NCN [2023] EWHC 2721(SCCO)

Case No: SC-2023-BTP-000472

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 31/10/2023

Before:

COSTS JUDGE ROWLEY

- -

Between:

Mr Stephen Turner	**Claimant**
- and -	
Coupland Cavendish Limited	**Defendant**

- -
- -

Mark Carlisle (instructed by **JG Solicitors**) for the **Claimant**
"**Mark Brighton** of **Kain Knight (North & Midlands) Ltd** for the **Defendant**
Hearing date: 14 September 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 31st October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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COSTS JUDGE ROWLEY

Costs Judge Rowley:

Introduction

1. Earlier this year half a dozen cases allocated to me requested assessments under the Solicitors Act 1974. They all required half day hearings according to the requests for detailed assessment and in each case the parties were represented by the same legal representatives. It seemed to make sense to list those cases consecutively so that they usefully employed a block of time before the court. The six cases were listed morning and afternoon between the 13th and 15th September.

2. It has transpired that the issues between the parties are such that the half day time estimates were insufficient and the hearings have been adjourned for further directions to take effect regarding evidence. The cases involve four different firms of solicitors and so there are different challenges within the points of dispute that have been served in the different cases.

3. However, before the further directions can take place in any of those cases, some preliminary issues needed to be dealt with and so I heard the parties' representatives – Mr Mark Carlisle for the claimant and Mr Mark Brighton for the defendant – ostensibly in the case of Turner, but in effect in relation to all six cases. Once those preliminary issues have been dealt with, the six cases can be dealt with individually rather than as a cohort of cases. Whilst there are some similarities in the points which I heard and indeed other points taken in the points of dispute, those matters are really little different from many other cases being brought before the court. They are all fact sensitive and so would be better dealt with individually.

4. As I say, I am treating the applications as having been made in the case of Turner for simplicity. The choice of that case was simply because the three issues raised by Mr Carlisle are all relevant to that case. (Indeed, the third issue only relates to Mr Turner's case.) The first application, regarding disclosure and inspection, also relates to the cases of Tyrrell and Wilkinson. The second application, which concerns Part 18 requests, also applies to the cases of McBride, Skutela, Perrett and Tyrrell.

The proceedings

5. Mr Turner commenced Part 8 proceedings on 29 March 2022 seeking an order for an assessment of the bill delivered to him by Coupland Cavendish Ltd on 11 March 2022. Such orders are made pursuant to s70 Solicitors Act 1974 and since the proceedings were brought within a month of the bill being delivered Mr Turner's entitlement to that assessment was absolute. There was a procedural hiatus as a result of awaiting the Court of Appeal's decision in Belsner v Cam Legal Services and so the order for assessment was not made until 17 February 2023. The directions given were for a breakdown of the costs to be served by 10 March 2023; for an electronic copy of the defendant's file to be provided to the claimant by 24 March 2023; and for points of dispute to be served by the claimant by 21 April 2023 with any reply by 19 May 2023.

6. Those steps were taken and a request for detailed assessment hearing was made in May 2023 with the hearing being listed in September 2023. Disputes about procedural compliance have occurred almost from the off. The breakdown and the solicitors file of papers were served upon the claimant. The points of dispute made complaint about the

extent of the disclosure provided by the defendant. The claimant referred to recent case law which he said required him to put in a level of detail in respect of the points of dispute which the claimant's representatives did not consider they could achieve in the absence of further disclosure. The defendant's response was that the file had been disclosed as ordered and neither the points of dispute nor the correspondence between the representatives explained what was said to be missing.

7. The claimant's solicitor issued an application on 29 June in respect of all six cases and I made orders without a hearing at the beginning of July. I set aside the points of dispute in each case and ordered new points of dispute to be served by the beginning of August. I indicated in the reasons to that order that the defendant's statement that it had disclosed all of the documents in the file was sufficient for the claimants to put forward points of dispute in the expectation that there were no other documents that were to be provided at the detailed assessment hearing. For example, therefore, if time was claimed which did not appear to be supported by any attendance note, then the claimant could proceed on the basis that the time was either estimated or that the time had only been recorded on a computerised time recording system rather than any separate, detailed note.

8. The further points of dispute were then served and the defendant served replies together with a witness statement of Mr Carl Chapman (in the case of Turner) who was described as a solicitor and manager of the defendant. It appears that Mr Chapman produced the statement because the fee earners with conduct of the case at the relevant times were no longer with the company.

1. The Disclosure / Inspection Application

9. The first point of dispute and reply is as follows:

> POINT OF DISPUTE
>
> Call Recordings
>
> The Defendant advised the Claimant at the outset that all calls are recorded for training and monitoring purposes (DB 43). All such records should be disclosed because –
>
> 1. CPR Part 31 applies to this claim
>
> 2. A recording is referred to at DB 41 and 43, which is a crucial conversation in relation to funding
>
> 3. Recordings of other calls will show whether the time recordings of calls with the client and others are accurate.
>
> The Claimant's position is fully reserved pending receipt of such disclosure.
>
> REPLY

1. Disclosure has taken place of the file. Call recordings are not stored on the file. No application exists for disclosure of documents not stored on the file.

2. The notes on pages 41 and 43 show a script. The Claimant has made no allegation that the script was not accurately delivered.

3. The line-by-line assessment appears to challenge the veracity of only 3 units of time. A query over 3 units of time cannot give rise to such sweeping disclosure.

This is merely a fishing expedition and should be dismissed.

10. The first application on the part of the claimant is for disclosure of the call recordings as referred to in the first point of dispute above. Mr Carlisle ran several different arguments as to the method by which the claimant ought to be entitled to receipt of the recordings.

11. One of these was to say that it was in fact simply the inspection of documents which had already been disclosed. As can be seen from the point of dispute and reply, the reference to telephone calls being recorded was contained in a script which would be delivered by the fee earner to the client, presumably at the outset of the retainer. I say presumably because I have not seen that document. Mr Carlisle's argument was that such recordings clearly exist and they are obviously relevant to the case. Since they are referred to in the file, they should be capable of inspection by the claimant.

12. In response, Mr Brighton pointed out that the reference to the recording was not in a statement of case or a witness statement, for example. He did not accept therefore that the call recordings had been disclosed. What had been disclosed was the solicitors' file of papers in accordance with the court order and, as it said in the reply, any call recordings were not stored on the solicitors' file.

13. It seems to me that this is a complete answer in respect of the argument that the documents have actually been disclosed. CPR 31.14 says that a party may inspect a document mentioned in a statement of case, a witness statement, a witness summary or an affadavit. That is a restricted group of documents which all share the quality of having been produced specifically for service on the opponent (as well as filing at the court). Documents referred to in such a statement or affidavit would obviously have been disclosed in a document which itself could count as evidence before the court. Those documents are a world away from a reference in a script on the client's file referring to the fact that the calls between the solicitor and client would be recorded.

14. In the absence of an argument that the call recordings have been disclosed already, the disclosure application runs into the ground procedurally. I ordered disclosure to be provided in respect of the solicitors' file. Whilst that is not standard disclosure via a list in form N265, it is standard disclosure in the sense that it is the disclosure that normally occurs in a case involving the assessment of a bill of costs rendered by a solicitor to their client. There is no scope for any further standard disclosure and Mr Carlisle was right to say that he did not specifically ask for this to occur, nor did he ask for a list verified by an affidavit or other procedural approach that has sometimes been taken.

15. It seems plain therefore that the application was for specific disclosure in terms of the call recordings. It was Mr Brighton's argument that specific disclosure required procedural steps to be taken which have not occurred in this case. In particular, paragraph 5.1 of Practice Direction 31A refers to the making of an application for an order which must specify the order that the applicant intends to ask the court to make and which must be supported by evidence. The grounds on which the order sought either have to be in the application notice or in the evidence filed in support. None of that had occurred in this case.

16. The need for these six cases to be adjourned to another date has been clear to all parties for some time. Correspondence between the parties and the court as to whether any directions could usefully be given was undertaken prior to the existing hearing date. One particular issue raised was whether a formal application for outstanding matters needed to be made or whether they could be dealt with by way of case management directions under CPR Part 3. The defendants wished for formal applications to be made: the claimants thought that that was not necessary.

17. Mr Brighton explained the defendants' position as being a result of what he considered to be a moving target in relation to the disclosure sought by the claimant. By way of example, he referred to the fact that the request in the points of dispute regarding the call recordings was not just for the call at which the sign up script was involved but also for calls throughout the case so that the time recorded could be compared with the recordings themselves. At the hearing, and in Mr Carlisle's skeleton, the call recordings sought were solely those regarding the initial interactions between the client and solicitor in order to consider what was said to him at the time he signed up with the defendant.

18. Mr Carlisle's response to this need for formality was a citing of the decision of Ritchie J in Edwards and Others v Slater and Gordon which he said had clarified that Part 31 applied to Solicitors Act assessments. Indeed, Lord Justice Warby, when considering a request for permission to appeal Ritchie J's decision had confirmed that any gap there may be with Part 31 applying could be filled in with the court's general case management powers in Part 3. By this combination of jurisdiction, I was clearly able to order the call recordings to be provided.

19. Whilst this submission is an accurate reflection of judicial comments in Edwards and Others, I do not see that it assists the claimant here. If the application does not succeed under Part 31 because of procedural irregularities, it cannot be the case that it can be dealt with more leniently under Part 3.

20. I note that paragraph 5.4 of PD 31A says that all the circumstances will be taken into account and if there has been some failure adequately to comply with the obligations regarding disclosure originally, for example by failing to make a sufficient search for documents, then "the court will usually make such order as is necessary to ensure that those obligations are properly complied with."

21. But this is not a case where the defendant has failed to carry out a sufficient search. It has provided the solicitors' file and has confirmed that the entirety of that file has been disclosed when pressed by the claimants. In any event, call recordings would not be on the solicitors file but, if anywhere, in some IT backup of presumably thousands of calls taken by the solicitors over time.

22. There is nothing before me from either side about the facility with which any individual telephone call could be identified. It does not strike me as being likely that it is a particularly straightforward task. It is not something which has traditionally been on the solicitors' file and I think the claimant would have to put forward extremely cogent evidence to justify any of the call recordings being searched for and, if found, made available. (As indeed occurred in the unusual circumstances of the application in Edwards and Others, see below).

23. Mr Carlisle did not emphasise the proposal for call recordings to check the time actually recorded on the file, but he did not resile from that request as set out in the points of dispute when Mr Brighton raised the issue. Locating such recordings, as well as the time spent by the parties listening to the recording to check its length and whether it all related to the call in question is, in my view, a transparently disproportionate approach to a detailed assessment. The claimant's approach assumes that it is a simple matter to obtain call recordings when required. That may be so, but it does not seem likely to me and the court would need some evidence to demonstrate that this was not the disproportionate approach that it appears to be.

24. Mr Carlisle also relied on a citation from Nichia Corporation v Argos [2007] All ER (D) 299 (Jul) which began "it would be against the interests of justice if documents known to exist, or easily revealed, which would harm a party's own case or assist another party's case need not be disclosed because of a blanket prima facie rule against any standard disclosure in patents actions."

25. That quotation obviously concerned standard disclosure with which I have concluded we are not concerned. But it is interesting in two other aspects. The first is the assumption that the documents would be easily revealed and as I have just said, I am not convinced that is the case in respect of call recordings. Secondly, the disclosure is required where it assists or harms a party's case. That is obviously a reference to CPR 31.6 concerning the documents a party is required to disclose as standard disclosure. Each party can tell whether the documents it has, or has had, fit into those categories by reference to the statements of case. In detailed assessment proceedings, the statements of case, to the extent that there are any, are the points of dispute and reply. There is nothing in the point of dispute as it currently stands to indicate whether any recordings would either harm or assist either party.

26. Mr Carlisle gave examples of both ends of the spectrum as to the effect a detailed (or not) explanation of various matters would have on the parties' arguments. But that was entirely theoretical and it highlights the fact that, at this point, the claimant has given no indication of what he says was deficient in the signup process and which may be proved or disproved by the call recordings. The cart is well and truly before the horse in that the claimant wishes to hear call recordings before deciding on what his case may be (if any).

27. It is sometimes said by claimants' representatives in this situation that they cannot know what their arguments might be but that is a luxury which claimants do not generally have. Mr Turner was present at the telephone calls and his evidence will be what he remembers about them. If, for example, he said that the sign up call lasted barely 5 minutes and as such the script in the file had not been gone through, then there may be something on which an application for specific disclosure might be built. But so far the

claimant has said nothing and so there is nothing on which the court could act, even if it felt it might otherwise be appropriate to do so.

28. In the case of Edwards and Others, a positive case was put forward with the aid of a recording from a different claimant which suggested that the signup script had not necessarily been followed. Requesting the equivalent call recording was a much simpler task for this court as well as for Ritchie J. But here the application consists entirely of supposition as to what the call recording might say, if anything, meaningful at all.

29. One of Mr Carlisle's arguments was that not only was the claimant currently unable to put forward his case as to the usefulness of the call recordings, absent disclosure, but that this was compounded by the assumption that the defendant already knew what their position was since they must have listened to such recordings. In the unlikely event that the defendant had not yet listened to them, Mr Carlisle submitted that this was all the more reason why inspection was necessary.

30. I did not find that to be a compelling argument. The defendant has disclosed the solicitors' file in the usual way in support of the bill delivered to the client. The call recordings made no appearance in the original points of dispute and their supposed importance has only surfaced quite recently and without any indication of why the claimant says those call recordings might assist. Why they should be exhumed, should they exist, and be listened to by the solicitors or their costs lawyers in such circumstances, given the expense that would incur, is not readily apparent.

31. Mr Carlisle's final submission was that, if all of the other arguments were unsuccessful, the client, as the principal, was entitled to access to all of the records of the solicitor, as agent, even once the solicitor had stopped being the client's agent. Mr Carlisle included call recordings within this broad description and relied on the case of Yasuda Fire and Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd [1995] QB 174 which featured more in relation to the second application concerning ATE insurance and commissions.

32. The purpose of recording calls with clients seems to me to be most likely for the purpose of demonstrating what was said if a complaint of one nature or another was raised by the client or indeed a regulator. (Transcribing calls for the purpose of running the substantive case would appear to be prohibitively time consuming and expensive.) As such, it is a defensive mechanism and seems to me to be analogous to notes written by the solicitor for his own benefit in the file. Such documents are not ones to which the client is entitled. They are usually disclosed in detailed assessment proceedings in order to justify the time claimed. Nevertheless, they are the property of the solicitors rather than the client.

33. I have dealt with Mr Carlisle's argument regarding the entitlement of the client to its former solicitors' documentation more fully in the second application. But as far as the submission that the case of Yasuda Fire and Marine entitles the client to call recordings made by the solicitor is concerned, I consider that to be more than a step too far. Such recordings have never been part of the solicitors' file and it is to that file which the client has ever had access in Solicitors Act proceedings. As I have indicated in the previous paragraph, even if the call recordings are part of the solicitors' file, contrary to my view, then they are part of the working notes and similar documents which remain the solicitors' property rather than the client's. For reasons of dealing with a case in a

proportionate fashion, I do not consider that they would need to be disclosed even where the parties have agreed that the "solicitors' file" should be disclosed in any event.

34. It will need a judge of higher judicial authority than myself and, I would suggest, some evidence as to the facility of locating them, to determine that call recordings should become part of the file of papers to which the client is entitled to examine to any extent, not least because of the logistical difficulties that would almost certainly entail, in my view, in the organisation of solicitors' practices.

35. In any event, I refuse the claimant's application for disclosure of any call recordings that there may be, both on the grounds of procedural irregularity in there being a complete absence of application, draft order or evidence to put this application on a proper specific disclosure footing, as well as the failure of the claimant to make out why such documents advance the claimant's case in the absence of any form of positive statement of the claimant's position.

2. The Part 18 Request Application

36. According to paragraph 16 of Mr Carlisle's skeleton argument:

> "The Part 18 questions relate to any commissions, financial or other benefits that may have been received by the defendant or an associate but for which the Defendant has not accounted to the client (broadly *"undisclosed commissions")*. They are all but identical to the questions ordered to be answered in *Edwards*…"

37. It seemed odd to me, but seemingly not to the parties, that I was asked to make orders requiring the defendants to respond to Part 18 requests without any of those requests being before the court. That position was exacerbated by Mr Brighton's submission that in fact some of the Part 18 requests did not go to the ATE insurance and any undisclosed commissions but concerned other matters. Mr Brighton's submission was only made after Mr Carlisle had finished on this subject and during which he had made no mention of any Part 18 requests that did not relate to the taking out of ATE policies.

38. Ostensibly, these requests arise out of a contention that the cash account is in dispute. The client cannot challenge the ATE premium in Solicitors Act proceedings according to the Court of Appeal in Herbert v HH Law. This is essentially because the ATE premium is not something which should be in the solicitors' bill which is the subject of the assessment. Instead, it should be shown in the cash account which is the record of the credits and debits to the client's account whilst someone is a client of a solicitor. By matching the cash account with the solicitors' invoice, the full picture of the financial relationship between the client and solicitor ought to be apparent. Since the ATE premium will be found in the cash account, a practice has grown up of stating that the cash account is in dispute as a means by which to interrogate the circumstances in which the ATE policy was taken out.

39. It has previously appeared that this meant the possible reduction of the premium to take account of any undisclosed commissions of the sort referred to in Mr Carlisle's skeleton. But, as Mr Carlisle made clear in oral submissions, such lack of disclosure may open the gateway to all manner of relief and remedies via provisions such as the Financial Services and Markets Act 2000.

40. In the case of Raubenheimer, I refused to order the defendant to respond to Part 18 requests but that decision was overturned on appeal by Ritchie J (in Edwards and Others). Subsequently, in a case called Brown v JMW Solicitors, I distinguished the Raubenheimer decision from the facts in Brown and again refused to order Part 18 requests. In order to avoid reinventing the wheel, I set out paragraphs 28 to 31 of that judgment:

> 28. Warby LJ described the issue in the Raubenheimer appeal as being "of an unusual nature". The evidence obtained by the claimant's lawyers must, it seems to me, be unlikely to be obtained in most cases. The fact that the insurer had gone into administration meant that a third party was answering the claimant's lawyer's questions rather than the insurer itself. The commercial arrangements between an ATE insurer and other parties would be confidential where the insurer was a going concern and, as such, less likely to be discussed with external law firms.
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> 29. Mr Dunne sought to argue that the claimant's entitlement to Part 18 requests being ordered at this point in proceedings could not depend on whether the claimant was fortunate enough for the insurer to be insolvent so that information came to light which might not otherwise have been the case. But in the absence of such information, the effect of Mr Dunne's submission is that any claimant can obtain an order for Part 18 answers from a defendant without needing to have any evidence whatsoever. Mr Dunne suggested that the questions posed were simple ones and therefore could easily be answered. In this way, he sought to minimise the obligation on the defendant to provide information notwithstanding the claimant having put forward no positive case about commissions, secret or otherwise.
>
> 30. I have come to the conclusion that Mr Dunne's arguments, though persuasively put, must be rejected. It is a basic tenet of litigation that he who asserts must prove. In the situation before me, the claimant's position is that he does not even need to assert let alone prove a commission may be in issue. He simply has to say that the premium is disputed without putting forward any grounds for doing so. Mr Dunne described the claimant as being trapped in a Catch-22 situation. He needed information from the defendant in order to be able to put forward his case: however the defendant refused to provide that information without the claimant's case having been set out.
>
> 31. But, in my judgment, there must be many situations where a party considers that an opponent has possibly caused him some loss but has no evidence as such. In the absence of any proof to support that suspicion, then proceedings cannot get off the ground. As indicated above, a pre-action disclosure application would need to have evidence of an arguable case and that must be the sort of threshold to apply in respect of Part 18 requests.

41. That decision was appealed but the appeal was withdrawn before the hearing took place. The nub of my decision in Brown was that there was no evidence before the court regarding alleged commissions which would justify Part 18 requests being answered. In this case I not only have a complete lack of evidence regarding alleged commissions but as I say, I have no part 18 request to consider in order to see what questions have been posed in any event.

42. Procedurally, it seems to me that this application cannot possibly succeed. Whilst there is no equivalent provision to the one concerning the need for specific disclosure to be sought via a formal application with evidence, it would be a woeful position for a court to order questions to be answered which it had not even seen.

43. Mr Carlisle appreciated that I was likely to take the same view as I had in Brown. At the outset of this submissions, he had sought to tackle the defendant's characterisation of these applications as being a "fishing expedition" in the absence of any evidence. Rather than simply dispute that characterisation, he sought to embrace it by suggesting that the claimant was in fact the owner of the lake and the fish but the defendant as a former gate-keeper refused to allow the claimant access to his own fishery. Whilst I commend the head-on challenge to the defendant's point, it does not seem to me to help the claimant. The owner of the fishery would be able to put some evidence forward as to the extent of the fish in the lake which he was seeking to catch, but here he has put forward no evidence whatsoever as to why he thinks there may be undeclared commissions etc, let alone evidence that they may exist.

44. Mr Carlisle challenged the appropriateness of replicating my decision in Brown in two ways. One was to point out that the dispute regarding the cash account would still be live, even if the Part 18 Request was not answered. As such, it was inappropriate to dismiss the application when the substance of it would rear its head later anyway.

45. That does not seem to me to be a matter of any great weight. If there remains no evidence regarding commissions at the time the cash account is determined, it is unlikely to detain the court for long. If there is evidence, then there will be an appropriate opportunity to consider it at the determination of the cash account.

46. Furthermore, as I have mentioned, some of the Part 18 requests apparently concern matters other than the ATE insurance and so the point is simply a bad one in respect of such requests. Regarding those requests which relate to ATE policies, the absence of any of the requests, as well as any evidence, before the court might make the application distinguishable from Brown, but it would not be in the claimant's favour in any event.

47. Mr Carlisle's main argument as to why I should come to a different conclusion from Brown arose from the decision in Yasuda Fire and Marine Insurance mentioned above which had not been referred to in the submissions in Brown.

48. Mr Carlisle quoted the following passage from the holding in Yasuda:

> "granting the application, that the relationship of principal and agent could exist independently of any contract between the parties, and a principal was entitled as a legal consequence of that relationship to continuing access to the agent's records relating to acts done in his name unless that right was expressly

> excluded by any contract between them; that clause 4.2 did not exclude that right, which continued to co-exist with any right conferred by that clause; that since the inspection facility conferred by clause 4.2 was ancillary or collateral to the subject matter of the contract, it was not discharged; and that, accordingly, the plaintiff's right, as principal, to inspect the documentary and computer records, maintained by the defendant agents for the plaintiff as principal, had not terminated when the agencies had been brought to an end on the basis of repudiatory breaches of contract and the defendants would be required to afford the plaintiff access to those records for the purposes sought."

49. Mr Carlisle's skeleton also cited the following passage from Colman J's judgment with the proposition that it supported "the obligation" extending beyond "direct transactional records":

> "That obligation to provide an accurate account in the fullest sense arises by reason of the fact that the agent has been entrusted with the authority to bind the principal to transactions with third parties and the principal is entitled to know what his personal contractual rights and duties are in relation to those parties as well as what he is entitled to receive by payment from the agent. He is entitled to be provided with those records because they have been created for preserving information as to the very transactions which the agent was authorised by him to enter into. Being the participant in the transactions, the principal is entitled to the records of them."

50. Based on these passages, Mr Carlisle submitted that the claimant was entitled to see the solicitors' records from their time as acting as his agent. An order for disclosure of such records would be an alternative to the Part 18 requests. But, he said, it also demonstrated the reasonableness of the information that the claimant was seeking via the Part 18 requests and therefore supported the application for them to be answered.

51. Mr Carlisle's skeleton also referred to subsequent cases which referred to Yasuda in respect of a principal's entitlement to see its agent's records. Those cases did not seem to me to take matters any further than confirming that Yasuda was still good law.

52. The claimant in Yasuda was a participant in a Syndicate or "pool" of underwriters and the defendant, as the managing agent, was responsible for entering into contracts of insurance underwritten by the syndicate. The defendant was therefore entering into contracts contingent on future events which might result in the claimant making money, because any claims were for less than the premium paid, or losing money if the claims were high. The relationship came to an end and there was the inevitable run-off required where claims came in and the overall position as to profitability would not be clear until the last claim had been resolved. Since the insurance involved "long tail" exposure, that run off period was expected to be lengthy. In the context of such an arrangement, the need for the claimant to be able to see the financial records concerning premium, claims, administration etc is obvious. Clause 4.2 specifically dealt with the point that handing documents to one syndicate member might prejudice another and so

specific arrangements were made for inspection of the documents rather than delivery of them.

53. That contractual limitation did not limit the claimant's right as principal to the documents, including computer records, of the agent. In the context of Yasuda that does not seem surprising. But it is far away from the situation in this case. The vast majority of personal injury claimants who purchase ATE insurance do so via a standard or "block" policy obtained through their solicitor and so, in the absence of any information about this, I assume the claimant has done so here.

54. When discussing the recoverability of ATE premiums from the opponent, the Court of Appeal in Hollins v Russell said:

> "The client's liability to pay the insurance premium arises from the contract of insurance, not from her contract with the legal representative. It arises whether or not there is a CFA and whether or not the CFA is enforceable. The CFAs which we have seen refer to the possibility of such insurance, but do not make it a term of the contract that such insurance is taken out."

55. The description of the contractual arrangements by the Court of Appeal demonstrates a distinction between the solicitor acting generally for the client via a contractual retainer such as a CFA and the solicitor specifically obtaining ATE insurance for the client. Whether the solicitor is the agent of the client when purchasing the ATE insurance, or in fact the agent of the insurer with the benefit of a delegated authority, is a question that I do not need to consider (nor do I have the materials to do so, at least at this point.) But even if the solicitor is properly characterised as the client's agent for this purpose, it seems plain to me that the scope of that agency is merely in respect of the ATE policy and any entitlement to records can go no further than that.

56. The documentation in respect of that purchase – the certificate and any policy documentation actually provided (rather than a reference to wording available online, for example) – is obviously something to which the client is entitled. Where the solicitor has an interest (including commission from the insurer) in recommending any particular ATE insurance, the Court of Appeal in Tankard v John Fredericks Plastics [2008] EWCA Civ 1375 made it clear that such interest needed to be notified to the client. On the other hand, the solicitor is not required to "trawl" the ATE market place for the best product for the client but merely an appropriate one. In practice, the solicitor will generally establish a relationship with an ATE insurer which it considers provides such a product and then obtain insurance for its clients from that insurer as part of a "basket" to avoid any suggestion of adverse selection.

57. I am aware that such relationships have resulted in some solicitors obtaining a payment for referring that business to the ATE insurer but that is not always the case. I do not see that this statement – which could be taken from caselaw such as Tankard – is anywhere near being sufficient to require solicitors to respond to allegations regarding commission in Part 18 requests in the absence of any evidence whatsoever on the claimant's part that this may be the case. That was the position in Brown and I do not see that the decision in Yasuda makes any difference to this.

58. I reject the submission that Yasuda provides the claimant with a gateway for a client to be able to see all of the solicitors' records, not just in relation to their own claim (the "direct transactional records") but also of any other financial records of the solicitor – which was the effect of Mr Carlisle's submissions. The support that Yasuda was said to give to obtaining the call recordings in the first application, since they would be a computer record, demonstrates how wide-ranging the decision in Yasuda was said to travel. In my judgment, the requirement of the defendant to provide records to the claimant is no more than the contractual ATE documents I have described above. Absent any positive case by the claimant, the defendant has to be taken to have followed the law as set out in Tankard regarding any declaration of interest in recommending any particular ATE insurance.

59. Therefore, in respect of the second application, it fails procedurally for the absence of any evidence, including documents in support such as the requests themselves. I also find that the decision of Colman J in Yasuda, in the circumstances of this case, does not provide the claimant with an entitlement to wide ranging access to the defendant's records in the absence of the claimant putting forward a positive case in support of the Part 18 Requests that have apparently been served.

3. The Gibraltar Company Number Application

60. This application only relates to Mr Turner's claim. According to the Replies to the Points of Dispute, a payment of £750 was made to AJG Limited on 27 October 2020. AJG Limited is apparently a Gibraltar based company and the claimant has expressed a wish via his solicitors to make enquiries regarding AJG Limited.

61. The claimant asked the defendant for the company number so as to make enquiries of Companies House in Gibraltar. The defendant's position is that the claimant can obtain that information via Companies House upon payment of a fee of £10. The number relates to a separate company rather than the defendant itself and so it was not an enquiry that should be aimed at the defendant. The claimant's solicitors responded that they had purchased software which would provide all of the information sought if only the number was provided and that no doubt the defendant had it already (or had ready access to it).

62. Even though the parties' advocates did not spend long on this point, it still took up some time in the hearing which, together with Mr Carlisle's skeleton argument and the communications between the parties has expended far more than the cost of the search etc. It was a rather dispiriting display of the parties failing to observe their duty in CPR Part 1 to assist the court in achieving the overriding objective of dealing with the case justly and at a proportionate cost.

63. It does not seem to me that, as a general principle, the defendant has to provide information about third party companies where such information can be obtained elsewhere. The fact that it would have been much simpler and cheaper all round if it had done so simply has costs consequences.

64. Therefore, whilst I am not going to make the order the claimant seeks in this respect, I am also not going to make any order for costs in the defendant's favour for declining to assist. Furthermore, if the claimant is ultimately successful in respect of the apparent dispute in relation to the cash account, I will entertain a submission that the costs of the

correspondence etc are recoverable, notwithstanding that they have not been allowed by the order in this application.

65. The overall result of this judgment is a finding in favour of the defendant on all three applications.