The defendant submitted it was a contract of insurance on appeal. Morritt LJ considered the case law worldwide, much of it criticising the use of the primary or dominant purpose test for distinguishing life insurance from investment return contracts. For instance Somers J in *Marac Life* v *Inland Revenue* [1986] 1 NZLR 694, has preferred to approach the question thus (p. 186E):

> "'I have reached the conclusion, however, that the insurance content of the Marac Life Bonds of whatever term, is not properly to be regarded as negligible. It is sufficiently substantial to justify the arrangement entered into between the insurer and the bondholder being regarded as a contract of life insurance."

174. Morritt LJ then examined the particular facts and features of life insurance and how such policies had morphed over the years as the business had developed. The appeal was dismissed and he ruled as follows (p. 189G):

> "Insurance Companies Act 1982 and the Financial Services Act 1986 are not relevant to this issue, but that question does not arise in the view that I have taken. Further, I do not accept that Sir Donald Nicholls V-C by his reference, at p. 133, to the principal object of the insurance indicated that he was adopting some inappropriate test. Reading his judgment on this issue as a whole it is clear that Sir Donald Nicholls V-C was correctly considering the characterisation of the policy as a whole and posing the question whether so read it was a policy of life insurance."

175. I do find that this judgment provides general guidance on how to apply the correct test to determine whether an indemnity in a CFA contact for legal services should be characterised as an insurance contract and hence regulated but not specific guidance.

176. The editors of *Colinvaux's Law of Insurance* described some

of the factors for the test for ascertaining whether there was a contract of insurance thus (12th Ed. 1-044):

> "(FSA), the predecessor in title of the two current insurance regulators, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA), has published guidelines on the meaning of 'insurance'. The guidelines, which have been adopted by the FCA, are not designed to be exhaustive or binding, and for the most part adopt the principles set out in the cases."

Under "relevant factors" the guidance states:

> "(a) A contract is more likely to be regarded as a contract of insurance if the amount payable by the recipient under the contract is calculated by reference to either or both of the probability of occurrence or likely severity of the uncertain event.
>
> (b) A contract is less likely to be regarded as a contract of insurance if it requires the provider to assume a speculative risk (i.e. a risk carrying the possibility of either profit or loss) rather than a pure risk (i.e. a risk of loss only).
>
> (c) A contract is more likely to be regarded as a contract of insurance if the contract is described as insurance and contains terms that are consistent with its classification as a contract of insurance, for example, obligations of the utmost good faith and the duty of fair presentation.
>
> (d) A contract that contains terms that are inconsistent with obligations of good faith may, therefore, be less likely to be classified as a contract of insurance; however, since it is the substance of the provider's rights and obligations under the contract that is more significant, a contract does not cease to be a contract of insurance simply because the terms included are not usual insurance terms."

177. Having looked at the authorities and taken into account the Acts and Regulations, the Guidance and the textbooks, I consider that, in relation to this CFA and this indemnity, the correct approach I should take when trying to determine whether it is a contract of insurance (thus requiring regulation) is as follows.

178. The court should take the following steps:

(1) Determine whether the indemnity term / wording on its own can be

properly characterised as an insurance provision by reference to the two necessary factors: (a) does the alleged insurer contract to pay out money or money's worth on the future occurrence of some chance or fortuity. (b) Does the alleged insurer receive a premium in money or money's worth for the contract so to pay, whether it be upfront or delayed?

(2) If the answer to the first question is: there is no insurance provision, then no further analysis is required.

(3) If the answer to the first question is: this is an insurance provision, then this court should consider the various factors necessary to determine whether or not the whole contract is to be characterised as an insurance contract and hence needs to be regulated by the insurers' regulator or not. In this second step the court should determine whether the contract is a single purpose contract.

(4) **Single Purpose contract:** the court should determine whether there is a single purpose for the contract or multiple purposes. Put another way whether there is a single objective or multiple objectives. Put another way whether the contract is just for insurance or indemnity or also for something else as well. If the contract is a single purpose contract, so for instance the provider seeks to provide insurance for premiums, then the court doesn't need to go any further. However if the contract has multiple purposes or objectives or contracted for activities then further analysis is required properly to categorise the contract.

(5) **Mixed purpose contracts:** What factors are to be taken into account when characterising a mixed purpose contract? I consider that the following are relevant in these claims:
   (a) the purposes and objectives of the parties; and
   (b) the proposed and contracted future activities of the parties; and
   (c) the moneys or benefits in kind moving between the parties and third parties and how they are calculated; and
   (d) the full terms of the contract including termination clauses, arbitration clauses and variation clauses; and
   (e) where the risks fall; and
   (f) the marketing carried out by the parties; and
   (g) the businesses of the parties; and
   (h) the regulators of the parties (if any); and
   (i) all factors relating to the contract and what it looks like to an objective bystander.

(6) Once those factors have been considered, it is for the court to determine whether the main purpose or purposes, objective or objectives of the contract is/are insurance business or whether those purposes are in fact the supply of goods, like washing machines with a guarantee or warranty, or the supply of services, like legal services with an indemnity. Then the court has to determine whether or not the indemnity is a mere adjunct to, or is peripheral to, or is ancillary to the main purposes of the contract.

179. On the basis that I am wrong above and the indemnity clause can be classified as an insurance clause, looking at the CFA which CLL offered to the claimants, it is clearly a mixed contract, so I need to move on to step two. Taking each factor in turn.

180. **The purposes and objectives of the parties.** The claimants wished to obtain specialist legal services to obtain refunds from Slater and Gordon. They were not looking to buy insurance. CLL were trying to sell their legal services. CLL were not trading as insurers or insurance brokers and were not going to work to sell indemnities. It is likely that they would have preferred not to have offered any indemnities if they could have obtained ATE cover in the market.

181. **The proposed and contracted future activities of the parties.** The activities which the claimants were to provide were evidence and instructions to enable CLL to obtain a refund of money. The activities for CLL to perform were legal work and legal services at a profitable rate. The future activities involved the claimants assisting CLL and authorising them. For CLL there was legal work and court work.

182. **The moneys or benefits in kind moving between the parties and third parties.** No money was to come from the claimants to CLL. Nor did any money pass from CLL to the claimants. CLL merely provided legal services. CLL did hope for and work for a win and hence the claimants would receive refunds from the defendant and CLL would receive their hourly rates, maybe assessed downwards. CLL paid court fees and disbursements.

183. **The full terms of the contract including termination clauses, arbitration clauses and variation clauses.** This court has not been provided with the full terms of the CLL CFAs but did have enough to determine that they were for the issuing of Part 8 claims, the seeking of SOCAs and refunds, under Part 8 or if necessary Part 7. The

indemnities were part of the terms inducing the claimants to enter the CFA.

184. **Where the risks fell.** No risk fell on the claimants' shoulders. The risk was all taken by CLL's business model.

185. **The marketing carried out by the parties.** CLL marketed themselves as specialist lawyers not insurers. The indemnity was a marketing tool to help persuade the claimants to sign up, as part of CLL's offered CFA light retainers.

186. **The businesses of the parties.** The claimants were consumers or injured ex-parties to successful civil litigation. CLL were lawyers and costs draftsmen.

187. **The regulators of the parties (if any).** CLL were regulated by the Law Society. The evidence does not disclose any other regulation, and the claimants were consumers.

188. **All factors relating to the contract and what it looks like to an objective bystander.** I stand back and look at the CFAs which were "lite" and so involved no deduction of URCs and had indemnities against ACOs. I compare them to those in *Sibthorne* and they are similar. I compare them to a guarantee for repairs, if needed in future, provided on the sale of a new or old car. I compare them to a warranty for a washing machine sold by a shop. In my judgement an objective bystander would say this is a lawyer's contact with lots of terms, one of which (the indemnity) is an inducement to use CLL's legal services to make a claim.

189. Taking the above into account I rule that these CFAs had the character of a lawyer's business deal, for the provision of legal services, made with members of the public in a particular category (ex-claimants in PI claims). I rule that the indemnities were a minor or ancillary term in that business model. I rule that the CFAs were not insurance contracts, even if the indemnities were insurance terms (which I have ruled they were not).

190. The defendant's appeal on the basis of unlawful insurance is therefore dismissed.

Champerty

191. MacDuff J in *Morris* considered the test in relation to champerty this way:

> "38. … Is there a real and significant risk (those are my words) that this agreement containing as it does this indemnity clause, might tempt the

claimant's solicitor for his personal gain to inflame the damages? The answer to that is 'No'. To suppress evidence, the answer to that is 'No'. To suborn witnesses, the answer to that is 'No'. Or otherwise to undermine the ends of justice, in my judgment the answer to that also is 'No'. But in reaching that conclusion, I have to confirm that I have taken into account the policy arguments advanced by both Mr James and Mr Bacon before this court."

192. On appeal, in *Sibthorpe* v *Southwark* [2011] EWCA Civ 25, the court ruled in favour of the claimants on the champerty issue. Lord Neuberger MR ruled as follows:

"40. In my judgment, when it comes to agreements involving those who conduct litigation or provide advocacy services, the common law of champerty remains substantially as it was described and discussed in *Wallersteiner* v *Moir (No. 2)* [1975] QB 373 and *Awwad's case* [2001] QB 570. This is for two main reasons. The first is to be found in the passages in the judgments of Buckley LJ in the former case at [1975] QB 373, 401, and of Oliver LJ in the *Trendtex* case [1980] QB 629, 663. The second reason, articulated in *Awwad's case* [2001] QB 570, 593, 600, by Schiemann and May LJJ, is that, in s 58 of the 1990 Act (as amended) the legislature has laid down the rules as to which previously champertous agreements may be entered into by those conducting litigation and those providing advocacy services, and which may not.

41. There is a third reason, at least in my judgment, for this conclusion. As already indicated, there is obvious attraction in the notion that there should be no general rule as to whether an agreement with a person conducting the relevant litigation which involves him benefiting from the success of the litigation, is unlawful, and that each case should be assessed on its merits. However, there is also much to be said for clear rules so that all parties, solicitor and claimant client as well as the defendant, know where they stand rather than waiting for a determination as to the validity of a potentially champertous agreement on the overall merits. There is also much to be said for a properly funded legal profession, which has no need to have recourse to conditional fees or contingency fees or the like. It is a matter for the legislature if such arrangements are thought to be necessary for economic or other reasons, and, if they are so necessary, then it is for the legislature to decide on their ambit.

From Costs Law Reports 2022/3, published by Class Legal
www.classlegal.com

The Validity of the Indemnity: Is It Champertous?

42. There is, however, a second argument as to why the indemnity may be enforceable. The inclusion of the indemnity meant that the solicitors had a financial interest in the outcome of the litigation in question, because they would have been likely to have to pay the council's costs if the claim had failed, whereas they have no such liability as the claim succeeded. However, there is no case where such an arrangement has been held to be champertous. When one examines the cases on champerty, they all involve arrangements whereby there is a gain if the action in question succeeds, and while there may also be a loss if the action fails, what is different about the indemnity is that there is just a loss if the action fails.

43. No case has been cited in which it has been held to be champertous for a person to agree to run the risk of a loss if the action in question fails, without enjoying any gain if the action succeeds. Further, if one considers the various judicial definitions of champerty, they all envisage a gain if the action concerned succeeds. I have already quoted Lord Phillips MR's adoption in the *Factortame (No. 8)* case [2003] QB 381, para 32 of the definition in *Chitty on Contract*, namely maintaining an action 'for a share of the proceeds of the action'. So, too, Lord Esher in *Pittman's case* 13 TLR 110, 111, referred to 'any advantage in respect of the result of that litigation'. Other definitions of champerty support this view. In the *Trendtex* case [1980] QB 629, 654, Lord Denning MR described it as maintenance 'when the maintainer seeks to make a profit'. Lord Mustill in *Giles* v *Thompson* [1994] 1 AC 142, 161, having described maintenance, said that 'For champerty there must be added the notion of a division of the spoils', a definition adopted in the *Thai Trading* case [1998] QB 781, 787.

44. The intellectual attraction of this argument is that to hold the indemnity in the present case champertous would involve extending the law of champerty, at a time when, as is apparent from the judicial observations I have quoted, its scope is to be curtailed rather than expanded. Thus, 'the trend of all the recent authorities has been to foreshorten [champerty's] shadow' (per Oliver LJ in the *Trendtex* case [1980] QB 629, 663), and all we have now are 'the vestigial remnants of the law of champerty' (per Lord Phillips MR in the *Factortame (No 8)* case [2003] QB 381, 414, para 91).

From Costs Law Reports 2022/3, published by Class Legal
www.classlegal.com

45. It also seems to me to be legitimate to invoke the *Thai Trading* case [1998] QB 781 in support of this argument. Although the decision itself was per incuriam, the judgment represents the considered view of Millett LJ and two other members of this court. Millett LJ said at p. 788:

> 'It is understandable that a contingency fee which entitles the solicitor to a reward over and above his ordinary profit costs if he wins should be condemned as tending to corrupt the administration of justice. There is no reason to suppose that Lord Denning MR in *Trendtex Trading Corpn* v *Credit Suisse* [1980] QB 629 or any of the members of the court in *Wallersteiner* v *Moir (No. 2)* [1975] QB 373 had in mind a contingency fee which entitles the solicitor to no more than his ordinary profit costs if he wins. These are subject to taxation and their only vice is that they are more than he will receive if he loses. Such a fee cannot sensibly be described as a 'division of the spoils'. The solicitor cannot obtain more than he would without the arrangement and risks obtaining less.'

46. It is apparent therefore that he would have seen nothing wrong with an arrangement which included the indemnity, if it was otherwise lawful. Further, in *Kellar* v *Williams* [2005] 4 Costs LR 559, para 21, the Privy Council expressed the view that 'it may now be time to reconsider the accepted prohibition in the light of modern practising conditions', citing Millett LJ in the *Thai Trading* case [1998] QB 781 and May LJ in *Awwad's* case [2001] QB 570, 600.

47. Furthermore, as mentioned, one of the main reasons for not curtailing the scope of champerty in relation to contracts involving those who conduct litigation is that Parliament has stepped into that area. That is an equally good reason for not expanding the scope of champerty in relation to such contracts. Indeed, it may well be a more powerful reason for not expanding the scope, given that the legislative trend is clearly in favour of restricting the scope."

193. The only financial benefit which CLL would achieve from the claims would be the receipt, from the defendant, of their assessed (never upwards and more probably downwards) legal fees on winning.

194. The classic champerty categories arise where the funder gains from a share of the claimants' "damages" or sums won. There is no such gain by CLL in my judgement through a lawyer simply receiving

assessed fees for legal work. The circumstances in which they would be able to receive fees from the claimants were limited and in my judgement unlikely to occur against this defendant: the trigger being a win with a no costs order.

195. I reject the submission that hourly rates at the levels claimed by CLL can be regarded as champertous profiteering.

196. I have considered the public interest in access to justice for claimants who feel aggrieved by deductions made from their damages by PI firms. I consider that it is in the public interest for claimants generally and these claimants specifically to be enfranchised to test the way in which those fees were explained, charged, deducted and calculated.

197. I dismiss the appeal on the grounds of asserted champerty.

198. The final part of the application for a stay was founded on the alleged impecuniosity of CLL to meet the defendant's costs orders should all or many of the claims be lost. I deal with that below and incorporate the findings and rulings I make there, here. I dismiss the appeal to impose a stay.

Security for Costs

199. Having argued that Part 31 of the Civil Procedure Rules did not apply to Part 8 claims, the defendant asserted that Part 25 of the same rules did apply and seeks to appeal the refusal of its application for security for costs against an alleged third party funder: CLL.

200. In *In re RBS Rights Litigation* [2017] EWHC 1217, Hildyard J gave some guidance on security for costs applications against alleged third party funders. In that long running litigation a British Virgin Islands funder and another in the Isle of Man had funded group litigation against the bank and its directors who applied for security for costs against the funder. As mentioned above disclosure of the details of the funder was ordered early in 2017 and then, after that was provided, the application was made. Many of the claims had settled and the funders were receiving a substantial share of the payouts. The guidance Hildyard J gave was as follows (para 19):

> "Of particular relevance in assessing whether an interlocutory order against a non-party under CPR r 25.14(2)(b) to secure a contingent liability pursuant to s 51 is appropriate and just will be:
>
> (1) whether it is sufficiently clear that the non-party is to be treated as

having in effect become in all but name a real party motivated to participate by its commercial interest in the litigation;

(2) whether there is a real risk of non-payment such that security against the contingent liability should be granted;

(3) whether there is a sufficient link between the funding and the costs for which recovery is sought to make it just for an order to be made;

(4) whether a risk of liability for costs has sufficiently been brought home to the non-party, either by express warning, or by reference to what a person in its position should be taken to appreciate as to the inherent risks;

(5) whether there are factors, including for example, delay in the making of an application for security or likely adverse effects such as to tip the overall balance against making an order.

20. As to (1) in para 19 above, amongst the important considerations in play is as to the reasons and motivation for the funder's involvement. In particular, the court will seek to ascertain whether the funder has become engaged by way of business with a view to profiting from an action in which it otherwise has no interest, or whether it is what is sometimes called a 'pure funder', acting altruistically to enable access to justice and what it perceives to be a worthwhile case to be adjudicated."

201. Looking at those factors and CPR r 25.14, I do not consider that the recovery of hourly rates for legal work on winning a case can be categorised as "a share of any money or property which the claimant may recover". Although, on winning, a claimant does recover her/his lawyers' costs, he does not receive them into his pocket. They go to his lawyers. They are not the claimant's recovered winnings. Claimants do not bring claims just so that their lawyers will get paid.

202. I note that those words are in the very same paragraph in the rule as the words: "has contributed or agreed to contribute to the claimant's costs". The difference is telling. I do not consider that CLL contributed to the claimants' costs by providing the indemnity. They were going to do the work for free under the CFA in any event, unless the claims were won.

203. CLL are not commercial litigation funders for profit, they are lawyers providing a legal service to these claimants and the only profit

they make is that part of the hourly rates recovered which exceed their operating expenses and liabilities.

204. In relation to impecuniosity, in the absence of any evidence served and filed by Slater and Gordon from a forensic accountant explaining the significance of the public financial statements of CLL and in the absence of any profit and loss accounts at all, I find myself unable and unwilling to make any adverse ruling on impecuniosity. The evidence showed the assets of the business of CLL to be over £3 million. Defence counsel's rather harsh assertions about the invalidity of the listed £3 million of assets owned by CLL were nothing more than submissions by a barrister. I do not see that there was any proper evidence before the judge on which to found a ruling of there being a realistic risk of impecuniosity. I also reiterate that no evidence was put before the judge on whether CLL's professional insurance would have covered any such losses should they go bust in future. I uphold the judge's decision on this matter.

205. In any event, even if I am wrong, Justice is one of the two factors to consider in the CPR r 25.14 test. The judge did not consider it just to make any security for costs order and I do not consider it just so to do either. When asked how it would be just to the defendant's ex-clients to have their claims stayed because their first lawyers were squabbling with their second lawyers over the latter allegedly having insufficient funds to pay the first lawyers' legal fees if the assessments went against the clients, the defendant submitted that Slater and Gordon might not get paid in full due to suspected impecuniosity. I have dealt with that assertion above. Weighed against that risk is the principle that access to justice is important. All litigation is uncertain. No PI solicitors firm is immune from financial pressures as the financial history of many firms (some of which have gone bust and others of which have been taken over) during the last 20 years has shown.

206. For the reasons provided by the judge and above I dismiss the appeal on security for costs.

Part 18 Requests

207. By a request dated 26 August 2020 the claimant (Raubenheimer) asked for a copy of his ATE policy; the details of intermediaries used; the commissions or payments received directly or indirectly from the ATE insurers by the defendant and/or to whom they were paid and any

other financial benefits which came back to the defendant or any associate. The defendant refused all the requests.

208. In the Cash Account the defendant asserted the past payment of a premium for the ATE policy of £258.87 on 24 October 2017. No commissions or payments back from the ATE insurer were listed.

209. In an email from Elite, the ATE insurers, dated 10 September 2020 they informed CLL that:

> "Elite's pre-administration records show that this case has not concluded, therefore the premium of GBP 254.24 remains unpaid.
>
> Should the case conclude, a claims handling commission of GBP 30.00 and a claims fund contribution of GBP 176.13 would fall due."

210. That raises the questions: was the premium ever paid in 2017 as Slater and Gordon assert? Also, to whom were the "claims handling commission" and "claims fund contribution" paid? and why were they paid? and what were they actually for?

211. In the Reply in the Edwards claims the defendant pleaded:

> "13.4. If the claimant might instead want to refer to the Raubenheimer claim, it is denied that there has been any receipt of any commission (as that term is properly understood); rather, if this is a reference to what has been called a 'commission' in that claim, it was in fact a legitimate claims-handling fee for services payable to a **separate group company** who was appointed by the ATE Insurer to provide claims handling services and manage the claims fund. Further there have not been other unexplained payments."

(The bold and underlining are mine.)

212. That raised the questions: which separate group company? Which group? Was it actually separate? And what were the payments for? This was, after all, simple ATE insurance for simple Portal claims with limited fixed costs ACO liabilities. An objective bystander might think that the premium for insurance would cover and include the costs of the insurer managing its own fund of premiums. A simple phone call or email from Slater and Gordon to the ATE insurer would trigger the policy for each claimant under a pre-negotiated group agreement for ATE for their Portal claims. What "handling" of the claims was going on? It leaves the bystander wondering: "what fund was being managed?"

From Costs Law Reports 2022/3, published by Class Legal
www.classlegal.com

213. The SRA FS(CB) Rules state at rule 5.1:

"**Rule 5: Record of commissions**

5.1 Where you receive commission which is attributable to your *regulated financial services activities*, you must keep a record of:

(a) the amount of the commission;

(b) how you have accounted to the *client* …"

And at Rule 16.1:

"**Rule 16: Remuneration disclosure**

16.1 In good time before the conclusion of the initial *contract of insurance* and if necessary, on its amendment or renewal, you must provide the *client* with information:

(a) on the nature of the *remuneration* received in relation to the *contract of insurance*;

(b) about whether in relation to the contract you work on the basis of:

(i) a fee, that is *remuneration* paid directly by the *client*;

(ii) a commission of any kind, that is *remuneration* included in the premium;

(iii) any other type of *remuneration*, including an economic benefit of any kind offered or given in connection with the contract; or

(iv) a combination of any type of *remuneration* set out above in (i), (ii) and (iii)."

214. The defendant submitted that the claimant was not entitled to question the defendant on these matters (Judgment para 9). Further that such issues are not for Part 8 claims but Part 7 instead, relying on *Herbert* v *HH Law* (citation above).

215. I take into account that the quantum of an ATE premium is a matter outside a SOCA, following the ruling in *Herbert*, but that, in my judgement, is not the point.

216. The judge held that:

"13. … There is no suggestion that these proceedings are in some way a precursor to other proceedings. Even if they were, it is unattractive to suggest that one court should carry out investigations into something which another court will ultimately need to consider. If this court has no

> jurisdiction to deal with the ATE premium, then it does not seem to me that it is the correct court in which to seek the information requested by the Part 18 request. Some form of pre-action disclosure in proceedings in the Chancery Division or an application within those proceedings would seem to be the appropriate course."

217. I was informed by both counsel during the hearing that no SOCA has yet been ordered in any of the claims but, as set out above, when this judgment was being corrected (in draft) I was informed as set out at para 118 above that some have SOCA orders in place. The stage they are at is that pleadings have been ordered and provided. Case management is needed going forwards as to whether part of the claims should be transferred/treated as Part 7 claims and heard in the Chancery Division.

218. In relation to the Cash Account the judge ruled that:

> "30. … The intention of the bill and cash account is, as I have quoted above, to provide a complete record of the financial transactions between the solicitor and the client during the period of the retainer. The extent of the solicitors' charges and the payments that have been made on behalf of the client can be compared to the sums paid by the client so that an outstanding balance, in one direction or other, can be paid over."

> "50. Whichever description is taken, a cash account is no more than a ledger showing receipt of monies during the retainer, invoices rendered and the payment of items such as damages or purchase monies to others. The payment of an insurance premium to the ATE provider fits into this category. The client has taken out the insurance and the solicitor, as his agent, pays for it by sending money to the ATE insurer, often at the end of proceedings upon receipt of monies from the losing opponent."

> "52. When looking at the nature of the cash account, I have given the example of a solicitor paying out monies to another party on behalf of the client. There is no possibility, in my view, of the court in Solicitors Act proceedings, making any enquiries as to the adequacy of that sum of money. The remedy of the client if the monies paid out had in some way be[en] in error would be to bring proceedings against the solicitor for breach of one of a number of potential duties. I can see no reason to distinguish between the ATE premium and any other cash account payment in this respect."

219. Here I consider that the judge fell into error. In my judgement the

Cash Account cannot be signed off in the SOCA and no order can be made by the CJ for sums to be paid to or by the defendant or the claimants unless the items in the Cash Account are accurate and certified by the CJ. If they are in dispute, that dispute must be resolved before the final SOCA order can be made between the parties.

220. The judge ruled (para 37) that a challenge to the ATE premium should be determined in the Chancery Court.

221. I reject the claimant's clever, but ultimately faulted submission, that assessment of the ATE premium can occur in a SOCA through the back door route of it being listed in the Cash Account in the wrong sum and assessed there. A challenge to the quantum of the ATE premium is usually more of a Chancery matter. However *secret commissions* may or may not be solely for Chancery. If the solicitor has complied with the SC rules, full disclosure of the commission will make the situation clear on paper. A simple paper trail may determine whether the commission is owed to the client or not. If evidence is required, the CJ will need to consider how much and where the best forum for determination is.

222. The judge held that:

> "**Conclusion**
>
> 60. For these reasons I dismiss the claimant's application to compel the defendant to answer the Part 18 request for further information."

223. Taking into account what I have set out above about hybrid hearings and transferring parts of Part 8 claims to the Chancery Division for determination if that is necessary, I do not consider that the right way to go forwards in these claims was or would be to require the claimants to issue 150 or less Part 7 claims relating to the alleged *secret commissions*. These commissions were very small sums. The issuing fees alone would be substantial. The better way for these issues to be dealt with would be to consider the correct judge/transfer to the Chancery Division, at the next case management hearing after disclosure has been provided and the Part 18 answers have been provided, certified by a statement of truth, and to determine the scope of the SOCA orders at the same time. The issues may involve quantification of the ATE premiums or the proof of the existence of and reason for the alleged *secret commissions*.

224. I consider that the judge fell into error when refusing to order

the defendant to answer the Part 18 requests relating inter alia to the alleged *secret commissions*.

225. I rule that, properly to facilitate the efficient handling of the next case management hearing, the Part 18 requests should be answered so that the judge can get a proper grasp of the issues, the claimants can determine whether there is anything to worry about, or whether it is all a storm in a teacup, and the defendant can consider whether to fight or settle the claims for alleged *secret commissions*.

226. I did offer the Parties a way out of the *secret commission* issue by suggesting that a partner in the defendant firm sign a statement of truth on the Cash Account in Raubenheimer, but no agreement could be reached on whether that would fully bite on the issues, so the parties did not accept that this suggestion would resolve the issues.

227. Once the Part 18 requests are answered and the defendant provides disclosure [in] the Raubenheimer claim, it will go with the other lead claims in Edwards, for determination of where, when and by whom the alleged *secret commission* issues will be tried (or assessed).

228. I take into account the law relating to appeals from case management decisions and I rule that the threshold is passed to overturn this case management decision.

229. For the reasons set out above I allow the appeal by the claimant in Raubenheimer and order that the defendant shall answer the Part 18 requests.

Conclusions

230. I dismiss the defendant's appeal in *Edwards & Others* v *Slater and Gordon* and I allow the claimant's appeal in *Raubenheimer*.

Note on Consequentials

231. I intend currently to make the following costs orders, subject to any submissions.

(1) The claimant's costs of the claimants' appeal in Raubenheimer shall be paid by the defendant.
(2) The claimants' costs of the defendant's appeal shall paid by the defendant.
(3) If not agreed, I will assess the costs summarily at a hearing listed for 1 hour at a date to be fixed before 21 May 2022.

From Costs Law Reports 2022/3, published by Class Legal
www.classlegal.com

232. The claimants shall draw up the order and submit it to the court by 10 am on 13 May 2022.

233. If a hearing is needed to deal with other consequentials then it can be listed before me for an additional 1 hour on the date to be fixed and my clerk should be kept informed.

Appendix 1: List of Issues and Where the Parties Say They Should Be Heard

			Where the parties say they can be dealt with			
No	**Allegation**	**Reference in SOC**	**Claimant**		**Defendant**	
			Part 8	Part 7	Part 8	Part 7
1	Breach of FSMA etc by receipt of undisclosed commission on ATE insurance	12–16	Y		N	Y
2	Breach of CC(ICAC) Regs 2013	17–19	Y		N	Y
3	Properly construed CFA is a CFA lite	20–21	Y		Y	Y
4	No CPR 46.9.2 agreement	22–23	Y		Y	Y

			Where the parties say they can be dealt with			
No	**Allegation**	**Reference in SOC**	**Claimant**		**Defendant**	
			Part 8	Part 7	Part 8	Part 7
5	Alternatively no informed consent to 46.9.2 agreement (including issues of fiduciary duty, other common law duties, duty under the code of conduct to provide information)	24–25	Y		Y as to informed consent. Y as to other issues said to be included such as breach of duty only if and in so far as those issues go to the question whether there was informed consent and/or whether costs were reasonable; otherwise N	Y
6	Alternatively any 46.9.2 term is unfair term under CRA 2015	26–27	Y		Y	Y

			Where the parties say they can be dealt with			
No	**Allegation**	**Reference in SOC**	**Claimant**		**Defendant**	
			Part 8	Part 7	Part 8	Part 7
7	CPR 46.9.3 and informed consent generally (also including issues of fiduciary duty, other common law duties, duty under the code of conduct to provide information)	28–31	Y		Y as to informed consent. Y as to other issues said to be included such as breach of duty only if and in so far as those issues go to the question whether there was informed consent and/or whether costs were reasonable; otherwise N	Y

NB. Claimants say that all issues *could* be dealt with under Part 7, but that they are not outwith Part 8.

Robin Dunne was instructed by Clear Legal Ltd Solicitors for the claimants.

Robert Marven QC was instructed by Slater and Gordon UK Ltd LLP for the defendant.

From Costs Law Reports 2022/3, published by Class Legal
www.classlegal.com