Case No: SC-2021-APP-000231

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 15/09/2021

Before:

COSTS JUDGE ROWLEY

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Between :

Rhys Edwards & Ors	**Claimants**
- and -	
Slater & Gordon UK Limited	**Defendant**

- -
- -

Robin Dunne (instructed by **Clear Legal Ltd**) for the **Claimants**
Robert Marven QC (instructed by **Slater & Gordon UK Limited**) for the **Defendant**

Hearing date: **7 July 2021**

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Approved Judgment

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

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COSTS JUDGE ROWLEY

Costs Judge Rowley:

Introduction

1. On 14 April 2021 I ordered that the case of Rhys Edwards together with nine other cases chosen in equal numbers by the claimants' solicitors, Clear Legal Ltd trading as Checkmylegalfees.com ("Clear Legal") and the defendant should be heard together and in advance of the other 134 or so cases brought by Clear Legal on behalf of their clients against the defendant.

2. As part of that order, I directed the claimants to file and serve a "Statement of Claim" and for the defendant file and serve a "Statement of Reply". I also ordered there to be a case management conference on 7 July and, even at the time of the order, it was clear that the claimants wished to make an application in respect of disclosure against the defendant and that the defendant wished to bring an application against Clear Legal in respect of their running of these cases. The parties made their applications on 7 July in detail and the entire day was taken up by those submissions. This is my reserved judgment in respect of those applications.

3. I have recently given a decision in respect of another claim against the defendant (Raubenheimer v Slater & Gordon UK Limited SC-2021-APP-000734) which concerned a Part 18 Request regarding the ATE policy taken out by the claimant. Similar part 18 requests have been raised in at least some of these cases and Robert Marven QC, leading counsel for the defendant, raised the prospect of an appeal in that case or alternatively separate proceedings commenced in the Chancery Division having an effect on these cases.

4. I do not think it is likely that either appeal proceedings in respect of Raubenheimer or separate Chancery proceedings regarding the ATE policy taken out should affect these cases. As things stand, I will not be considering anything in relation to the ATE policies taken out but if that is overturned on appeal then whatever effect that appeal judgment has will be applied to these cases in exactly the same way as all of the other cases. If Chancery Division proceedings are brought, then that simply emphasises the fact that the ATE premium is not to be considered in these Solicitors Act 1974 proceedings.

5. I am aware that the defendant is concerned about a possible suggestion that events concerning the ATE policy may be said in some way to taint the entire retainer and as such will have an effect on these cases. There are a number of hurdles that will need to be overcome before that might occur. But if that turns out to be an argument the claimants wish to run, then no doubt there will be further consideration in the future about its potential impact on these cases. For the time being however, I am keen to progress these cases given the number of outstanding cases which are essentially stayed pending the outcome of them.

6. I will deal with the Claimant's application for disclosure first. I have not overlooked the fact that the defendant's application is primarily for a stay of these proceedings and if that application is successful then it would not be appropriate for a direction regarding disclosure to take effect. But the Claimant's application sets the scene for the defendant's applications and so I have dealt with the applications in the order in which submissions were made at the hearing,

The Claimants' application for disclosure

7. All of the claimants have brought their claims for assessment under section 70 Solicitors Act 1974 for an assessment of the final statute bills rendered by the defendant for the costs incurred in acting for each claimant. The standard directions for such an assessment would involve the solicitor producing a breakdown of their bill and for the former client to serve points of dispute setting out the challenges to that breakdown. In order to ensure that the challenges are focused, it is usual to enable the former client to see the solicitors' file of papers before drafting those points of dispute.

8. On some occasions, the solicitors provide a copy of their entire file of papers to their former client for this purpose and the proceedings continue on the basis that everybody has access to all of the documentation. In other cases, solicitors rely upon a lien over the papers (quite properly) where the client has not paid the bill and so no copy of the file is provided to the former client's new legal representatives. But even there, facilities for inspection of the documents is usually provided so as to assist the court on the assessment by the former client's points of dispute being based on fact rather than conjecture.

9. In these cases the claimants have apparently been provided with what is described as "time-limited" inspection facilities and, given the similar fashion in which the cases have been dealt with, that would usually be sufficient to enable focused points of dispute to be produced.

10. However, the essence of these claimants' challenges concern the signing up process and as such the documentation on the clients' files is only of limited relevance. Having obtained a copy of an audio recording of the signup of a Mr Turnbull, the claimants make allegations about the signing up process and which, on the claimants' case, affect the costs that can properly be claimed from them. Since all the invoices have been paid by deduction from damages recovered, the claimants say that they should be entitled to a refund of monies that have been paid to the defendant.

11. I am told that the Turnbull recording indicates that all calls made for the purpose of signing up clients are recorded. There is no benefit in the ordinary running of a case for any such audio recording, let alone a transcript of it, to be placed on the file that is opened for the client's case. As such, there were no recordings on the files which the claimants have had an opportunity to inspect. Nor would it be expected that any related documentation regarding the signup process (other than the retainer documents themselves) would be copied on to each file.

12. It is in this context that the claimants make an application for disclosure to be dealt with by list under CPR Part 31 since the usual Solicitors Act directions that I have described do not give the claimants any access to the documentation that is said to be at the centre of their claims. In case there are any difficulties with disclosure being ordered under Part 31, the application contains the catchall phrase "or in such other manner as the court may direct."

13. Solicitors Act proceedings are usually brought by a Part 8 claim form. They may be brought by either the solicitor or the client as claimant. Where it is the client who brings the claim, it is in the manner of an application for an assessment of the solicitors' bill. Where the court orders an assessment should take place, the procedure for that

assessment is set out at CPR 46.10. That rule envisages a breakdown of costs and points of dispute as I have described above together with any reply the solicitor wishes to make and then either party requesting a hearing date for the assessment to take place. There is no direction in respect of disclosure in that procedure.

14. Part 8 claims are made where the court is required to make a decision on a question which is unlikely to involve a substantial dispute of fact. The evidence in Part 8 claims is expected to be provided in writing but the court may require or permit a party to give oral evidence at the hearing. In Solicitors Act proceedings, there are regularly disputes concerning the terms of the retainer, estimates of costs given (or not given) et cetera which require the client and the solicitor to provide evidence in writing. On some occasions that evidence needs to be tested by cross-examination.

15. One of the bases on which the defendant objects to an order for disclosure is that there is no provision for it in rule 46.10 which it describes as being the specific procedural rule for Solicitors Act proceedings. Mr Marven accepted that the original application on the Part 8 claim form would amount to a claim but it was, in his submission, a claim for an assessment and once that assessment had been ordered then the proceedings were properly characterised as a statutory proceeding under the Solicitors Act rather than a claim. As such Part 31 could not apply to those statutory proceedings because it only applied to claims.

16. The force of Mr Marven's submission seemed to me rather weakened by the acceptance he had to make that the CPR obviously applied to Solicitors Act proceedings, not only in respect of rule 46.10 itself but also under Part 67 which specifically provides for proceedings brought under the Solicitors Act.

17. In any event, the submission also relied upon me accepting that the Part 8 proceedings were not a claim but I was not taken to any definition in the rules or elsewhere to explain why the current proceedings are not a claim (or indeed why they should be defined as a "statutory proceeding") and I note that there is nothing in the skeleton argument which supports that proposition. It seems to me to be unarguable that these proceedings involve a claim. The CPR simply requires the person seeking relief to put their claim on a claim form. That makes them a claimant and there is nothing more that needs to occur for them to be pursuing a claim.

18. The absence of any direction regarding disclosure in rule 46.10 is of no support to the defendant's argument in my view. There is similarly no direction regarding witness evidence and yet such orders are made in Solicitors Act assessment proceedings. As Mr Dunne pointed out, where the Part 8 procedure is followed, the claim is treated as being allocated to the multitrack by rule 8.9(c) and multitrack cases invariably have directions for disclosure.

19. Mr Marven also ran something of a floodgates argument that if standard disclosure was ordered in these cases then there was no reason why it should not be ordered in all Solicitors Act cases and indeed in between the parties' assessments. I commented at the hearing in April that it was not unheard of for orders for disclosure to be made in Solicitors Act cases in appropriate circumstances and I remain of the view that such orders are made from time to time. The inspection method that I have described earlier is more than sufficient in the general run of Solicitors Act proceedings where it is a matter of considering the detail of the work done. However, these are unusual cases in

terms of the allegations that are being made and an order in these cases would not, in my view, have any effect on the general run of Solicitors Act proceedings.

20. As far as assessments of costs between the parties are concerned, there is a specific procedure requiring a party to "elect" whether to rely on a document in certain circumstances at paragraph 13.13 in PD47. That procedure arises from the obvious difficulty of disclosure between the parties where many documents are privileged from such disclosure. Whilst, strictly speaking, a list of documents might be produced with all of the letters, attendance notes et cetera on them so that they were "disclosed", they would all, or almost all, be prevented from inspection by the paying party by the issue of privilege and as such ordering disclosure would be a pointless exercise. I do not therefore accept Mr Marven's argument that an order for disclosure here would have ramifications elsewhere such as to make it inappropriate to make an order here.

21. In opposing the application, Mr Marven also relied upon dicta of the High Court in the cases of Nicholas Drukker & Co v Pridie Brewster & Co [2005] EWHC 2788 and Stephenson Harwood LLP v Geneva Trust Company (GTC) SA [2019] EWHC 1440 (Comm) which both caution against the forum of detailed assessment proceedings being used to deal with matters that would be better heard in the High Court. In particular, where there is a suggestion of negligence against the solicitors which will require evidence, perhaps including expert evidence, then such proceedings ought to be brought under Part 7 in the High Court. I accept that point entirely and indeed there is a convention that detailed assessment proceedings in the Costs Office are stayed where professional negligence proceedings are brought separately in the High Court. But it is also fair to say that Solicitors Act proceedings regularly deal with matters of evidence in the relationship between solicitors and their clients and there is a considerable overlap in cases which could quite properly be brought in either forum.

22. In these cases, the allegations as set out in the statement of claim and as expounded by Mr Dunne's explanations on several occasions now, revolve around a complaint that the explanation when clients were signed up by their then solicitor was, to use Mr Dunne's phrase "lightning fast" and lacked the information to be expected of a solicitor by their client. Such matters are entirely commonplace in Solicitors Act proceedings where clients regularly allege that they have not been informed of various matters which then affect the amount of costs which they are facing. Such matters cannot properly be described as negligence, whether professional or otherwise, but do fit in with the issue of informed consent which has been heard by judges in Solicitors Act assessments before being heard on appeal by High Court judges. There is no suggestion in cases which are in fact going through the appellate process at the moment that there was anything inappropriate in the original hearings being dealt with by the judges concerned. Therefore whilst this court always needs to be alive to the possibility of allegations made trespassing into the areas of professional negligence, that is a tightrope that all costs judges are used to walking.

23. Of more practical concern, Mr Marven suggested that the application was inappropriate in the absence of any proper description of the issues involved and as such the basis on which a disclosure exercise could be carried out. This argument was based upon the statement of claim being too vague in the defendant's view. Mr Marven also queried why it was only the defendant who should be subject to an order for disclosure rather than both parties? In respect of that latter point, Mr Dunne entirely accepted that any order for disclosure would apply to the claimants as much as to the defendant.

24. As far as delineation of the issues was concerned, Mr Dunne suggested that, in fact, there was not going to be very much for the defendant to disclose in its list for each case and the difficulties posited by Mr Marven were more theoretical than real. However, he did accept that it was not simply the recording that his clients were seeking.

25. Given the tenacity with which the parties have fought everything to date, I have some reservations about an order for standard disclosure being anything other than a springboard for further applications regarding disclosure on the basis of one, or possibly both, sides considering that the other has not provided a comprehensive list. Nevertheless, I do think in reality the area involved is relatively limited in the manner that I have described and it would be appropriate to expect the parties to carry out their obligations diligently in accordance with the usual rules.

26. The Turnbull recording has been confirmed to be accurate by the defendant and, given the comment by the defendant's representative on the recording that all such telephone calls are recorded, there is every reason to assume that there are other recordings available. They are in the possession of the defendant and relevant to the issues which the claimants wish to bring. On the face of it therefore, they should be available to the claimants and ultimately to the court in order to decide the issues in these proceedings. There is no principled basis in my view on which disclosure should not be ordered and therefore I have decided that the parties should be directed to give standard disclosure by list in accordance with Part 31 in these 10 cases.

27. For the avoidance of doubt, if there is any difficulty with me making an order under Part 31, then I would make it under my general case management powers in any event. However it seems to me to be beneficial all round if the structure set out in Part 31 was followed rather than disclosure being based on an ad hoc stand-alone order.

<u>The Defendant's application for a stay</u>

28. As indicated above, the defendant's application is first and foremost for a stay of these proceedings. The defendant's fall-back application is for security for costs if these proceedings are allowed to continue. That subsidiary argument gives the clue as to why the defendant says there should be a stay. In order for an application for security for costs to be made against the claimants, the defendant would have to show that they were either outside the jurisdiction or that they were a company or other body which appeared to be unable to pay the defendant's costs if ordered to do so. There is no such evidence put before the court because it is not the defendant's argument that the claimants themselves should provide security for costs nor that their conduct in any way ought to result in a stay of these proceedings.

29. The defendant's application is a full frontal attack upon the Clear Legal business model as it applies to the 10 cases that have been grouped together and indeed in respect of other proceedings brought by Clear Legal against this defendant. It is the defendant's case that Clear Legal are acting champertously and / or are providing insurance unlawfully to at least some of the claimants; that they do not have the wherewithal to meet adverse orders for costs and as such is a company made of straw as far as the indemnity it has provided to some claimants is concerned and has left those who are not indemnified unaware of their potential liabilities. These are serious allegations and they are robustly denied by Clear Legal.

30. The evidence upon which the defendant's application is founded is contained in two witness statements of Katie Wheeler who is an associate at the defendant. Her first witness statement was served with the application notice and a central purpose of it is to exhibit a "welcome pack" produced by Clear Legal for their clients. The pack begins with a letter thanking the client for their instructions and indicating that their file is being set up. It encloses two agreements which are both described as being "no win, no fee" agreements. The letter then goes on to indicate what the next steps will be. Essentially this is contacting the client's former solicitor to obtain documentation and to negotiate with them. It is said that the process can take anywhere from 28 days to between 3 to 6 months depending upon the issues involved and the number of cases brought against any particular firm of solicitors. The final two paragraphs of the letter are as follows:

> "3. There is nothing more that we need from you at this stage. We will update you at key stages of your case, so, for example, if we are unable to obtain documentation and need to issue an application at court, or if we can see you are owed a refund but your former solicitor refuses to pay then we might need to issue legal proceedings at court. Alternatively, of course, we may receive an offer of a refund on your case without the need for court proceedings.
>
> 4. You do not need to contact us and, as we are anticipating a significant volume of enquiries following recent coverage of checkmylegalfees.com and our work in the news, then we would recommend that you do not contact us, at least during the next 3 months. We will be working on your case and we will update you when key events occur."

31. The welcome pack then contains a client care letter which includes the following paragraphs:

> "Will I need to go to court?
>
> Almost certainly not. In the vast majority of claims, these claims are determined by the court with just the lawyers present and, increasingly, they are determined "on paper" by the court simply making a decision based on the arguments that either side has put in writing.
>
> Information about costs
>
> We will act for you on the basis of risk free "no-win no-fee" agreements. You have signed two agreements with us, namely "Agreement One" which is a contingency fee agreement, and "Agreement Two" which is a conditional fee agreement. We explain how these agreements operate below."

32. The client care letter then explains that agreement one is a contingency fee agreement which applies "from day one until the issue of legal proceedings." It explains that if the case is settled prior to any proceedings being commenced then there is no obligation on

the solicitors to pay costs in addition to any sums recovered. Consequently, agreement one entitles Clear Legal to take a percentage of the damages. Ms Wheeler's witness statement makes no comment in respect of this agreement and Mr Marven passed over it as well.

33. The client care letter then describes the operation of agreement two, which is a conditional fee agreement ("CFA"). The letter sets out the hourly rates payable under the agreement and then says the following:

> "These hourly rates are much higher than the normal typical hourly rate charged for legal work for claims with the typical value of the sums involved in your claim. We charge these rates because we're market leading specialists, because we provide you with an indemnity to protect you against adverse costs, and so that we can ensure that work of this value remains commercial and profitable for us. Alternative solicitors may charge you either a lower hourly rate or may charge on a different basis to us and we would recommend that you shop around before deciding to instruct us based on these terms."

34. Roughly two pages further on in the client care letter under the heading "Paying for your disbursements and your opponent's costs" the letter says:

> "We have agreed to indemnify you in relation to your opponent's costs and your own expenses and disbursements subject to you complying with your obligations under the agreements you have signed and as outlined above."

35. The client care letter then goes on to list alternative funding possibilities which Clear Legal do not recommend or are not available. In that list includes legal aid and damages based agreements. Under the heading "hourly rate" the client care letter says the following:

> "You can instruct us to act on an hourly rate. We charge per hour for undertaking this work. The rates per hour are as outlined above under the heading "Agreement Two – Conditional Fee Agreement". If you proceed by this method then, depending upon the amount of the damages you stand to receive, it is probable that your bill will be lower overall and that all the costs will be recovered from your opponent. However, the main disadvantage to you will be that you will have to pay our bill whether or not your claim is successful. It is for this reason that we have not recommended this method of funding your claim."

36. The heading of "hourly rate" is not particularly illuminating but the paragraph I have set out clearly shows an alternative of what is usually called a "private paying" agreement.

37. Paragraph 6 of the CFA says:

> "What do You pay if You lose?

> If You lose, You do not pay Us for any of Our charges for time spent so long as You have kept to Your responsibilities. You will have to pay Our expenses and disbursements and You may be liable to pay some or all of Your opponent's costs. Your liability for those costs is not altered by the terms of this agreement but we will indemnify You for those costs in any event."

38. Further down the same page of the CFA under the heading "Our charges for time spent" is an identical paragraph regarding why the hourly rates are "much higher" than normal to the one in the client care letter and set out at paragraph 33 above. The paragraph ends with a reservation of the right to increase the hourly rates each year and if so notification will be given to the client.

39. The remainder of the exhibits to Ms Wheeler's witness statement concern correspondence between the parties as to conclusions that can be drawn from the contents of the welcome pack and also provides financial information regarding Clear Legal.

40. The claimant responded to Ms Wheeler's witness statement by serving a further statement of Mark Carlisle, the fee earner with conduct of these cases at Clear Legal which is dated 2 July 2021. (I say further witness statement because he provided a witness statement in support of the application for disclosure on 15 June 2021.)

41. No explanation is given as to why the witness statement in opposition to the defendant's application was not served until 2 July i.e. five days before the hearing. As such, Mr Marven's criticism that it was not served as soon as possible, as expected by paragraph 9.5 of the Practice Direction to Part 23, went unanswered.

42. At paragraph 19 of his witness statement, Mr Carlisle begins to deal with Clear Legal's retainers as follows:

> "19. There are 3 different retainers involved in the 10 "test cases"… The example retainer exhibited by Ms Wheeler is one of them. This particular version of our retainer is hardly a secret. It is freely available to anyone who completes a form on our website.
>
> 20. I do not propose to exhibit them as they are privileged but I will set out below what I believe are the key terms.

	Is there an Indemnity for Adverse Costs?	My rate	Is it a CFA Lite?	Is there a success fee?
Retainer 1	Yes	£177.00	Yes	No
Retainer 2	Yes	£231.00	Yes	No
Retainer 3	No	£231.00	Yes	No

> 21. I have included just my own hourly rate in the table for ease of comparison (and as I do the vast majority of the work on these cases). The hourly rates (mine and others) for retainer 2 (in which an indemnity is provided) are identical to those in retainer 3 (where no indemnity is provided)…
>
> 22. It is legitimate to explain, as we do in retainers 2 and 3, that these rates are much higher than the normal typical hourly rate charged *"for legal work for claims with the typical value of the sums involved in your claim"*. These claims are typically of relatively modest financial value and, were it not for the specialist nature of the work (for example if these were just contractual debt claims that would be allocated by value to the small claims track) they would not warrant such rates.
>
> 23. We make the point, quite properly, in retainer 2 that there are benefits that the client receives as a result of instructing us at these rates, including our specialism in this area and the fact that we provide an indemnity. There is no causal connection however between the provision of indemnity and these rates. That is, they would not be lower if no indemnity were provided. As I have said they are precisely the same rates as in retainer 3 in which there is no indemnity provision, and precisely the same rates as we charge to privately funded clients for whom we provide a no indemnity.
>
> …
>
> 25. The reason that the rates in retainer 1 are lower is that, although it too provides an indemnity for adverse costs, this retainer was originally taken out with checkmylegalfees.com Limited, before assignment to Clear Legal Ltd t/a checkmylegal--fees.com when the companies began working together in March 2020…
>
> 27. The sole exception to [there being no additional charge to the sum recovered] is in exceptionally rare cases where proceedings are issued and the claim is won (in that a bill is reduced, either by agreement or by order, by 20% or more) but where it is then either agreed that no costs are paid, or where the court makes no order as to the costs of the proceedings."

43. Mr Carlisle's witness statement then goes on to describe, amongst other things, why an indemnity has been provided to claimants. The main factor for this is that neither checkmylegalfees.com nor Clear Legal have been able to obtain any After The Event ("ATE") insurance for these claims. Mr Carlisle puts that down to a wish for the insurers to avoid supporting claims against their primary market of solicitors and also that the premiums would be unaffordable. At paragraph 47 of his witness statement, Mr Carlisle says that the majority of the retainers involve the provision of an indemnity. This comment is made in the context of commenting on correspondence between the parties

where a request was made for confirmation regarding the "capital adequacy" of Clear Legal.

Submissions as to the evidence

44. Mr Marven began his submissions by dealing with the evidence of Mr Carlisle. Having criticised its lateness he then suggested that in any event it did not provide any answers to the defendant's arguments. For example, although the majority of claimants apparently have an indemnity, it is not clear how many fall into this category. Furthermore, it could not be appropriate for me to see those retainers (as was offered by Mr Dunne on behalf of his clients) unless the defendant could also see them.

45. Similarly there was no evidence as to why some clients did not have an indemnity and, in Mr Marven's submission, it begged an enormous question of what arrangements the un-indemnified claimants had in respect of the defendant's costs in these proceedings. There was no costs sharing arrangement or an order made by the court in this respect and the court should be concerned with what those arrangements might be if the case goes wrong for the claimants. Mr Marven questioned whether the claimants really knew anything about these proceedings and the potential costs impact that it may have upon them. He also queried whether the funding arrangements had a bearing on the choice of the five test cases put forward by the claimant since they were only put forward after correspondence from Kain Knight, a firm of costs lawyers, who wrote on behalf of various defendants to raise the issue of the indemnity.

46. Mr Marven said that the extent of the indemnities provided was a key consideration for the court in order to consider the capital adequacy of Clear Legal and its potential liabilities. The court needed to require evidence of exactly which claimants had an indemnity or otherwise it ought to disregard Mr Carlisle's witness statement. One way of establishing the position would be to require each individual claimant to produce their own witness statement dealing with their own particular case. If the claimant declined to answer the question of the indemnity then the court should draw an inference that there was indeed an indemnity provided as there was no reason for the claimant to refuse to answer. It was Mr Marven's submission that until the situation was clarified the court could not give a decision on Clear Legal's arrangements. If the court decided to require witness statements to be produced, the defendant would wish to have an opportunity to comment upon them before any decision was made. Until Mr Carlisle's witness statement was served, the defendant had been working on the assumption that all of the claimants were indemnified in the same way as the documents which were exhibited and which had been provided to the defendant by a former client of Clear Legal.

47. The suggestion by Mr Carlisle that the indemnity provided was gratuitous was a hopeless one in Mr. Marven's submission. The documentation clearly stated that higher hourly rates were claimed in part as a result of providing the indemnity. There was clearly consideration provided as part of the overall package and it did not matter that there was no specific cash amount specified as relating to the indemnity.

48. Furthermore, the argument that the retainer documents were privileged and therefore did not need to be disclosed to the defendant had been waived by paragraph 20 of Mr Carlisle's witness statement. It could not be the case that the "key terms" were set out in his witness statement without waiving any entitlement to privilege. In any event the

authorities suggested that retainers were not privileged and that any advice that was contained within them could be redacted. Given that the agreement was apparently freely available to anyone who completed an application form on the website, it was difficult to see how any privilege could be claimed in any event.

49. Mr Marven then went through the welcome pack. The leitmotif of his submissions was that the indemnity provided was an integral part of the package. He sought to portray the arrangements as being ones where the claimant was not required to trouble themselves about the progress of the case. The comments regarding refraining from contacting Clear Legal and that most cases did not get to court were all part of an attempt to reassure the claimant about the process and the indemnity was key to that reassurance. As such it could not be said to be peripheral.

50. Mr Marven then went through various materials to demonstrate that an entity which is providing insurance but which is unregulated is doing so unlawfully. I do not think those submissions were contentious and so I have not set out the material such as the perimeter guidance to which Mr Marven took me. For the sake of completeness I record that those materials also included the Solicitors Regulation Authority's code regarding the need to keep records to demonstrate compliance with the SRA's regulatory arrangements and that solicitors need actively to monitor their financial stability, business viability and all material risks to the business.

51. The submissions were all predicated upon the assumption that the arrangements provided by Clear Legal amounted to insurance and so this led into submissions by Mr Marven as to the relevant authorities. Before going to those submissions, I will set out Mr Dunne's response in respect of the evidence of Mr Carlisle and the welcome pack.

52. In relation to Mr Carlisle's evidence, Mr Dunne's submissions were focused on paragraph 21 of his statement. There, Mr Carlisle states that the hourly rates charged by Clear Legal for retainers two and three are exactly the same whether or not the indemnity is provided. As such, in Mr Dunne's submission, it simply could not be said that there was any consideration passing in respect of the provision of the indemnity. Furthermore, privately paying clients also paid the same hourly rates notwithstanding that they too were not provided with any indemnity.

53. Mr Dunne submitted that the comments regarding the fact that "higher" hourly rates were charged was an attempt to give the client more information about hourly rates so that they were well informed. There was no need to explain why the hourly rates were set as they were. It was clearly true that for modest value cases, as most of these claims were, the hourly rates claimed were higher than might be expected but Solicitors Act cases required specialism.

54. A secondary argument regarding hourly rates came from the fact that the CFAs used are "CFA Lites" whereby the extent of the costs recovered from the opponent in a successful case is the amount that the solicitors accept. There is no shortfall claimed from the client. The consequence of this, according to Mr Dunne, is that the hourly rates charged either have to be agreed by the opponent or set by the court. As such it could not be said to be akin to a premium because they were neither fixed nor payable by the client in the event of a win.

<u>Submissions as to the law</u>

55. On the face of it, the obvious starting point in considering the law in this area is the conjoined cases of Morris and Sibthorpe v Southwark London Borough Council. An appeal from a deputy costs judge was heard by MacDuff J, sitting with assessors, on 5 February 2010 ([2010] EWHC 901 (QB)). In that case the defendant said that the arrangements between the claimants and their solicitor were champertous and/or amounted to unregulated insurance. MacDuff J found against the defendant but granted permission to appeal regarding the champerty point. He refused permission to appeal in respect of the insurance point. Consequently, when the case reached the Court of Appeal ([2011] EWCA Civ 25) and it agreed with MacDuff J, it dismissed the appeal in respect of champerty and refused permission to appeal on the insurance issue. Since that decision runs contrary to Mr Marven's argument, he pointed out that the refusal of permission did not provide any binding authority upon me and proffered the doctrine of comity between MacDuff J to this court as to why I am not bound by his decision either.

56. Mr Dunne, by contrast, submitted that Sibthorpe was the complete answer to the question of whether the solicitors had provided insurance in the manner suggested by the defendant. In short it was not such a contract but was instead a contract for legal services.

57. The facts of Sibthorpe are set out in the head note of the Court of Appeal decision as follows:

> "In two separate cases the claimants, residential tenants of the defendant council, brought claims for damages for the council's failure to carry out repairs at the claimants' properties. In each case the claimants were represented by solicitors who were instructed to act under conditional fee agreements. Those agreements contained indemnity clauses under which the solicitors undertook to indemnify the claimants against the risk of having to pay the council's costs if they lost their cases. In all other respects the agreements complied with the requirements of section 58 of the Courts and Legal Services Act 1990, as amended. Both claims were settled on terms by which the council agreed to pay, inter alia, the claimants' costs subject to detailed assessment unless agreed."

58. Most of MacDuff J's judgment deals with the question of champerty. But having overturned the deputy master's decision on that point, the question of whether the solicitors were providing insurance then became more important. The relevant part of the judgment begins at paragraph 44:

> "… There is no statutory definition of insurance, and it is clear that the courts have repeatedly held and affirmed that a contract of insurance does not have to have a premium. On the other hand, as Mr James has pointed out, the payment of premium or non-payment of premium might provide a valuable pointer.
>
> 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. 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 a 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. 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."

59. When the Court of Appeal came to consider the point, the Master of the Rolls quoted paragraphs 45 and 46 of MacDuff J's judgment. He said that he was of the view that permission to appeal on the point should not be granted and that *"I think that the judge was right in his view and reasoning on the point"*.

60. Notwithstanding the apparent similarities to this case of solicitors acting under CFAs with an indemnity given to their clients in respect of the opponent's costs, Mr Marven submitted that the facts in Sibthorpe were very different from the present cases. In Sibthorpe, the solicitors' indemnity would have to be used rarely, if at all, and the judge had regarded the absence of premium as potentially being at least a valuable pointer that this was not insurance. By contrast, in the present cases the number of cases produced against the defendant showed that the indemnity could be called upon in significant numbers and the higher hourly rates claimed for the insurance amounted to a premium. Mr Marven also submitted that the provision of the indemnity in Sibthorpe was not an integral part of the solicitor's general business model and as such was a subsidiary part of the contract. In these cases, Mr Marven submitted that the claimants had been induced to make a claim by being promised that the claim was risk-free to them and the indemnity was integral to that inducement.

61. In Mr Marven's submission, the law applicable to this case involved a line of cases concerning mixed contracts of insurance and which demonstrated that the quotation from *MacGillivray* was wrong or at least commentary from another insurance work ought to be preferred.

62. Both counsel considered the starting point of whether the arrangements amounted to a contract of insurance to be a quotation of the ingredients necessary for such a contract

set out in the case of Prudential Insurance Co v Inland Revenue Commissioners [1904] 2 KB 658 where Channel J said:

> "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 repairing 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."

63. Mr Marven then took me to the case of Fuji Finance Inc. v Aetna Life Insurance Co. Ltd [1997] Ch. 173. That case also referred to a New Zealand case of Marac Life Assurance Ltd v Commissioner of Inland Revenue [1986] 1 NZLR 694. The nub of these decisions is that the policy as a whole had to be considered when posing the question of whether or not it amounted to a policy of life insurance.

64. From this line of cases Mr Marven submitted that *Colinvaux's Law of Insurance* correctly stated the law following Fuji Finance and relied upon the first sentence of the following paragraph in that work at 14-040:

> "***Mixed contracts***. A contract which contains both insurance and non-insurance elements is an insurance policy provided that the monies are payable by reference to an uncertain event, and it appears not to matter that the insurance element is not the predominant element. It would seem to be irrelevant that the contract is not framed as a policy of insurance for it to constitute a contract of insurance, other than in the special case of marine insurance where the assured must be in possession of a policy before he can enforce the contract evidenced in it. However, there are some cases in which the courts have held that the contract must have a substantial insurance element before it can be treated as a contract of insurance.
>
> A contract may also be mixed in that it provides for different classes of insurance. In such cases the test is the same as for mixed insurance and non-insurance contracts, namely that any substantial part of the contract which falls into a class of insurance business has to be authorised under that class, so the different classes of authorisation may be required.
>
> For regulatory purposes under the FSMA 2000, an insurance contract which contains elements of life and non-life cover is to be treated as a life policy notwithstanding the fact that it contains related and subsidiary provisions which are non-life, providing that the principal object is to provide life cover. This provision is necessary to take account of the fact that life and non-life businesses are regulated in different ways, and the FSMA 2000 effects a strict separation between the two."

65. The case law on which Mr Marven relied regarding insurance concluded with the case of Re Digital Satellite Warranty Cover Ltd [2011] EWHC 122 (Ch) where Warren J said the following at paragraph 84:

> "The "principal object" test may or may not be the appropriate test when it comes to deciding whether elements of insurance bring a contract containing both insurance and non-insurance elements within the concept of a contract of insurance. But even assuming that it is, it may not, in reality, differ much from the approach of the FSA. The "principal object" test cannot require, in every case, that a single principal object be identified. A contract may have two important elements, albeit that one is more significant than the other but it would not be right to categorise the nature of the contract by reference only to the more important element. What the "principal object" test is surely getting at is that there is to be found a principal object where the other elements are either "ancillary" or "minor" (to use descriptions found in Card Protection Plan Ltd v Customs and Excise Comrs (Case C-349/96) [1999] 2 AC 601) to a main objective of providing cover in the case of breakdown or malfunction or, to use other words, where those elements are "integral with" or "subsidiary to" a main object.
>
> 85. The FSA's approach is to identify discrete elements. A strict application of such a test could result, as is pointed out in *MacGillivray*, in contracts of insurance being found where the insurance element is insubstantial. It may or may not be right to go that far. I rather doubt that it is, especially given the acceptance by the FSA that an ordinary manufacturer's warranty provided as part of a sale agreement does not give rise to a contract of insurance… "

66. Mr Marven emphasised the statement in the middle of paragraph 84 that the principal object test cannot properly always identify a single principal object and that there may be cases where at least two principal objects can be identified. In these cases, provision of an indemnity as a form of insurance to enable claims to be brought risk-free as described in the welcome pack could not be considered as subsidiary but was, to use Mr Marven's phrase, "co-important" with other provisions. It was a fundamental part of the arrangement and clearly induced claimants to bring cases by the lack of any risk.

67. If, contrary to his submissions, I concluded that the arrangements between the claimants and Clear Legal do not amount to insurance, then Mr Marven also argued for a stay on the basis of the agreements being champertous which, in the context of these cases, he described as being the trafficking in litigation. Whilst the involvement of others in litigation had relaxed over recent times, there had been no relaxation in relation to lawyers' involvement and that was made clear in Sibthorpe. The solicitor's actions in that case had not been considered to be champertous on the basis that the arrangement had only provided a downside and no upside in the event of a win.

68. Mr Marven's submission was that these cases were of a much larger scale involving a much greater risk and, based on evidence provided by the defendant, there was a

considerable risk that liabilities could not be met by Clear Legal. The evidence that Clear Legal could not get ATE insurance for its scheme was provided very late but in any event missed the point. The defendant's argument was not that the claimants could not bring proceedings. The objectionable part was that the claimants were told that they would be at no risk and as such entered into litigation on a fundamentally false premise because they are at risk of a considerable liability.

69. In support of his submission that proceedings which are maintained champertously constitute an abuse of process and so should be stayed, Mr Marven relied upon quotations from several authorities. I have set out a quotation from the most recent of those authorities, namely *Stocznia Gdanska v Latreefers* [2001] BCC 174 which, in addition to confirming the proposition that an abuse of the court process may justify a stay, also comments upon the phrase "trafficking in litigation" used by Mr Marven as being the essence of the champerty in this case:

> "61. Abuse of the court's process can take many forms and may include a combination of two or more strands of abuse which might not individually result in a stay. Trafficking in litigation is, by the very use of the word "trafficking', something which is objectionable and may amount to or contribute to an abuse of the process. We think that it is undesirable to try to define in different words what would constitute trafficking in litigation. It seems to us to connote unjustified buying and selling of rights to litigation where the purchaser has no proper reason to be concerned with the litigation. "Wanton and officious intermeddling with the disputes of others in which they [the funders] have no interest and where that assistance is without justification or excuse' may be a form of trafficking in litigation. Lord Mustill's words, quoted by Simon Brown LJ in the context of an application to stay, are powerfully descriptive of the kind of plain and obvious champerty of which Chadwick LJ considered *Faryab v Smyth* itself not to be an example. A large mathematical disproportion between any pre-existing financial interest and the potential profit of funders may in particular cases contribute to a finding of abuse but is not bound to do so."

Submissions as to a stay

70. In addition to setting out the features of the welcome pack and the law on contracts of insurance and maintaining proceedings champertously, Mr Marven relied upon the evidence of Ms Wheeler regarding the wherewithal of Clear Legal to meet adverse costs orders. Ms Wheeler's first witness statement has been mentioned above. Upon receipt of Mr Carlisle's witness statement in response to the application, Ms Wheeler provided a second witness statement on the day before the hearing which concentrated on points made in Mr Carlisle's evidence regarding the finances of Clear Legal.

71. The essence of the evidence is that Clear Legal has a balance sheet showing a net asset position of £3.1 million and which the claimants say is more than sufficient to demonstrate an ability to pay the defendant if necessary. The defendant says that the asset is illusory, or at least unreliable, in the sense that it is a debt owed by another company in the same group and has been outstanding for a number of years which raises

some doubt as to whether or not it can be called upon if required. It certainly does not give the appearance of being "liquid" so that it can be used for meeting the claimants' liabilities.

72. Consequently, Mr Marven submitted, the defendant is faced with claimants who have been encouraged to bring proceedings in a seemingly risk free environment by the contractual arrangements set up by Clear Legal. Whether those arrangements are unlawful in terms of insurance or consist of Clear Legal trafficking in litigation, the result is that there is a significant amount of litigation brought against this defendant by the actions of Clear Legal and it is apparent from the evidence before the court that if matters turn out badly for the claimants, Clear Legal is not able to meet the adverse costs that would follow.

73. This puts not only the defendant in an unenviable position of having to defend cases where there is no prospect of a successful recovery of costs, but also places the claimants in a position which the defendant suspects is one about which they are unaware. For these reasons, these proceedings ought to be stayed until at least it is clear that the claimants are aware of their potential liabilities and express a wish to continue with the litigation in that knowledge.

74. In response, Mr Dunne categorised the application as being based on two issues, one was the contract of insurance and the second was the question of champerty. In relation to the question of insurance, Mr Dunne was firmly of the view that the case of Sibthorpe was the only decision which was on point. Whilst it could not be "absolutely" binding, it was a High Court judge decision which the Court of Appeal took the trouble to say was not only right but was also right in its reasoning. By comparison, the defendant relied upon earlier cases involving other forms of mixed insurance contracts which were very different from these cases. Whether a financial instrument was properly insurance or whether a contract of insurance should fall within one class of insurance or another were very different matters from a solicitor providing legal services with an indemnity to their client.

75. In Mr Dunne's submission, the contract of retainer was clearly a contract for legal services and the indemnity provided was subsidiary to those legal services and was not freestanding in any way. This was the answer to Mr Marven's argument that if the retainer and the indemnity had been provided separately the latter would undoubtedly have been regulated by the insurance authorities. The indemnity provided by Clear Legal was not a stand-alone product that could be purchased separately or indeed at all.

76. In order to seek to demonstrate that the indemnity was for the payment of a sum of money or some other corresponding benefit as required by the definition in Prudential Insurance, the defendant was obliged to cling on, to use Mr Dunne's phrase, to the single comment regarding the hourly rates. That comment was nothing akin to a premium or its equivalent. In fact the same hourly rates were used whether a CFA or a private paying retainer was put in place and whether or not an indemnity was given. It could not be said therefore that the hourly rate was calculated in any way on risk factors. The fact that the costs recoverable by Clear Legal were dependent on either an agreement by the defendant or by the scrutiny of the court was completely alien to the way of setting a premium. The rates which were either agreed or allowed would not include anything for an indemnity in any event.

77. In answer to Mr Marven's comments about the indemnity here being much greater and more likely to be used, Mr Dunne submitted that in fact there was no material difference between the arrangement in Sibthorpe and here. The only difference was in fact a 10% success fee claimed in Sibthorpe where there was no success fee claimed in these cases. Mr Dunne referred to paragraph 59 of Mr Carlisle's witness statement in which he said that since August 2017, Clear Legal (or its predecessor) had in excess of 300 claims against the defendant and the cohort of 134 are those that remain. In no case has Clear Legal been ordered to pay or agreed to pay adverse costs.

78. Mr Dunne said that if there were regular calls on the indemnity then Clear Legal would have gone bust, but in fact, checkmylegalfees.com had been around for a number of years. In the circumstances the suggestion that this was high risk litigation in which there was every likelihood that the indemnity was going to be called upon was simply false.

79. In respect of the allegation of champerty, Mr Dunne described it as a fight that had already been fought in Sibthorpe. The Court of Appeal had been clear that the indemnity provided to prevent the downside to the client of having to pay adverse costs did not offend public policy. There was no "trafficking in litigation" but simply solicitors bringing cases on behalf of their clients and who were faced with defendants who were legal professionals dealing with the claims in house and who very regularly, as here, used specialist costs counsel to defend them. It was unrealistic to expect claimants to take on such defendants on their own, and so the claimants' solicitors had come up with their own scheme to fill the gap.

80. Mr Dunne therefore did not accept that a stay was appropriate since the defendant's allegations were erroneous in fact and contrary to established authority. But even if the defendant was able to establish, for example, that unlawful insurance had been provided, it was Mr Dunne's submission that a stay would not be the appropriate option in any event. A stay would essentially be indefinite since there was no obvious trigger which would enable the stay to be lifted. Even on the defendant's case this was not an abuse of the court process by the claimants themselves.

81. The solvency of Clear Legal was not relevant to the application for a stay and had not been put in evidence in support of the stay but only in relation to security for costs. If the court was in any doubt as to the arrangements regarding capital adequacy contended for by the defendant, then the way to deal with that doubt would be to make an order for security for costs and if it had not been paid, the court could consider what to do at that point. There was no need for a stay.

Decision regarding a stay

82. The first issue I need to deal with is Mr Carlisle's evidence given the complaint of late service made by the defendant and the fact that it provides the entire evidential case put forward by the claimants / Clear Legal. Looking at the pre-hearing correspondence between the parties, the evidence of Mr Carlisle was chased on 18 June and again on 30 June. In the former letter, the evidence was requested by 23 June and in the latter, an email, asked for confirmation as to when the evidence would be served. The defendant's position was reserved in respect of any prejudice caused by "late" evidence. Mr Carlisle's witness statement was served on 2 July and the letter serving that statement is the last one included in the bundle so there is no response before the court.

83. The defendant itself, let alone its experienced legal advisors, would no doubt have considered the options open to it, having received this evidence. An adjournment could have been requested in order to produce evidence in response. Cross examination of Mr Carlisle could have been requested, although Mr Marven understandably demurred when that point was made by Mr Dunne given that Mr Carlisle's witness statement does not exhibit the key documents and as such Mr Marven would have been interrogating blind. An application might have been made to seek production of the three retainers before the application was heard on the basis that privilege was waived.

84. However, none of these approaches were taken and instead the defendant served further evidence regarding Clear Legal's finances and left Mr Marven to do his best in undermining the evidence that Mr Carlisle had produced. In these circumstances, I have no doubt that I am able to consider Mr Carlisle's evidence as well as Ms Wheeler's witness evidence for the defendant.

85. The first legal issue to consider is whether or not the arrangements entered into between the claimants and Clear Legal can properly be described as a contract for legal services or as a contract for insurance. One of the key points is to determine how important the indemnity is in the contractual arrangements. If it is very important then it seems to me that it would suggest that the contract is one of insurance, whether that is concluded by looking at the contract as a whole or whether specific decisions about one (or more) principal objects are made. The converse is true if the role of the indemnity is only a peripheral one.

86. The starting point in my view is Sibthorpe. The Court of Appeal's imprimatur of MacDuff J's decision may not be binding on me but the Master of the Rolls' specific endorsement of the reasoning of MacDuff J's decision (as well as the decision itself) is very powerfully persuasive. There may be a nice argument regarding whether the principle of judicial comity applies to all judges in the High Court. My own understanding of this is that, if it is arguable at all, it relates to decisions at first instance, and MacDuff J was sitting on an appeal in Sibthorpe. Consequently, I consider his decision is binding upon me. But even if that is not so, I have no doubt that Sibthorpe is the most helpful authority given the similarity of its facts.

87. Macduff J followed the principal object description set out in *McGillivray* in concluding that the contract was one for legal services with only a subsidiary element regarding an indemnity for insurance.

88. It does not seem to me that the cases referred to by Mr Marven really alter the conclusion in Sibthorpe. I have set out the entirety of paragraph 14 – 040 from *Colinvaux* at paragraph 62 above which distils the cases referred to by him. In particular, the first part of the first paragraph cites the Fuji Finance case in its footnote. The final sentence of that paragraph, however, cites Sibthorpe in its footnotes to support the need for a substantial insurance element. Similarly, the second paragraph requires authorisation specific to a particular class of insurance where there is a substantial part of the contract within that class. The final paragraph reverts to the need for there to be life cover as a "principal object" to establish an insurance contract for regulatory purposes under the FSMA 2000. There is perhaps only a modest difference between something needing to be substantial and something which is a principal object.

89. The need for there to be a significant element of insurance as one of the objects of the contract also seems to me to be the essence of Warren J's comments in the Digital Satellite case. Consequently, my task is to decide whether or not the indemnity provided by Clear Legal was no more than a subsidiary part of the contract in the manner described in Sibthorpe or whether there are sufficient differences to raise the importance of the indemnity so that it becomes an object of the contract such that it ought to be recognised by the contract being characterised as a contract of insurance.

90. The basic structure of the arrangements set out in the welcome pack regarding a CFA Lite being used if proceedings are commenced with an indemnity against adverse costs is on all fours with Sibthorpe. Mr Carlisle's evidence regarding the lack of availability of ATE insurance also chimes with the evidence of the claimant solicitor, Mr Curtin, in Sibthorpe. Mr Marven suggested that the disinterest of ATE insurers perhaps told its own story but it was not really clear to me what that story was. These are low value claims and as such an ATE provider's scope for charging premiums of any weight seem to me to be rather limited. I did not find it surprising that Mr Carlisle, amongst others, had been unable to source ATE insurance. It reminded me of the experiences of solicitors representing claimants in claims against the police where the damages would usually be limited and there was every expectation that the case would be stoutly defended. As such, it did not create an attractive risk profile for ATE insurers and so ATE policies were difficult to obtain. That was a reason why those representing claimants sought to extend the Qualified One way Costs Shifting to such cases during the Jackson Reforms.

91. In the circumstances, the conclusion that an indemnity by the solicitors against adverse costs needed to be provided was a logical one in the absence of any ATE insurance to go with the use of a CFA. It was exactly the same conclusion that Mr Curtin reached and which the Court of Appeal considered was not champertous since the solicitor's "interest" in the litigation was solely a negative one.

92. What then might lead to the conclusion that Clear Legal have an interest in the litigation which is at least champertous and may amount to unlawful insurance by virtue of the creation of a contract of insurance?

93. I have to say there seems to be nothing in these arrangements which comes close to the concept of "trafficking in litigation" referred to in the Latreefers case. Where is the unjustified buying and selling of rights to litigation? The gloriously florid phrase of "wanton and officious intermeddling" in the disputes of others "without justification or excuse" which is regularly used as a description of champerty is only said "may be a form of trafficking in litigation." The terminology used in Latreefers suggests a very high bar and the suspicions and conjecture of the defendant do not even get it off the ground. There is simply no room for a conclusion of champerty here for the reasons set out in Sibthorpe.

94. Clear Legal offer a CFA Lite in terms which solicitors up and down the country are prepared to offer their clients. The welcome pack refers to publicity for cases they have brought which no doubt has brought business in. That is not buying or selling litigation but simply conducting business as a solicitor.

95. These arrangements do not suggest that any unlawful insurance is being provided either. When the defendant scoured the welcome pack provided by one of its former clients, it

must have appeared to be essentially on all fours with the Sibthorpe arrangements. The single potentially differentiating factor is the description of why the hourly rates claimed are, in Clear Legal's own view, much higher than some other firms might charge.

96. The three reasons given for claiming the rates that are charged are (i) specialism, (ii) ensuring the work of this value remains commercial and profitable and (iii) providing an indemnity to protect the client against adverse costs.

97. Clear Legal are able to demonstrate a specialism in this area. Whilst it might be expected that solicitors would all understand the Solicitors Act 1974, the experience of this court is that it is a mystery to a great many of them. The age of the Act itself has led to many cases being reported since it was incepted and, it is almost trite to say, there are many cases going back to Victorian times which impact on Solicitors Act cases given that the 1974 Act is essentially a reiteration of numerous previous Acts stretching back to the 19th Century. Specialist practitioners need to be aware of this mass of case law which is not likely to be come across in any other context.

98. The great majority of the cases brought by Clear Legal are of limited value and, as Mr Carlisle states, were it not for the availability of Solicitors Act proceedings, cases would probably have to be brought in the Small Claims Court. Such cases would not attract recoverable costs and the environment would be similar to "Portal" cases for low value personal injury where the profitability of such work is keenly felt. Claiming hourly rates of the sort set out in the CFA where it is possible to recover them is bound to occur to assist profitability. It is the same as the close eye kept by those running Portal cases of the option of escaping the Portal where there is an opportunity to do so.

99. In my view, both reasons (i) and (ii) would justify higher hourly rates being claimed by Clear Legal from their clients than might be claimed by a less specialist or simply less commercially aware firm of solicitors. The purpose of the relevant paragraph in the client care letter seems to me to be written so that it can be referred to if necessary on a Solicitors Act assessment of Clear Legal's own fees by one of its clients. The presumption at rule 46.9(3)(c) is that costs will be presumed to be unreasonably incurred if they were unlikely to be recovered from an opponent and that prospect had not been explained to the client. The wording, in my view, seeks to assist Clear Legal in respect of the second part of the test.

100. This leaves the third reason given for the higher hourly rates being claimed and which is the one relied upon by the defendant in establishing that a contract of insurance has been created. The wording clearly seeks to justify the level of the hourly rate by the fact that one of the elements of the contract of retainer is that an indemnity is provided against adverse costs. The conclusion reached by the defendant is undoubtedly an arguable one in that it might be expected that an amount within the hourly rates claimed had been "priced in" to reflect the provision of that indemnity.

101. The difficulty with the defendant's conclusion however is Mr Carlisle's evidence that the same hourly rates are claimed whether or not an indemnity is offered to back up the CFA (or indeed whether a CFA is used or a client simply pays fees, win or lose, under a privately paying retainer.) Mr Marven understandably took great pains to seek to challenge the weight that could be placed on Mr Carlisle's witness statement by

pointing to issues which were not covered, or not covered sufficiently, in the defendant's view.

102. In my judgment, however, the challenges to Mr Carlisle's evidence highlighted if anything, the paucity of evidence that the defendant has on which to bring this application. The defendant has had the two retainers by Clear Legal together with the client care letter and overall covering letter (i.e. the welcome pack) and the only challenge that is made is to a single reference, albeit repeated, that the existence of the indemnity offered by the solicitors is, in part, a justification for the hourly rates charged by the solicitor to the client and which will be sought from the defendant in the event of a win.

103. Based upon that single sentence, the defendant has sought to query how much the claimants actually know of these proceedings and to seek to interrogate the claimants' arrangements with their solicitors at a point where the claimants have not even obtained an order for costs against the defendant which is the stage at which such questions might usually be raised. I queried this during the submissions since it seems to me to be unique that the challenge to the opponents' retainer had been made within the proceedings. Mr Marven quite fairly point out that client's funding of proceedings is raised, for example in security for costs applications, and it is usual that the funding is separate from the solicitor's retainer. As such this situation would not normally arise. But it seems to me that that argument points to the fact that this retainer, viewed as a whole, actually bears little resemblance to the sort of funding agreement (e.g. ATE insurance) which might be put forward to combat an application for security for costs.

104. The parties did not dwell on agreement one which is described as a contingency fee agreement. It could equally be described as a non-contentious business agreement in that it agrees to act for the claimant on the basis of a share of the damages if there is no need for any court proceedings. Once proceedings are commenced, all of the work to that point becomes contentious and continued reliance on such an agreement becomes unlawful. Hence the need for agreement two i.e. the CFA.

105. It is unusual in my experience for the two agreement approach to be undertaken because it tends to increase the opportunities for errors in the drafting to be made. Where CFAs are generally used, the CFA is used from the beginning in the expectation that a case settled before proceedings will be costs bearing in that the defendant agrees to pay costs in addition to damages to avoid proceedings (or are specifically allowed for such as in Portal cases). There is no need for a non-contentious business agreement in those circumstances.

106. The only purpose of such an agreement is, as it describes, where the defendant pays the claim but does not agree to pay any costs in addition. It can easily be visualised that a solicitor, upon receipt of a letter of claim from Clear Legal acting on behalf of a former client who says that they have been overcharged in some way, may prompt the solicitor simply to send a cheque to resolve matters without having to pay costs of any court proceedings. Acceptance of the cheque in full and final settlement would preclude any claim for costs. In such cases agreement one would enable Clear Legal to receive a share of that cheque.

107. I have described this situation because it seems to me to reflect the fact that many of the claims for modest sums brought by Clear Legal on behalf of their client will operate

in this pre-proceedings environment. There is no equivalent of the Portal and it is a matter of correspondence and negotiation. Either those negotiations will prove fruitful and the client receives a cheque or they will not and the claim goes away. But in none of these cases would there be any claim on the indemnity provided to the client since the defendant could not make a claim for costs in the absence of proceedings (see e.g. McGlinn v Waltham Contractors Ltd [2005] EWHC 1419 (TCC)).

108. This court's experience of cases involving clients of Clear Legal is overwhelmingly Part 8 claim forms containing applications under either section 68 (for the delivery of a statute bill) or section 70 of the Solicitors Act 1974. Most of those claims are resolved before any hearing takes place. I would describe that litigation as modest and relatively low risk. The decision to bring the proceedings is always in the claimant's hands and it would be extremely rare for any claimant in my view to disagree with their solicitors as to whether proceedings should be brought.

109. Given this business model of pre-proceedings work and modest applications, it seems to me that the indemnity provided is in fact very similar to the one in Sibthorpe in terms of its likely impact upon Clear Legal's business. The decision to provide an indemnity to clients to encourage them to bring proceedings does not in my view inevitably mean that it actually costs enough money to weigh in the balance in respect of the hourly rates that are charged. At most, on the evidence before me, any allowance in the hourly rates charged must spread the cost of that indemnity over the entire caseload of indemnified and non-indemnified clients which would reduce its financial impact still further.

110. In my view therefore, it is 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 in the first place. But if the defendant is able to get over that hurdle it seems to me that the "scheme" run by Clear Legal as evidenced by the welcome pack is overwhelmingly a contract for legal services and the indemnity that is provided is entirely subsidiary to that scheme.

111. It seems to me unlikely that when considering the provision of an indemnity to clients, Clear Legal would ever have concluded that they would be involved in litigation of the sort which is now before this court. The defendant estimates that costs in respect of claims brought by those represented by Clear Legal amount to £700,000. I will say more about that below but for the moment, it does not seem to me that the fact that some clients may have to call upon an indemnity which is considerably larger than would have been expected can somehow distort the general scheme put forward and which is the one in my judgment that needs to be considered when deciding whether the contract with the client is a contract of insurance.

112. To sum up, I do not accept the defendant's characterisation of the claimants and Clear Legal's arrangements as consisting of unlawful insurance or to be otherwise champertous. The indemnity is a peripheral element of the contract of legal services and I do not consider that, even if the defendant is correct regarding the asset position of Clear Legal, it would be appropriate to stay proceedings purely for that reason. Similarly, the defendant's argument that the claimants are passengers in these proceedings and are somehow unaware of their responsibilities holds no weight in the absence of any specific evidence regarding this supposition nor any substantiated criticism (in my judgment) of the Clear Legal business model.

113. Accordingly, I reject the application for a stay of these proceedings.

Application for security for costs

114. The defendant's application notice seeks, as an alternative to an order for a stay, an order for security for costs. The defendant does not seek security from the claimants themselves but from Clear Legal. The jurisdiction to make such an order under the CPR is to be found at rule 25.14 as follows:

> **"25.14**
>
> (1) The defendant may seek an order against someone other than the claimant, and the court may make an order for security for costs against that person if –
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
>
> (b) one or more of the conditions in paragraph (2) applies.
>
> (2) The conditions are that the person –
>
> (a) has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against him; or
>
> (b) has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings; and
>
> is a person against whom a costs order may be made."

115. The defendant says that Clear Legal have contributed to the claimants' costs, or agreed to do so, in return for a share of any money which their clients may recover in the proceedings and as such come within rule 25.14(2)(b). Given the circumstances of the case, the defendant says that it is just for an order for security of costs to be made against Clear Legal. Whilst there is some suggestion of making Clear Legal a party for these purposes, there is undoubtedly jurisdiction to make such an order under section 51 of the Senior Courts Act 1981 and no point was taken by Mr Dunne about the entitlement of the court to make an order against Clear Legal without them being made a party to these proceedings.

116. Before considering the parties' submissions on CPR 25.14, I should first deal with Mr Dunne's jurisdictional challenge based upon the wording of section 70(1) Solicitors Act 1974, which says:

> "(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 assessed and that no

> action be commenced on the bill until the assessment is completed."

117. The claimants' argument is that the phrase "without requiring any sum to be paid into court" is a complete answer to the defendant's application for security for costs. The claimants say that the rule is clear that no order for payment into court can be made when ordering that the solicitor's bill is to be assessed. It would be nonsensical for there to be any jurisdiction once that order has been made to order a payment into court at a later stage. It would rob the provision of any practical meaning.

118. Mr Marven challenged the written and oral submissions of Mr Dunne on this part as rendering the court essentially impotent in its case management powers if it could not sanction a claimant simply because the claimant brought proceedings promptly.

119. In my view, the claimant's interpretation of this provision goes some way beyond its force in detailed assessment proceedings under the CPR. When the Solicitors Act was enacted in 1974, an application for an order for assessment would have been made to a master in either the Chancery Division or Queen's Bench Division. If the order was made then the taxation would have been carried out by a taxing master in the Supreme Court Taxing Office. The master making the order for assessment would no doubt have refrained from making any order for a payment into court where section 70(1) rather than section 70(2) applied. The procedure thereafter would have been dealt with by a different judge who would not have had the jurisdiction to make an order for a payment into court during the taxation procedure.

120. The revamping of Order 62 in 1986 and the advent of the Civil Procedure Rules in 2000 have changed the landscape in respect of Solicitors Act proceedings. All High Court proceedings (save in the District Registries) regarding Part III of the Solicitors Act concerning remuneration are now brought in the Senior Courts Costs Office. Those proceedings are allocated to costs judges who deal with them from beginning to end. The distinction between the application for an order for assessment and the assessment itself has consequently become comparatively blurred.

121. Nevertheless, it is clear, in my view, that the restriction on the order to be made under section 70(1) only applies to the making of the order itself, as Mr Marven submitted. Thereafter, active case management, which was a concept that was not in play in 1974, dictates that the court must be able to sanction a defaulting party where appropriate. The idea that a party can litigate without concern up to and including the assessment, as was the essence of Mr Dunne's submissions, is not, in my view, a realistic proposition.

122. There is only one practical argument put against the view that the restriction in section 70(1) applies at the time of making the order for assessment. That is the proposition that the statutory provision would be toothless if the solicitor could apply for an interim payment in respect of its costs as soon as an order has been made.

123. In some cases, the court will not order a detailed assessment at the initial directions hearing but will give directions for a preliminary issues hearing to deal with matters relating to the retainer, or similar, which may require evidence to be produced in order to deal with those issues. There is no order for assessment because the preliminary issues are often potentially knockout blows or at least will materially affect the amount

that can be claimed. Since there is no order for detailed assessment at this point, then no application for an interim payment can be made in a section 70(1) case.

124. Where an order for assessment is made, it will invariably provide directions along the lines of CPR 46.10 for a breakdown of the disputed invoice or invoices together with points of dispute, any replies and provision for requesting a detailed assessment hearing. It is extremely unlikely, in my view, that a costs judge receiving an immediate application for an interim payment will consider it appropriate to make such an order unless and until they have seen the points of dispute and any replies so as to see the extent of the challenges. They will no doubt have in mind the statutory restriction in section 70(1) which provides a reward for those who act promptly.

125. As such, it seems to me that the theoretical position raised by Mr Dunne is not one which in practice has any effect. At the earliest, an application for an interim payment would be made at around the time that an interim costs certificate could be sought in a between the parties' assessment i.e. at the time a detailed assessment hearing has been requested. That is a very different proposition from the one raised by Mr Dunne. Consequently, I do not accept that there is a jurisdictional difficulty based on the wording of the Solicitors Act in making an order for security for costs, if it is just to do so.

126. But, even if I were wrong on this approach, I consider that two of Mr Marven's further submissions would defeat this argument in any event. The first is that it is not the claimants from whom the defendant seeks security for costs and s70(1) is squarely aimed at the clients who are challenging the bill rather than their legal representatives. Mr Dunne, quite rightly, did not take any literal argument regarding the fact that it does not say exactly who should be paying money into court since it is obviously intended to be the client. The statutory provision relevant to this point would be section 51 Senior Courts Act 1981 and not any provision in the Solicitors Act. Secondly, Mr Marven pointed out that security for costs is regularly given in some manner other than a payment into court in any event.

127. I now return to the competing arguments on rule 25.14. The defendant has to demonstrate that Clear Legal has contributed or agreed to contribute to the claimants' costs in return for a share of any money or property the claimants may recover in the proceedings. Mr Marven says that Clear Legal has clearly contributed to the claimants' costs by paying all expenses and disbursements as well as funding adverse costs through the indemnity. It did not seem to me that Mr Dunne disagreed with that proposition although it is not obvious to me, at least, why funding (or indemnification) against adverse costs bears any relation to a contribution to the claimants' costs. Nor is it, in my experience, unusual for solicitors running numerous modest value claims to meet disbursements without monies on account in order to avoid the administration that chasing clients for such sums entails. This is particularly so where, as here, those disbursements would essentially be written off if the claimant did not succeed.

128. The dispute between the parties in relation to this subparagraph (25.14(2)(b)) is really whether the contribution to the claimants' costs is "in return for a share of any money or property which the claimant may recover in the proceedings." Mr Dunne referred to commentary in the White Book which confirms that mere contribution to the claimants' costs is not sufficient.

129. Mr Marven said that this element is established by the provision in the Clear Legal CFA which allows for a reduction of the damages recovered by up to 25% plus VAT where the claimant has been successful in respect of damages but has not obtained an order for costs. Furthermore, Mr Marven submitted that if there is an order for costs in the claimants' favour then those sums are paid to Clear Legal and that is part of the money which the claimant recovers.

130. In respect of the first argument, Mr Dunne relied upon Mr Carlisle's evidence. At paragraph 28, he recalls a case where a more substantial bill than is involved in these cases was in issue and a reduction of £50,000 was offered by the solicitors on condition that there was no additional order for costs. In essence, it was a global settlement and the pressure to accept it was increased by an indication that the firm would enter into some insolvency procedure from which nothing would be likely to be forthcoming if the offer was not accepted. In the light of the client's acceptance of that offer, which provided no fees for Mr Carlisle or his counsel, the provision in the agreement regarding payment of a share from the damages was included in subsequent retainers. Mr Carlisle's evidence is that the occasion he recounted is the only one which has occurred in the last six years during which he has been dealing with such cases in volume.

131. Regarding Mr Marven's second point, Mr Dunne disputed the description of the recoverable costs where an order for costs was made as being a share of any money or property that the claimant may recover. The CFA Lite provided for such costs as were agreed with the defendant or assessed by the court and that was no more nor less than any other solicitor would obtain. If that amounted to a share of the spoils, then all solicitors would be at risk of paying security for costs.

132. In Mr Dunne's submission, rule 25.14 was aimed at commercial litigation funders who obtained a percentage of the damages in return for funding the case. He relied upon the decision of Hildyard J in the RBS Rights Issue Litigation [2017) EWHC 1217 (Ch) which was clearly such a case. In the context of commercial funders, the judge considered various factors to be of particular relevance in deciding whether security for costs against a non-party would be appropriate and just. They included whether the non-party is to be treated as having effectively become in all but name a real party "motivated to participate by its commercial interest in the litigation"; whether there was a real risk of non-payment; whether there was a sufficient link between the funding and the costs for which recovery was sought; and whether the costs liability risk had been sufficiently brought home to the non-party.

133. It seems to me that this is the weakest part of the defendant's application. I do not think it can be the case that if the claimant obtained an order for costs against the defendant and those costs are quantified, that they can be properly categorised as a share of the money recovered by the claimant. The order for costs is consequent upon the recovery of the money or property and in my judgment is an entirely separate matter. I agree with Mr Dunne on this point that the purpose of rule 25.14 is to deal with commercial funders of litigation and the defendant's interpretation of this point would potentially bring many solicitors into the frame for a security for costs application.

134. This then simply leaves the provision regarding payment from the damages where those damages have been recovered but no order for costs has been made. This cannot mean recoveries made under agreement one since no adverse costs apply in that environment and as such there can be no need for security for costs. It can only mean the provision

in the CFA which Mr Carlisle described as occurring once in six years of specialising in these cases.

135. If the client has not paid the disputed bills, then there is no recovery, but simply a smaller liability. Therefore, the proceedings would have to involve bills that have already been paid. The proceedings would have to be successful to an extent for an order to repay fees to be made, but it would require a reduction of less than 20% of the solicitor's bill so that the one fifth rule in section 70(9) Solicitors Act applied in the solicitors' favour. It would also mean that there were no special circumstances available to overturn that provision.

136. Such a result is not uncommon where clients merely challenge their solicitor's bill in respect of the amount of time claimed and seek to reduce specific times or certain amounts of work. Such challenges are regularly ineffective. It seems to me to be much less likely to occur in the sort of claim brought by Clear Legal where there is a fundamental challenge to the bill which results in either a reduction of rather more than 20% or no reduction at all. Neither of these scenarios produces a "win" on damages but no order for costs. I am not surprised therefore by Mr Carlisle's evidence that this has only occurred to him on one occasion and yet was of sufficient consequence to cause him to amend the terms of business.

137. It does not seem to me that an outcome which is as rare as this properly fits within the description in rule 25.14(2)(b) of agreeing to contribute to the claimant's costs in return for a share of the damages.

138. Mr Marven urged upon me not to take too narrow a view of this subparagraph given that there is the "just in all the circumstances" safeguard at 25.14(2)(a). But if I take the view that this particular provision of the retainer does (just about) amount to an agreement that satisfies subparagraph (b), it seems to me that it must weigh heavily against making an order when considering all the circumstances in subparagraph (a).

139. The parties' arguments as to whether it would be just in all circumstances to make an order for security for costs tread upon similar, if not the same, ground as the application for a stay. The defendant points to the schedule it has produced to justify seeking the sum of £700,000 by way of security for costs. Based on that sum, the defendant queries Clear Legal's ability to meet such a sum and we head into the dispute as to whether or not the £3 million or so of net assets in Clear Legal's accounts are really capable of meeting adverse costs.

140. The parties' arguments regarding the financial position of Clear Legal have generated some considerable effort, particularly on the part of the defendant, but it seems to me with little real effect upon the issues with which this court is concerned.

141. The extent of the evidence before the court in Ms Wheeler's first witness statement is what she describes as an asset report. It is anonymised and redacted and largely, (it appears from accounts exhibited to Ms Wheeler's second witness statement), a transposition of the numbers into a different format. To the extent that there is any analysis, the report says that the accounts show "a low amount of outstanding short term obligations", "a very positive Net Assets position" and that the company "trades in an industry with a low level of corporate failures." None of this suggests that the court should be concerned about the position of Clear Legal and yet presumably this

report represents the fruits of the defendant's investigation before and after the intention to bring this application was ventilated at the hearing on 14 April.

142. In her second witness statement, Ms Wheeler says that the purpose of it is to counter Mr Carlisle's evidence regarding the liquidity of the assets. She comments upon the accounts of both Clear Legal and Clear Law LLP, a related company. She appears to draw adverse conclusions from the absence of any "cash at bank" for Clear Legal and only £60 for Clear Law LLP as if this is a sign that there are no funds available to meet obligations.

143. In my view that is a questionable proposition even if it did not depend upon accounts from two years ago (the most recent accounts available.) Purely to demonstrate why this seems to be of little relevance, I refer to the defendant's own most recent accounts. They are clearly a much bigger concern than Clear Legal but their "cash and cash equivalents" entry for each of the two years shown was less than £20,000 That may very well represent an efficiently run company but if Clear Legal had such figures in its balance sheet, it appears from this application that it would be said to have insufficient funds to meet the defendant's potential costs of these and related proceedings.

144. I use the cash at bank comments simply as an illustration of the issue here. There is insufficient information publicly available for any real depth to the analysis put forward but nevertheless I am asked to conclude that a sum in publicly available accounts cannot be relied upon simply by virtue of the fact that it has been owed by a different company for some considerable time. That might be entirely correct but I do not see that I have the evidence to support that supposition. It might equally be the case that the controlling minds of the group of companies could do something rapidly about the intra company payments if they wish but simply choose not to do so.

145. Therefore, whilst the second witness statement of Ms Wheeler was produced with commendable speed in response to Mr Carlisle's witness statement, some relatively limited analysis by a lawyer of available accounts (no criticism of Ms Wheeler is intended by this comment) is, in my judgment, of relatively little weight in considering whether it is just to require a sum to be paid to safeguard costs incurred by the defendant.

146. The sum that the defendant says it has incurred and is likely to incur is summarised on a one-page schedule in the bundle. The estimate of costs is broken down into five parts. The general, incurred costs are said to amount to £109,261.20 of which a little over half is profit costs and the remainder are counsel's fees. It is not obvious to me as to what these costs actually cover. There were two hearings at which I invited costs lawyers to attend on behalf of their clients and for which the defendant instructed leading counsel. There will no doubt be some general consideration of strategy, tactics et cetera involved in the numerous cases that have been brought against the defendant in similar and related proceedings elsewhere. Nevertheless, it seems to me that the sum claimed would need some justification, not least because the appearance has been given that no investigation as to disclosure has yet been undertaken and which might have formed a sizeable proportion of the time claimed. I posed a simple question to Mr Marven at the hearing regarding whether or not there are actually any recordings which form part of the application for disclosure and which are obviously central to this case given submissions that have been made at all of the hearings. Mr Marven told me that he had

not been provided with any instructions on that issue. That might mean that the solicitors were seeking to prevent placing Mr Marven in an awkward position but equally it may mean that in fact no investigation has been carried out as to whether they exist. I would not normally make that comment but given that in the case of Piper, the ATE policy at the heart of a hard fought application did not actually exist, it seemed to me to be a relevant question to ask.

147. The second part of the estimated costs is in fact in relation to the application concerning Piper regarding Part 18 requests as to the non-existent ATE premium (as well as the similar case of Raubenheimer). The costs claimed in that part amount to £26,055.90 and which, it seems to me are separate from this case since a separate order for costs has been made.

148. The third part concerns costs up to and including the preliminary issues hearing which the parties appear to think will take three days and which are claimed in the sum of £97,684.20. Three quarters of that sum is put down as counsel's fees. The assumption appears to be that, whatever the outcome of those preliminary issues, most of the work in respect of the test cases will have been dealt with since part four regarding post preliminary issue costs in respect of the test cases is for the rather lower sum of £37,407.70.

149. The most significant part of the schedule is part five which deals with costs after the preliminary issues hearing in respect of all of the other cases and for which costs of £443,990.60 are claimed, more or less equally split between the fees of the solicitors and counsel. The figures for the five parts make a total sum of £714,399.60 and form the basis of the request for £700,000 by way of security for costs.

150. Mr Dunne's written submissions were withering as to the appropriateness of the sums claimed. Mr Marven was moved to describe there having been a certain amount of cold water poured upon those figures, particularly in relation to the part five costs concerning the additional cases. Those cases are, as Mr Dunne pointed out, already stayed for all practical purposes since they are awaiting the outcome of the test cases. The entire purpose of having a limited number of cases on which to try the central issues was so that they can then be applied to all of the other cases. The need for hearings for each individual case following the hearing of the test cases would be a first in my experience and making an assumption that such hearings would still be required is unduly pessimistic.

151. It is not clear to me how the defendant says that it expects to be able to claim the part one costs from the claimants even if ultimately all of the cases are unsuccessful. There are no orders for costs made in respect of the first two hearings and there will have to be some demonstration that the costs are of and incidental to the proceedings commenced in this court. The part two costs are definitely outwith this application in my view and that leaves approximately £135,000 in relation to the costs up to and after the preliminary issues hearing in respect of the test cases (parts three and four).

152. Seen in this light, the defendant's concerns regarding the liquidity of the assets in Clear Legal's accounts are, in my judgment, severely weakened. Mr Dunne appeared to suggest that the figures for the additional cases in part five had been included in the application for security for costs simply to increase its value so as to make it appear of more concern. I do not ascribe any particular motive to the defendant in its calculation

of the costs which it seeks to be secured but, having deducted the additional claims costs etc, it seems to me that the sum sought has considerably less resonance when looking at the real risk of non-payment as described by Hillyard J in his checklist.

153. As far as that checklist is concerned, I do not consider that Clear Legal can be described as having effectively become, in all but name, a real party to the litigation motivated by its commercial interest. Mr Marven prayed in aid the case of Murphy v Young & Co [1997] 1 WLR 1591 CA as authority for the possibility of an order for costs being made against Clear Legal where it contracted to pay adverse costs. In Murphy the court considered making an order under section 51 at the end of the case. If it transpired that Clear Legal were a real party to these claims then the same possibility would apply here. The fact that a section 51 application may ultimately be made does not of itself mean that security for costs should follow.

154. Mr Marven also relied upon the case of In Re Jones (1870-1871) LR 6 Ch App 497 to support the proposition that a solicitor who contracts to hold the claimant harmless as against adverse costs has stepped outside the role of a solicitor. The case of Jones described itself as being a peculiar one and involved a solicitor who did not originally act for the claimant ultimately taking over the case entirely so that he was *"to be the only person answerable in every respect for the suit."* The facts of that case are odd and it seems to me that if there is to be any analogy drawn to it, the defendant will have to demonstrate that Clear Legal are running the cases without input from the claimants as a minimum.

155. I did indicate earlier that Mr Marven suggested that Clear Legal's methodology was to seek to tell the clients that they did not have to get involved in the case or that they should feel the need to contact Clear Legal as it progressed. Mr Dunne responded that the involvement of the claimants in these cases was probably rather more considerable than had been their involvement in the original personal injury cases run by the defendant. It is in the nature of cases for modest values that clients will simply tend to take the advice of their trusted adviser in running the case and consequently the lawyer will have great sway in how the cases are pursued and ultimately what settlement is reached. That does not seem to me to be anything resembling the position of Mr Jones where he decided to run the case without the need for any input from the client at all. As such, there is nothing before me, in my judgment, to suggest that the likelihood of a section 51 order is sufficiently probable for me to make an order for security for costs against a non-party at this stage.

Decision regarding security for costs

156. Drawing these matters together, I am not persuaded that the defendant has managed to proceed through the gateway in rule 25.14 in establishing that Clear Legal have contributed to the claimant's costs in order to obtain a share of sums recovered by the claimants. But even if that is just about established, it would not be just, in my judgment, to order Clear Legal to make a payment as security for the defendant's costs.

157. I have found that Clear Legal has, like the solicitors in Sibthorpe, agreed to provide legal services to their clients but with an indemnity against adverse costs. The defendant has not established that Clear Legal has stepped outside that role so that a section 51 order is probable at this stage. Nor has it demonstrated that Clear Legal's balance sheet should be a matter of concern for the repayment of the defendant's

potential costs in these proceedings in accordance with the indemnity provided to the claimants. As such, it would not be just in all the circumstances to require Clear Legal to make a payment into court or provide some other security for costs to the defendant.

158. I therefore dismiss the defendant's application for security for costs.

Next steps

159. The parties / their advocates are asked to confirm their time estimate for the handing down hearing on 15 September to include consequential matters.