Neutral Citation Number: [2019] EWHC 1339 (Comm)

Case No: C40MA059

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (QBD)

Manchester Civil Justice Centre,
1 Bridge Street West,
Manchester

Date: 24 May 2019

Before :

His Honour Judge Pearce

- -

Between :

SUSAN ANNE PLEVIN	**Claimant**
- and -	
DAS LEGAL EXPENSES INSURANCE COMPANY LIMITED	**Defendant**
- and -	
MILLER GARDNER LIMITED (in administration)	**Third Party**

- -
- -

Mr Stewart Chirnside (instructed by **Miller Gardner Limited**) for the **Claimant and Third Party**
Mr Alexander MacDonald (instructed by **Clyde and Co LLP**) for the **Defendant**

Hearing dates: 5th, 6th and 7th March 2019

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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.

His Honour Judge Pearce:

Introduction

1. In this claim the following relief is now sought:

    a. By Mrs Plevin against DAS, declarations as to the extent of cover provided under an after the event legal expenses insurance policy issued by the Defendant to the Claimant;

    b. By DAS against Miller Gardner[1], the repayment of monies advanced to Miller Gardner under a funding agreement and the repayment of premium received by Miller Gardner.

2. DAS originally sought further relief as follows:

    a. Relief in a counterclaim against Mrs Plevin. In the light of how Mrs Plevin and Miller Gardner put their cases, the counterclaim is not pursued.

    b. In the claim against Miller Gardner, relief in respect of a number of other cases (relating to the so-called "Schedule 1 Insureds") insured by DAS. At the beginning of the trial, I struck that claim out for reasons given at the time.

3. In summary, Mrs Plevin purchased a PPI policy from Paragon Personal Finance Ltd ("Paragon"). She subsequently contended that she was entitled to relief under section 140B of the Consumer Credit Act 1974 in respect of that purchase. The claim was tried in the County Court in October 2012 ("the first CC trial"). Mrs Plevin was unsuccessful. She appealed to the Court of Appeal ("the CA appeal"), who, in December 2013, allowed her appeal. Paragon in turn appealed to the Supreme Court ("the SC Appeal") who, in a hearing which led to judgment being handed down in November 2014, dismissed the appeal and remitted the matter to the County Court. The remitted hearing ("the second CC trial") took place in March 2015. Mrs Plevin was awarded damages including interest in the sum of £4,500. The Judge adjourned the issue of costs. Paragon made various applications to the Supreme Court, including an

[1] The Claimant's solicitors' firm has in fact had three incarnations during these proceedings: the first was Miller Gardner (a firm); the second, Miller Gardner LLP; and the third, Miller Gardner Limited. The original CFA policy was entered into by the first of these. The benefit of the CFA was subsequently assigned first to Miller Gardner LLP then to Miller Gardner Ltd. No issue arises in these proceedings as to the validity or effect of these assignments and therefore, for the sake of simplicity, the solicitors are simply called Miller Gardner throughout.

application to set aside the costs order made on the SC appeal ("the SC applications"). The SC applications were dismissed with costs in March 2017. On 22 June 2017, the adjourned costs issue from the second CC trial was dealt with in the County Court, the Judge ordering that Mrs Plevin should pay Paragon's costs from 27 January 2015 to 2 March 2015 but that otherwise there should be no order as to costs in respect of the claim.

4. The full chronology of events, including relevant events relating to the funding of the claim, is set out in the Appendix to this judgment. I have also been greatly assisted by the narrative chronology set out in the skeleton argument of Mr Chirnside.

Miller Gardner's original agreement with DAS

5. In 2008, Miller Gardner was involved in representing claimants, such as Mrs Plevin, in cases arising from alleged financial mis-selling. Such a claim would be funded by a conditional fee agreement ("CFA") backed in respect of liability for costs by an after the event insurance policy ("ATE").

6. Miller Gardner started to issue ATE policies in respect of financial mis-selling claims with DAS (which operated under a trading name, 80e) under the delegated authority contained in an agreement between them and DAS called a Terms of Business Agreement ("TOBA") entered into in 2008[2]. That agreement contained a number of significant terms:

    a. By Schedule II, the agreement dealt with procedures for the issuing of insurance. The insurance policy that was issued had three stages: stage A, pre-issue; stage B, post-issue; and stage C, trial. Reporting was required as follows:

> "*The firm[3] shall carry out a continuous risk assessment of each case to ensure that the prospects of success remain at 60% or above and if prospects of success fall below 60% the firm must notify 80e immediately for confirmation that indemnity will remain in force….*

[2] A later TOBA was entered into in 2012, as referred to below. To distinguish them, the two agreements will be called the 2008 TOBA and the 2012 TOBA.
[3] The solicitors – in this case, Miller Gardner.

On acceptance of each new case, 80e shall issue two copies of the 80e Schedule of Insurance. The firm shall promptly issue the Schedule together with the Policy wording to the Policyholder and a copy of the Schedule to the opponent.

The firm shall advise 80e of each case prior to the issue of proceedings (stage b of the policy). …

The firm must then advise 80e of the level of indemnity required to conclude the case (in multiples of £5,000) and confirm their assessment of prospects. The premium for stage b will then be individually assessed by 80e…

Once proceedings have been issued 80e will send an amended Insurance Schedule to the firm, applicable from the date of service. The firm shall promptly send the amended Schedule to the policyholder and a copy to the opponent….

For each case that reaches stage c of the policy, the firm shall provide an estimate of their disbursements to conclusion of the case together with an estimate of the opponent's costs and disbursements to conclusion. Where possible this estimate should be taken from the opponents listing questionnaire. The premium for stage c will then be individually assessed by 80e. Once assessed, 80e will send an amended insurance Schedule to the firm. The firm shall promptly send the amended Schedule to the policyholder and a copy to the opponent."

Mrs Plevin's engagement of Miller Gardner

7. In terms of legal representation, Mrs Plevin engaged Miller Gardner to act on her behalf in respect of all of the proceedings referred to in paragraph 3 pursuant to a CFA. The only letter of engagement of Miller Gardner, dated 19 July 2018 and signed by Mrs Plevin on 20 July 2018 ("the LOE"), provided, amongst other things:

"3. Conditional Fee Agreement

In this case we are prepared to act on a conditional fee agreement which is enclosed in duplicate together with an explanatory information document which hopefully makes entirely clear the basis of our charges, both of which you should sign, but do not date, and please return to me in the enclosed freepost envelope.

…

4. Payment Terms

We ask you to provide us with standing instructions, that, as and when we feel it appropriate, we can issue the claim on your behalf and present it to the bank. We only ask you to forward now £15 (if not already done so) so we can apply for a list of charges. We shall not require any more monies whatsoever, other than sums which are payable from recoveries…"

8. However it should be pointed out that the LOE refers to a claim against Loan Line, the broker who recommended that she take out a loan with Paragon. It is the Claimant's case that no letter of engagement relating to the claim against Paragon was created and no one has produced such a letter. By Paragraph 2 of the Reply, the Claimant admits that the terms of the LOE apply to the claim against Paragon, but in her skeleton argument she raises doubt about this issue.

9. The CFA was signed by Mrs Plevin. The agreement date is said to be 19 June 2008 though there is no date next to her signature nor that on behalf of Miller Gardner. The material parts of the agreement were as follows:

"This agreement is a binding legal contract between you and your solicitor/s. Before you sign, please read everything carefully. This agreement must be read in conjunction with the document enclosed "What We Do Next".

…

What is covered by this agreement

• Your claim against PARAGON PERSONAL FINANCE LIMITED for damages and refunds of unfair, unlawful or improper payments suffered as a result of your loan arrangements or payments for any insurance on related product with Banks or Institutions named above.

• Defending any claim brought against you whether directly or by way of counterclaim for payment of monies under a consumer credit agreement or other loan agreement.

• Any appeal by your opponent.

• Any appeal by you against an interim order.

• Any proceedings you take to enforce a judgment, order or agreement.

• Negotiations about and/or a court assessment of the costs of this claim.

What is not covered by this agreement

• Any counterclaim against you.

• Any appeal you make against the final judgment order.

…

Paying us

If you win your claim, you pay our basic charges, our disbursements and a success fee. You may be entitled to seek recovery from your opponent of part or all of our basic charges, our disbursements, a success fee and insurance premium. "Win" for these purposes, means an agreement or Judgment in your favour and including provision for a costs order or award payable to you by your opponent. Win also includes relieving you of liability in whole or in part from any monies being claimed against you.

…

Work Covered

This agreement covers all work carried out from the date of your initial instructions notwithstanding that this date may well pre-date the date of this agreement and covers steps taken to seek leave to Appeal any final Judgment.

The Success Fee

The success fee is set at 100% of basic charges, where the claim concludes at trial…"

10. The document entitled "What We Do Next" ("WWDN"), attached to the CFA, provided amongst other things:

"What we do next

- *Once you have signed and returned the terms of Business Letter, Conditional Fee Agreement And documentation in connection with money laundering requirements we shall continue with your case*

  …

Costs and our Conditional Fee Agreement (CFA) with you.

- *As we have explained your liability for costs is pursuant to the terms of the CFA which means that provided you co-operate at all times and provide us with instructions promptly and regularly, there will be no obligation upon to you (sic) meet the costs incurred.*
- *Should your case not succeed for any reason or the matter is lost at Trial or we deem the prospects of success by reason of a change in law, or upon taking full and more detailed instructions from you as unlikely to succeed, we have the right to discontinue which means that if the claim has been presented to the Court you will be liable for the other side's costs. However, the reason we require you to take out costs insurance is to protect you against such liability and the costs insurance will completely indemnify you for such costs.*
- *We only get paid if your claim is successful so you understand that we have taken on your case in the expectation that in due course the case will settle or you will succeed at Trial…"*

11. The CFA was varied to cover the CA appeal, the SC appeal and the SC applications[4]. The terms were the same as those of the original CFA save that:

[4] The variations are referred to as the CA variation, the SC variation and the SC applications variation respectively.

a. The definition of "win" was amended to "*succeeding wholly or in part in respect of the appeal and includes any costs order in [Mrs Plevin's] favour";* and

b. The success fee was varied from 100% to 96% under the variation relating to the SC appeal.

After the Event Insurance Policy taken out by Miller Gardner with DAS

12. In accordance with the 2008 TOBA, DAS confirmed cover under the Policy and issued the first schedule to Mrs Plevin on 29 October 2008. As a result of an error by DAS, the schedule referred to the policy wording of DAS's Business Litigation Policy ("*the Business Policy*") whereas it should have referred to the wording of the Personal Litigation Policy ("*the Personal Policy*"). The wording of the two policies is materially identical for present purposes. DAS confirmed during the course of the SC applications that, insofar as the wording of clause 4 of the Personal Policy differs from the wording of the Business Policy, it would not seek to rely on the Business Policy wording and would be bound by the Personal Policy wording.

13. The Business Policy provides:

> "*This is your 80e Justice Solutions Business Litigation Legal Protection Policy. Along with your 80e schedule of insurance, your policy sets out the terms of your insurance cover and when your insurance premium is due.*
>
> …
>
> *Your policy and 80e schedule of insurance attach to your conditional fee agreement and operate for the duration of that agreement*
>
> *The insurance premium due for your policy is payable at the end of your claim (by court decision or settlement) or if your policy ends for any reason.*
>
> *The level of your insurance premium depends on the stage at which your claim ends. It is calculated using the formula set out in your 80e schedule of insurance. The three stages are listed below.*
>
> *a. Before court proceedings are issued.*
>
> *b. From issue of court proceedings up to stage c.*
>
> *c. From 14 days before the trial date, or the trial period if applicable."*

14. The relevant part of the Business Policy, dealing with the extent of its cover, provides:

> *"What is COVERED*
>
> *1. We will pay your solicitor's disbursements, barrister's fees and your opponent's legal costs and disbursements (and your opponent's insurance premium if*

recoverable from you) and we will indemnify you against your liability to pay your insurance premium for your policy:

(a) If you lose; or

(b) If your claim is withdrawn by agreement between us and your solicitor; or

(c) If, after a Part 36 offer, you win but a court awards you damages which are less than the offer to settle.

2. *We will pay your solicitor's basic charges, disbursements, barrister's fees and success fee and your opponent's legal costs and disbursements if you win, except in the circumstances set out in 1(c) above, but the court orders that you pay part or all of these costs.*

3. *We will pay your solicitor's disbursements, barrister's fees and success fee if you win but your opponent cannot pay what the court orders them to pay.*

4. *The most we will pay under your policy is shown in your 80e schedule of insurance plus the amount, if any, you are liable to pay for your insurance premium.*

15. The slight difference in the Personal Policy is that clause 4 above is renumbered 5 and is preceded by a new clause 4 which states:

> "*We will indemnify you against your liability, if any, to pay your insurance premium for your policy if you win and cannot recover the premium in full or in part."*

Further dealings between Miller Gardner and DAS

16. As noted above, in 2012, DAS and Miller Gardner entered into a new TOBA. For present purposes, the important difference between the 2012 TOBA and the 2008 TOBA was the provision for payment of commission to Miller Gardner in the latter. The agreement is stated to apply to:

> "*all 80e Justice Solutions Legal Protection Insurance Policies sold by the firm on or after 1 March 2012."*

Schedule V of the agreement, relating to commission, provides:

> "*All premiums are deferred until the conclusion of the case and the premium amounts will be shown in the Insurance Schedule. Commissions will be paid on conclusion for Won cases only in the following amounts:*
>
> *Stage 1*[5]*: 20%*
>
> *Stage 2: 20%*
>
> *Stage 3: 10%*
>
> *For cases which progress to Stage 3, the commission will be based on the actual premium collected."*

[5] At an earlier point in the 2012 TOBA, reference is made to Stages A, B and C, which correspond to the stages referred to above in respect of the 2008 TOBA. Stages 1, 2 and 3 are not separately defined, but it was common ground that they were synonymous with stages A, B and C.

17. At around the same time, Miller Gardner entered into a further agreement with DAS, known as the Forward Funding Agreement ("the FFA"), pursuant to which DAS paid certain monies to Miller Gardner in respect of the funding of disbursements.

18. An email dated 27 March 2012 from Mr Mayhew of DAS to Mr Gardner is the only contemporary written evidence of the FFA. The material part of the email states:

> "*I can also confirm that we have agreed to fund your disbursements on insured cases; disbursements will include counsel's fees, court fees, any necessary expenses, such as agents fees or experts fees and costs drafting fees. 80e will endeavour to arrange for payment of your disbursements within 7 days of receiving the request and I would request that, in successful cases, you refund the disbursements within 7 days of costs recovery by you."*

The Issues

19. The issues that arise in this case revolve around:

    a. Whether Mrs Plevin's liability for Miller Gardner's basic charges, disbursements and success fee relating to the claim against Paragon is limited by the terms of CFA to such of those costs as may in fact have been recovered from Paragon in the claim ("issue 1")[6].

    b. Whether, on the true construction of the ATE policy, the indemnity cover provided by DAS to Mrs Plevin included:

        i. Miller Gardner's basic charges, disbursements and success fee, in so far as Mrs Plevin may be liable for those ("issue 2");

        ii. Mrs Plevin's costs of the remitted proceedings ("issue 3");

        iii. Mrs Plevin's costs of the detailed assessment proceedings relating to the CC proceedings ("issue 4");

        iv. Mrs Plevin's costs of the detailed assessment proceedings relating to the CA appeal ("issue 5");

        v. Mrs Plevin's costs of the detailed assessment proceedings relating to the SC appeal (including the SC applications) ("issue 6");

[6] Whilst this issue might be thought to raise a conflict of interest between the Claimant on the one hand and the Third Party on the other, Counsel who represented both parties assured me that the matter had been carefully considered and that no conflict arose in reality.

c. If the finding on issue 2 is that, on the true construction of the ATE policy, the indemnity liability of DAS included the basic costs and success fee of Miller Gardner, whether Miller Gardner are nonetheless estopped from recovering such costs and fee ("issue 7");

d. The extent to which, if at all, Miller Gardner is liable to repay monies advanced under the FFA ("issue 8");

e. The amount of monies advanced to Miller Gardner pursuant to the FFA which have not been refunded to DAS ("issue 9");

f. Whether Miller Gardner are entitled to deduct commission from premium recovered in respect of the ATE policy before accounting to DAS ("issue 10").

20. Whilst issues 4, 5 and 6 are on their face separate, the arguments in respect of issues 5 and 6 are identical and they can conveniently be dealt with together. Issue 4 raises very similar but not identical issues and is dealt with separately.

The Evidence

21. During the course of the trial, I heard evidence from Mr Gardner the Managing Director of Miller Gardner, on behalf both of his company and Mrs Plevin. DAS called Mr Brown, an underwriting manager, and Mr Petty, as an expert in litigation funding including the ATE market.

22. In his oral evidence Mr Gardner explained that he was the sole director of Miller Gardner from 2008. Since that time, his firm have specialised in financial mis-selling claims. This would usually involve his firm entering into a CFA with the client. Counsel would not act under a CFA and insurance cover was required in respect of claims.

23. Miller Gardner and DAS had entered into the 2008 TOBA in 2008 under which DAS agreed to provide relevant insurance cover. They had also insured cases through an ATE product issued by Temple. That policy had the disadvantage that counsel's fees were not insured. This was an area of work where counsel would not generally act under a CFA so the DAS policy had distinct advantages in insuring counsel's fees.

24. Mr Gardner said that Mr Mayhew of DAS visited him in early 2012, saying that DAS were very pleased with Miller Gardner, who were "*singular"* amongst solicitors with

whom DAS were dealing in having been successful in all cases without any adverse claims. Mr Mayhew said that he "*wanted to help"* Miller Gardner by entering into a forward funding agreement and a new agreement that would provide incentive by way of commission. This led to the revisions in the 2012 TOBA between Miller Gardner and DAS, which was sent by Mr Mayhew to Mr Gardner under cover of the email dated 27 March 2012. The agreement attached to the email was signed in March 2012.

25. Of the payment of commission under the 2012 TOBA, Mr Gardner stated that Mr Mayhew wanted his firm to write as much business as possible and *"would be happy to take work from other insurers."* He said that he asked Mr Mayhew what would happen if one of the cases went to the Court of Appeal. Mr Mayhew responded that it would be treated as a new policy and hence commission would be payable. He said that "*this was the basis on which I understood the new arrangement."* Mr Gardner acknowledged that the terms under which commission would be paid should an existing case be subject to an appeal were not spelt out either in the 2012 TOBA or elsewhere.

26. It was put to Mr Gardner that, when issues developed between his firm and DAS relating to the costs of the case, his initial position was that he was withholding insurance premium not on the basis of any right to commission but as security for other claims against DAS. In particular, his attention was drawn to a letter from him to DAS dated 27 April 2017. He accepted that he had not raised the issue of withholding commission until his letter to DAS of 4 July 2017.

27. Mr Gardner was also asked as to why his firm's pleaded case did not state the case that he was now advancing, namely that the contractual terms by which his firm had a right to commission were only part contained in the 2012 TOBA, there being a further term agreed orally that commission would be payable on variations to pre-existing insurance policies where the case was subject to an appeal. He responded that he had initially considered that the right to commission arose from the written terms of the 2012 TOBA but, when counsel pointed out that a strict interpretation of the document was against this, he had sought to rely on the oral agreement.

28. Mr Gardner was asked about his understanding of his firm's entitlement to recover their own costs. He said that cover was widely available from ATE insurers for solicitor's own profit costs. However, on further exploration, it became clear that some of the sources of Mr Gardner's belief that such cover was available comprised material

relating to the availability of such cover when a claim was lost and that the only situation that Mr Gardner had in mind where insurance cover might be available for the solicitors' own costs in spite of the claim being successful was where the Defendant was insolvent and could not meet an order for costs. (Of course such a situation is expressly contemplated at clause 4 of the agreement referred to at paragraph 14 above.)

29. Mr Gardner's evidence was that it was his firm's practice to send costs details including his own firm's basic fees. This can be seen in the costs estimate sent to the Defendant under cover of a letter dated 9 December 2010. He accepted that, as of a letter dated 22 December 2010, DAS had stated that their policy only included the Defendant's costs and disbursements and the Claimant's disbursements after the CFA was entered into. He said that he did not reply to the letter to state that he understood cover to include his firm's profit costs because he did not want to get into an issue with DAS in respect of a situation that might never arise.

30. Of the FFA, Mr Gardner said that its purpose was to assist his firm with their cashflow. DAS could not informally loan money but there was no bar to its advancing disbursements which would either be recouped from the opponent and repaid to DAS or met by DAS under the terms of the ATE policy.

31. It was Mr Gardner's evidence at paragraph 6(i) of his seventh witness statement that, at the same time as the payment of £65,000 to his firm by Paragon, the sum of £235,000 was paid to DAS of which £60,000 relating to the balance of forward funding was paid to DAS. Mr Gardner recorded an agreement to the payment of £235,000 in an email to Mr Brown dated 10 July 2018. This is consistent with Mr Gardner's case more generally that, apart from the payment of £14,478 which Miller Gardner accept in principle was repayable to DAS but which was set off against a liability from DAS to it in the circumstances agreed in closing submissions to arise from a liability of DAS to Miller Gardner in respect of an adverse costs order, all sums due to be repaid to DAS under the FFA have been accounted for.

32. As to the individual sums involved, the position is somewhat confused. Mr Gardner was unable to give detail of the figures and deferred to counsel's calculation. This is dealt with further below.

33. Mr Gardner's oral evidence was measured in tone. I found nothing in it to suggest that he was trying to do other than assist the court with his recollection. However, the tone

of his witness statements is far less measured. He is repeatedly highly critical of DAS – examples include paragraphs 12 and 29 to 34 of his statement of 14 September 2018 and paragraphs 11 to 20 of his statement of 28 September 2018. The latter passage is particularly striking given Mr Gardner's concession in cross-examination that the situation that he was contemplating in respect of which an insurer would provide cover in a case that the Claimant won was where there was a costs order in favour of the Claimant but the Defendant was insolvent and therefore unable to meet the costs order. Indeed, in spite of calling Mr Petty's opinion "*ill thought*" at paragraph 19 of his statement of 28 September 2018, the example that Mr Gardner gives following a call to an ATE insurer is of own side's costs being recoverable where the case loses, not the situation as here where the claim was successful but there was no costs recovery for whatever reason.

34. It is clear from these statements that Mr Gardner holds DAS in low regard. In contrast, he emphasises his own role in pursuing Mrs Plevin's case against Paragon, particularly in respect of the SC applications, notwithstanding the difficult position in which he found himself because of DAS's stance on costs[7]. Whilst he may well be justified in some or all of his criticism of DAS, the tone of Mr Gardner's written evidence leads to the conclusion that he may have lost a degree of objectivity in his account of matters. Where his account does not tally with contemporaneous documents this causes me some caution in accepting it.

35. On behalf of DAS, Mr Brown accepted that the figures claimed in respect of forward funding, both relating to Mrs Plevin and to the Schedule 1 insureds, were overstated.

36. He further accepted that he could not speak to the detail of conversations between Mr Mayhew and Mr Gardner. He did not deal with Mr Gardner to any significant extent until Mr Mayhew was promoted from the role of operations manager in (he accepted) July 2012[8]. When he did become involved with Mr Gardner, he was surprised to learn of the FFA. He accepted that he did not approve of this agreement and indeed investigated whether DAS could find grounds to go behind it.

37. In his written evidence, Mr Brown stated:

[7] See for example paragraph 13 of the statement of 14 September 2018.
[8] The date appears at paragraph 45 of his statement of 14 September 2018, although Mr Brown did not appear to have personal knowledge of the date.

"*DAS provided the ATE insurance to Mrs Plevin and rated both the Stage C premium and premiums for extensions of cover in respect of the Court of Appeal and Supreme Court appeals, on the understanding that the cover did not extend to Miller Gardner's own costs or success fee in any circumstances. Had Miller Gardner stated at the time Mrs Plevin's policy was underwritten, whether in connection with Mrs Plevin's policy or other claimants represented by Miller Gardner, that in fact Miller Gardner or the insureds understood the cover to extend to Miller Gardner's own costs, DAS would have declined to proceed with the risk on those terms. In the unlikely event that DAS would have been prepared to include Miller Gardner's own costs within the indemnity, DAS would have insisted on being given full information about Miller Gardner's own fees (including and success fee) and charging a higher premium accordingly.*"

38. Mr Brown was not cross-examined on this passage, it being the Claimant's case that DAS' subjective belief about the extent of cover is not relevant to the issue of the proper interpretation either of the CFA or the insurance policy. In so far as this evidence may be relevant, it was unchallenged.

39. Mr Brown was asked about the provision by Miller Gardner of information about its own costs. He said that the costs estimate attached to the letter of 9 December 2010 could be seen as evidence that Miller Gardner believed that DAS' policy covered their own costs, but he offered the alternative suggestion that the use of a costs estimate was simply a convenient way to inform DAS of what it was interested in, namely disbursements.

40. Mr Brown was asked about the dealings under the FFA. As the case developed, it became apparent that the issues between the parties were narrow, in particular on the issue 9, the amount of monies paid under the FFA that had not been repaid to DAS. The differences about the FFA largely turned on legal issues that are considered in the analysis of issue 8 below.

41. However, on two points, Mr Brown gave evidence of significance.

    a. He was asked about the payment of fees relating to counsel, Mr Robert Marven, in the SC appeal. Mr Brown said that Mr Marven was paid directly rather than as a disbursement to Miller Gardner under the FFA. However he said that they had agreed to pay Mr Marven directly on the basis that the payment would be dealt with in the same way as a payment under the FFA. He agreed that there was no written evidence of such an agreement and said that,

although he believed there had been "*exchanges*" about this issue, he had not been involved in them.

b. In so far as the payment of monies relating to fees in the CA appeal was concerned, he accepted that £60,000 was repaid by Paragon to DAS, the priority of DAS being to get funds in. They had not sought a higher figure.

42. As indicated above, Mr Petty gave evidence as an expert on the issue of market practice. His attention was drawn to his statement at paragraph 3 and in particular the assertion that he did "*not have any conflict of interest of any kind."* He accepted that the insurance brokers for whom he worked as a consultant at the time of signing his statement had a commercial relationship with DAS. He was unaware that Miller Gardner had been a client of those same brokers, as Mr Gardner asserted to be the case.

43. On the issue of market practice, Mr Petty accepted that ATE insurance in respect of PPI claims was a new market when the 2008 TOBA with Miller Gardner was entered into. However it was considered to be similar to the market for ATE insurance for personal injury and clinical negligence claims. He expressed some agreement with what Mr Gardner had said about the availability of cover for own side's costs and accepted that it was possible to get ATE insurance cover for a solicitor's own costs in 2008, but only when the case lost and then only for base costs, not the uplift. Even then, such cover was not common.

44. Mr Petty accepted that whether the terms of dealing in this case covered the Claimant's own costs turned on the terms of the CFA and the particular policy. However, he maintained, as set out in his report, that cover was not generally available for the solicitors' own costs when the case was successful but there was not full recovery of those costs.

45. Mr Petty's assertion that the kind of cover for which the Claimant in this case contends would provide a "*perverse incentive to increase own side's costs",* as stated at paragraph 33 of his report, is an obvious point to make. However, I was not persuaded on his evidence that there could be said to be any established market practice in 2008 relevant to the proper interpretation of the agreements entered here.

The Law

46. There is largely common ground on the applicable law relating to the issues in this case.

47. In the leading case of Arnold v Britton [2015] UKSC 36, Lord Neuberger set out the fundamental principles to be applied at paragraph 15 of his judgment

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions..."*

48. Lord Neuberger then went on to set out seven principles of which two are particularly important on the facts of this case:

> *"[18] Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning…*
> *[20] Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice."*

49. In Wood v Capita [2017] UKSC 24, Lord Hodge considered further the approach to the construction of contracts:

> *"[10] The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the*

> *wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning…[11]…Interpretation is, as Lord Clarke stated in Rainy Sky (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense…[12] This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated…[13] Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements."*

50. In so far as the court is concerned with the interpretation of the insurance policy, where there is ambiguity in the policy, it is to be interpreted against the drafter; but for this principle to apply, the ambiguity must be genuine (see Colinvaux's Law of Insurance, Eleventh Edition, paragraph 3-011).

51. The doctrine of estoppel by convention has been stated, by the authors of Chitty, Thirty-Second Edition, paragraph 4-108, as follows:

> "*Estoppel by convention may arise where both parties to a transaction* '*act on assumed state of facts or law', the assumption being either shared by both or made by one and acquiesced in by the other. The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable (typically because the benefit has been 'materially influenced' by the common assumption) to allow them to go back on it. Such an estoppel differs from estoppel by representation and from promissory estoppel in that it does not depend on any representation or promise."*

52. In HMRC v Benchdollar Ltd [2010] 1 AER 174 at paragraph 52, Briggs J (as he then was), in a passage that was subsequently reformulated by him in Stena Line v Merchant Navy [2010] EWHC 1805 by the addition of the words in the square brackets in (i), set out the requirements for estoppel by convention as follows:

> "*(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly [or implicitly by words or conduct from which the necessary sharing can properly be inferred] shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in*

the sense of conveying to the other party an understanding that he expected the other party to rely on it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

Issue 1 - Was Mrs Plevin's liability for Miller Gardner's basic charges, disbursements and success fee relating to the claim against Paragon limited by the terms of CFA to such of those costs as may in fact have been recovered from Paragon in the claim?

A. The Claimant's case

53. The Claimant contends that the true meaning of the CFA was that the Claimant was liable to pay Miller Gardner's basic charges, disbursements and success fee if she "won" her claim against Paragon, that is to say obtained judgment against it for damages or other payment pursuant to the Consumer Credit Act, regardless of whether the court made an order for costs in her favour.

    a. This is the natural meaning of the words in the CFA set out at paragraph 9 above, namely:

    "*'Win' for these purposes, means an agreement or Judgment in your favour and including provision for a costs order or award payable to you by your opponent."*

    b. In so far as the word "*including*" creates some kind of ambiguity, it should be read as meaning "*includes*", in which case the meaning is clear that either judgment in the Claimant's favour or a costs order in her favour is sufficient to establish liability to meet Miller Gardner's costs.

    c. The CA variation, the SC variation and the SC applications variation each define "*win*" in this manner. The Claimant's suggested interpretation would lead to consistency between agreements.

54. In respect of the Defendant's case, the Claimant contends:

    a. The Defendant's argument that "win" is defined as being both judgment and an order for costs in her favour might have been the natural meaning if the wording of the CFA had been "*'Win' for these purposes, means an agreement*

or Judgment in your favour <u>*including*</u> (my emphasis) *provision for a costs order or award payable to you by your opponent.*" But the inclusion of the word "*and*" suggests a disjunctive interpretation.

b. The Defendant's argument as to the definition of "*win*" would create an inconsistency in that success by a Claimant in defending a counterclaim would render the Claimant liable for Miller Gardner's costs even without an order for costs in her favour because of the later definition of win in that context as including "*relieving you of liability in whole or in part from any monies being claimed against you*."

c. If the Defendant's interpretation is favoured, the Claimant could win a substantial sum by way of damages or statutory compensation yet have no liability to meet Miller Gardner's costs. It is unlikely that this is what the parties intended.

d. In so far as reliance is placed on the LOE, this relates to the claim against Loan Line and cannot necessarily be read as applying to the claim against Paragon.

e. Even if the LOE is found to govern the relationship between Mrs Plevin and Miller Gardner relating to the Paragon claim, it is not intended to limit Mrs Plevin's liability for costs, merely to define when they may seek payment of those liabilities from her. The mere fact that it is vanishingly unlikely that solicitors will seek to recover their costs from a client does not mean that the client is not liable for such costs – see paragraph 30 of the judgment of Slade J in <u>HMRC v Gardiner</u> [2018] EWHC 1716 (QB).

55. The Claimant concedes that, if DAS's interpretation of the CFA is to be preferred, the Claimant is not required to pay Miller Gardner's costs of the County Court proceedings because, although she was awarded damages of £4,500, the Court made no order for costs in her favour in respect of the original County Court trial.

B. The Defendant's case

56. By paragraph 5.1 of the Defence, the Defendant appeared to be arguing that there were no circumstances in which the Claimant was liable for Miller Gardner's costs and therefore no prospective liability under the ATE insurance policy. In written

submissions, the Defendant accepted that the presumption is in favour of a client who had instructed a solicitor to represent them being liable for costs incurred by the solicitor[9]. The Defendant also made clear that it did not dispute that there were circumstances in which she was liable for the basic charges, disbursements and/or success fees but that these were limited to where those costs were the subject of an order for payment by Paragon.

57. The Defendant contends that the proper interpretation of the CFA is that costs are only payable where the Claimant obtains judgment in the case and also a costs order in her favour. This interpretation is to be drawn from the following:

    a. The definition of "*win*" in the CFA, namely "*an agreement or Judgment in your favour and including provision for a costs order or award payable to you by your opponent"* is only consistent with the requirement for an agreement or judgment in the Claimant's favour and an order for costs in the Claimant's favour as being cumulative requirements.

    b. This interpretation is consistent with the commercial purpose of the CFA, namely that the Claimant should be able to bring the claim without exposure to costs and that Miller Gardner should be recompensed if and to the extent there is an order for costs in the Claimant's favour.

    c. The CFA expressly deals with situations where the Claimant's obligation to pay costs is not triggered by an order for costs in her favour. So for example where the case is allocated to the small claims track and is successful or settles before proceedings are commenced, a fixed figure of 25% of the amount recovered plus VAT is payable. The express provision for payment in such circumstances is inconsistent with there being a more general liability on the Claimant's part for Miller Gardner's costs where costs are not recovered.

    d. The wording of WWDN as set out at paragraph 10 above, specifically the phrase "*provided you co-operate at all times and provide us with instructions promptly and regularly, there will be no obligation upon to you (sic) meet the costs incurred"* is only consistent with there being no circumstances in which

[9] See HMRC v Gardiner [2018] EWHC 1716 at paragraph 30.

the Claimant can be liable for costs beyond those where there is recovery for them.

e. The terms of the LOE indicate the only circumstances in which costs will be payable by the Claimant. They do not cover this situation.

58. The Defendant rejects the Claimant's interpretation.

a. The apparent inconsistency between this position and that where, in successfully resisting a counterclaim, the wording of the CFA would potentially make the successful Claimant liable for Miller Gardner's costs even if there were no costs order in her favour is met by reading the words "*relieving you of liability in whole or in part from any monies being claimed against you*" as a substitute for "*an agreement or judgment in your favour*" such that there is a cumulative requirement of success in defending the counterclaim and a costs order in the Claimant's favour. This would give consistency between the two situations.

b. The interpretation contended for by the Claimant would have the consequence that a costs order on one issue would trigger a liability for all of Miller Gardner's costs. It is unlikely that the parties would have intended this.

c. Whilst it is true that the Defendant's interpretation leads to the possibility that the Claimant might recover substantial damages but not its costs, that is an unlikely scenario. In any event, it would be the consequence of a bad deal, which is not a reason to depart from the normal meaning of language (see Lord Neuberger in Arnold v Britton at paragraph 20, cited above).

d. The suggestion that the CA variation, SC variation and/or SC applications variation can be used to assist in the proper interpretation of the CFA is contrary to principle, given that these were variations after the CFA was entered into.

C. Discussion

59. This is not a case in which one party can show that its reading of the language of the CFA is more natural than that of the other. The use of "*including*" rather than

"*includes*" undermines the Claimant's proposed interpretation; the inclusion of "*and*" undermines the Defendant's case.

60. I do not see that the change of the wording by substituting "*includes*" for "*including"* in the later variation documents as set out at paragraph 11 above can rescue the Claimant's case on this ambiguity. The very fact that the words were changed suggests that the author saw an ambiguity in them. The fact that the parties later signed up to clear wording might at best be said to be evidence that they intended that wording at the outset – yet to interpret the agreement on that basis would be to succumb to the temptation to search out evidence of the parties' subjective intention, exactly that which is prohibited by the sixth of Lord Neuberger's points at paragraph 15 of the judgment in Arnold v Britton.

61. There is force in the argument of each party that the other's interpretation of the CFA could give rise to an outcome that cannot have been intended. The Claimant's interpretation would lead to a situation in which she might be liable to meet Miller Gardner's costs simply because a costs order was obtained en route to an unsuccessful claim. Equally, it would seem unlikely that the parties would have intended a situation to arise that can be contemplated on the Defendant's case in which the Claimant recovers a substantial sum by way of damages but does not obtain a costs order in her favour, thereby avoiding any liability for the solicitors' own costs. But of these two, the former seems contrary to the whole concept of a "*no win no fee agreement*" as expressed in the passage from WWDN cited at paragraph 10 above, whereas the latter seems simply to be the kind of bad bargain that Lord Neuberger would say the court should disregard. Thus the Defendant's interpretation more naturally coincides with the commercial common sense of the relationship.

62. The particular definition of the entitlement to costs where the claim is settled before the issue of proceedings or is resolved in the Claimant's favour on the small claims track is an indication that the term "*win*" is not intended to encompass all situations where the claim is resolved by a judgment or settlement in the Claimant's favour. It is also striking that the definition of "*win*" within the CFA immediately follows reference to the possibility that a person may be entitled to recover basic charges, disbursements, success fee and insurance premium from the opposing party. The more natural meaning of the disputed definition is that the word "*win*" is defined so as to encompass

succeeding in the claim where the order for costs encompasses recovery of those costs. Again the Defendant's interpretation is preferable.

63. For these reasons, I find that the true interpretation of the word "*win*" to give rise to a liability on her part for Miller Gardner's basic fees, disbursements and success fee within the CFA is the obtaining of judgment (or settlement of the claim) in the Claimant's favour coupled with the obtaining of an inter partes costs order in her favour and that her liability for those costs is to the extent of the order for costs in her favour.

64. For the sake of completeness, I should add that I do not find the argument based on the LOE to add to the case advanced by DAS on this issue and it is not therefore necessary to consider whether that in fact governs the relationship between Mrs Plevin and Miller Gardner in respect of the claim against Paragon.

Issue 2 - On the true construction of the ATE policy, did the indemnity cover provided by DAS to Mrs Plevin include Miller Gardner's basic charges and success fee, in so far as Mrs Plevin may be liable for those?

A. Introduction

65. Given my finding on the issue of the true interpretation of the CFA between Mrs Plevin and Miller Gardner, it is not strictly necessary to decide the issue of the ambit of cover under the insurance policy, since the only liability that Mrs Plevin has to Miller Gardner is that which is the subject of an inter partes costs order and there are no further costs in respect of which Mrs Plevin could claim indemnity under the policy. However for the sake of completeness, it is appropriate to consider what my findings would have been on this issue.

B. The Claimant's case

66. In so far as, contrary to the finding made above, Mrs Plevin were found to have won the claim against Paragon within the meaning of the CFA such that she was liable for Miller Gardner's basic fees and success fee, she argues that DAS is liable to indemnify her in respect of such fees on the true construction of the ATE policy.

67. The Claimant's starting point is the terms of clause 2 of the ATE policy, providing:

> "*We will pay your solicitor's basic charges, disbursements, barrister's fees and success fee and your opponent's legal costs and disbursements if you win,*

except in the circumstances set out in 1(c) above, but the court orders that you pay part or all of these costs."

The circumstances set out in clause 1(c), relating to the failure of the Claimant to do better than a Part 36 offer made by the Defendant, do not apply here. Accordingly, the Claimant is entitled to recover the solicitors' basic charges and success fee.

68. In response to the Defendant's case, the Claimant rejects the argument that the Schedule should bear greater weight than the policy itself. Spire Healthcare v Sun Alliance [2018] EWCA Civ 317 concerned the proper interpretation of a policy of insurance where there was an apparent conflict between the limit of indemnity provided in the Schedule to the policy on the one hand and a proviso in the policy on the other. In his judgment with which Vos LJ agreed, Simon LJ said (citing as authority the judgment of Tomlinson J in Standard Life Assurance v Oak Dedicated [2008] Lloyd's Law Reports 552), "*The starting point in my view is to consider the combined effect of the relevant provisions without giving greater weight to the words of either the schedule or proviso 5A."*

69. The Claimant cites paragraph 30 of the judgment of Potter LJ in The Zeus V [2000] 2 Lloyd's Law Reports 587: "*...in a case where uncertainty arises as to the meaning or scope of a provision in an insurance policy designed to exclude or diminish the lability of an insurer which would otherwise arise under the terms of the policy, a contra proferentem approach is appropriate."* My attention is further drawn to a passage in Colinvaux at paragraph 3-010, (citing Peabody v Eagle Star, Worksop County Court, unreported): " *a policy that contains internal inconsistencies which cannot be reconciled, may also be construed contra proferentem*."

70. The Claimant points to the fact that subjective matters, such as the basis on which the Defendant calculated premium, is irrelevant to the proper interpretation of the policy. Further, the subsequent conduct of parties, such as those matters relied on in support of the argument for estoppel in issue 7 below, are irrelevant (see Miller v Whitworth [1970] AC 583).

71. In so far as the Defendant contends for an interpretation of the policy that treats the clauses in the policy under the heading "*what is covered*" as a sort of menu from which the Schedule may select the actual cover, the Claimant contends that nothing in the policy either expressly or impliedly treats the clauses in this way.

C. The Defendant's case

72. The Defendant contends that, regardless of the definition of "*win*" in the CFA agreement, the indemnity provided under the ATE policy did not encompass the Claimant's solicitors' own costs. They point to the schedules issued by DAS under the policy. In each case, the schedule states the cover to be "*own solicitor's disbursements and opponent's costs and disbursements*." [10] Thus there is a conflict between the terms of the policy and the terms of the schedule.

73. The Defendant contends that this is a case where the principle set out in Lewison, the Interpretation of Contracts 6th edition at paragraph 7.05 applies, namely: "*Where the contract is a standard form of contract to which the parties have added special conditions, then unless the contract otherwise provides greater weight must be given to the special conditions and in case of conflict between the general conditions and the special conditions, the latter will prevail."* In so far as the judgment of the Court of Appeal in Spire Healthcare might suggest otherwise, the Defendant points out that that case concerned contradictions between a Schedule and a Proviso contained in the same document. The instant case on the other hand involves the interplay of a generic policy document and a particular schedule. Thus the passage cited from Lewison is more apt to deal with the situation.

74. As to the argument that the alleged ambiguity between the policy document and the schedule should be resolved *contra proferentem,* the Defendant contends that this principle does not arise on the facts of this case because in truth there is no ambiguity between the documents. Rather, they are contradictory, which leaves the court to determine which is to take preference in the true interpretation of the insurance contract.

75. The Defendant proffers two approaches to resolving the contradiction in the "*cover*" clause between the policy on the one hand and the schedules on the other:

    a. The first is to read clause 2 as setting out not what is covered under the policy, but what may be covered, the schedules setting out the actual cover provided.

[10] The Schedule in respect of the SC applications adds "(excluding any costs and disbursements relating to the wasted costs elements of the applications)."

b. The second is to excise the words "*basic charges"* and "*success fee"* from clause 2 of the policy.

76. Either way, the effect would be to give the wording in the schedules precedence over that in the policy. This would be consistent with the scheme of issuing schedules under the 2008 TOBA which required the provision of the schedule to Mrs Plevin and the opponent, thereby emphasising the schedule as the document containing the key terms as to cover.

77. This result would be consistent with Mr Petty's evidence as to market practice, although as identified above, I did not find his evidence to amount to more than an explanation for why the Defendant's interpretation of the policy made commercial sense.

78. In response to the Claimant's contentions, the Defendant rejects the suggestion that this is a case of ambiguity to which the *contra proferentem* principle should be applied. Whilst the Defendant accepts the principle that a clause which excludes cover that would otherwise be provided by an insurance policy should be construed in a manner which is consistent with the purposes of the contract, such that it may in an appropriate case be construed narrowly, the principles of narrow construction relating to exemption clauses do not apply to such clauses (see Impact Funding v Barrington Services [2017] AC 73, per Lord Hodge at paragraph 7 and per Lord Toulson at paragraph 35). As Lord Toulson puts it, "*words of exception may be simply a way of delineating the scope of the primary obligation."*

D. Discussion

79. For reasons that I have identified above, the evidence of Mr Petty does not persuade me that there was any relevant market practice that assists in the interpretation of the insurance policy. Equally I accept that the subsequent conduct of the parties, including the conduct of the Claimant that is alleged to give rise to an estoppel cannot assist me.

80. The central problem arises from a frank contradiction between the policy terms and the schedule. This is not a case of ambiguity that should lead to interpreting a document *contra proferentem.* Further, this is not a clause that seeks to restrict a right to cover that otherwise exists – on the express terms of the policy (and in accordance with usual

insurance practice), the issuing of a Schedule that sets out the extent of cover is a central feature of the policy.

81. As to the relevant weight to be given to the fact that the restriction on cover appears in the Schedule rather than the Policy, it seems to me that there is force in the Defendant's argument that the policy is a generic document and the schedule is an individualised one for the particular claim. It is correct that Mr Brown stated the "*cover*" provision in the Schedule to be standard in terms though the SC Variation shows circumstances in which that might be departed from. But other aspects of the Schedule are specific to the particular stage of the particular case.

82. In looking for the true meaning of a contract which involves an interplay of generic and specific documents, commercial common sense would lead one to consider the terms that were specific to be the ones that took preference.

83. In so far as it is argued that inconsistencies in insurance contracts should be construed against the insurer, I am unconvinced that the decision in Peabody v Eagle Star supports the existence of such a principle. I have not been referred to a transcript of the judgment in that case. I note that it is a decision in the County Court. From the account of the facts given in Colinvaux, it would appear that this was an inconsistency that arose within a single document (as was the case in Spire Healthcare). Since the Court cannot then look to which of two documents should be taken to have greater force where there is contradiction between them, the use of the *contra proferentem* principle in such a situation makes sense. It does not have the same value here, where there is reason to consider that one document has greater value in determining the true meaning of the contract than the other.

84. I conclude that the true interpretation of the Claimant's insurance cover with DAS is that she was covered in respect of any liability she may have for her own side's disbursements and the costs of her own opponent, but did not include her solicitor's own basic fees or any success fee.

Issue 3 - On the true construction of the ATE policy, did the indemnity cover provided by DAS to Mrs Plevin include Mrs Plevin's costs of the remitted proceedings?

A. The Claimant's case

85. The Claimant contends that cover under the policy covers costs of the remitted proceedings. The Business Policy provides that "*words used in your policy will be the same as under the conditional fee agreement."* The policy and schedule of insurance are stated to "*attach to your conditional fee agreement and operate for the duration of that agreement."*

86. It is accordingly necessary to look to the terms of the CFA. That is stated to cover the claim against Paragon including certain appeals (excluding an appeal by the Claimant against a final order), enforcement proceedings and/or costs proceedings.

87. The claim against Paragon cannot be said to have been concluded by the judgment dismissing the claim in October 2012 because that was subsequently set aside by the Court of Appeal, in a decision confirmed by the Supreme Court. Thus the claim against Paragon survived until the determination of the remitted proceedings and the insurance cover continued for the same period.

B. The Defendant's case

88. The Defendant accepts that the determination of this issue revolves around whether the CFA remained in effect after conclusion of the Supreme Court appeal. The Defendant points to the fact that any appeal by Mrs Plevin against a final judgment was not covered by the CFA. Thus, once permission had been granted to appeal the decision of Recorder Yip QC (as she then was) in the first CC trial, the work being carried out was no longer pursuant to the CFA.

89. The subsequent schedules covering the CA appeal, the SC appeal and the SC applications were each linked to a variation of the CFA agreement to cover the further work. Those variations recited that *"The CFA covered all proceedings to trial including steps taken to seek permission to appeal."* The variations were said to take effect at a time relevant to the particular aspect of the appeal to which they related. The Defendant therefore contends that each variation took effect in place of the previous one. There was no further variation (or indeed fresh CFA) after the SC applications were determined and, accordingly, when the matters were remitted to the County Court, there

was no extant CFA in association with which the policy could provide cover. The CFA had come to an end and hence so did the policy.

C. Discussion

90. Whilst I accept the Defendant's argument that none of the variations to the CFA encompasses the work done on behalf of the Claimant after the case was remitted to the County Court, it does not follow that such work was not done pursuant to the CFA. The simple fact is that the CFA covered the claim against Paragon for damages and refunds. It was that claim that was determined in the Claimant's favour in the remitted proceedings. Thus on the face of it, the work done in the remitted proceedings fell within the ambit of the original agreement.

91. The Defendant seeks to argue that the natural meaning of the terms of the CFA is that it comes to an end after the application for permission to appeal is determined because of the definition of "*work covered*." But if this were so, the agreement would have terminated on 4 June 2013, when the Court of Appeal granted permission to appeal, before the variation to the CFA to cover the appeal (which is dated 8 August 2013). If the agreement had already come to an end, the alleged variation must have amounted to the entering into of a new CFA, and equally the associated insurance cover must have been a new policy. Yet the Claimant and Miller Gardner treated the CFA to cover the CA and SC Appeals as a variation of the existing agreement not a new agreement, and equally DAS treated the insurance cover to be an amendment to an existing policy rather than a new policy. This shows a shared factual understanding of all concerned that the CFA and policy continued in force notwithstanding the grant of permission to appeal. In that factual situation, both the CFA and the insurance policy should in my judgment clearly be treated as continuing to be in force notwithstanding the grant of permission to appeal, the only issue being as to what steps in the proceedings were covered.

92. The only way for the Defendant to escape this consequence is to show that the variations (either individually or cumulatively) acted so as to bring the original CFA to an end save in so far as its terms were relevant to the step in the proceedings that were covered by the variation. The closest that the Defendant comes to showing that this is the effect of the variations is the term in each variation that *"The CFA covered all proceedings to trial including steps taken to seek permission to appeal."*

93. But the mere assertion that the CFA covered certain steps in the past does not necessarily mean that the parties are acknowledging that it cannot or will not cover steps to be taken in the future. There is no illogicality in having an agreement of this nature that does not cover the steps being taken at present but may, subject to the outcome of an appeal, cover steps in the future.

94. The simple point is that the remitted proceedings were part of the claim against Paragon for damages and refunds and were not excluded by the terms of the CFA and/or policy. It follows that both the CFA and the policy cover "own solicitor's disbursements and opponent's costs and disbursements costs" of the remitted proceedings.

Issue 4 – On the true construction of the ATE policy, did the indemnity cover provided by DAS to Mrs Plevin include Mrs Plevin's costs of the detailed assessment proceedings relating to the CC proceedings?

A. The Claimant's case

95. The Claimant contends that it is clear that the "*claim*" in respect of which insurance cover is provided is, subject to any exclusions, the entirety of the claim through to its conclusion. So, for example, the Business Policy provides that "*the insurance premium due for your policy is payable at the end of your claim"* which can only mean the end of detailed assessment proceedings if such occur. This is consistent with the terms of the CFA which expressly stated that it covers "*a court assessment of the costs of this claim."*

B. The Defendant's case

96. The Defendant contends that the insurance policy provides cover for defined stages of the case. The last stage covered by a Schedule (before the variations) was "*trial*." Detailed assessment proceedings cannot be said to be part of the "*trial*" phase and therefore no cover is provided in respect of such work. This is consistent with the definitions of "*trial date*" and "*trial period*" in the Business Policy.

97. Further, the Defendant contends that its liability to pay under the policy is triggered by a "*win*" which, on any definition, relates to the orders made at trial relating to judgment and (arguably) the principle of costs. Nothing in the policy shows it to provide further cover in respect of detailed assessment proceedings subsequently.

C. Discussion

98. The Defendant's argument that the "*trial*" phase of the case ends before detailed assessment proceedings supposes that the cover provided by the policy is limited by the expiry of the "*trial*" phase. This raises the question as to how the stages of the case are determined. The stages are referred to at paragraph 13 above. Those stages are defined, in respect of Stage A, as ending at the start of stage B (the issue of proceedings), and, in respect of Stage C, as starting at the end of Stage B (14 days before the trial date or the trial period). The beginning of stage A is not in fact defined. That is unsurprising because the Stage cannot begin until the CFA and insurance policy have been entered into, which supposes at least an embryonic dispute with the opponent.

99. The Defendant's interpretation supposes that the reference to "*trial date*" or "*trial period*" provides a natural finishing point for Stage C. But I do not read the policy this way. Only the commencement of Stage C is defined, by reference to 14 days before the trial date or the start of the trial period. The Stage is not defined as ending with the trial.

100. In reality, the Defendant relies on the use of the word "*trial*" in the schedule to define the relevant period as ending with the trial, on the ground that it would no longer be the trial period once the trial had ended. But stage C, by express definition, starts before the trial. It is not obvious why it should not finish after the trial, rendering the use of the word "*trial*" simply descriptive of the main event in this stage of the case, rather than definitive of what is covered. This reading of the Business Policy is consistent with the reference to it operating for the duration of the CFA, since that agreement expressly covers the assessment of costs.

101. The determination of costs following a trial (or indeed an appeal) is a central part of the litigation process. Given that, on my finding, the Business Policy does not act so as to limit the "*trial phase*" to the end of the trial (rather than the end of proceedings), the interpretation of the policy so as to cover the costs of detailed assessment proceedings following the trial is a more natural reading and one which accords with commercial common sense.

102. Accordingly, I find that on the true interpretation of the policy, it covers "*own solicitor's disbursements and opponent's costs and disbursements*" of the detailed assessment proceedings relating to the CC proceedings.

Issues 5 and 6 - On the true construction of the ATE policy, did the indemnity cover provided by DAS to Mrs Plevin include Mrs Plevin's costs of the detailed assessment proceedings relating to the CA appeal and to the SC appeal?

A. The Claimant's case

103. Neither the Claimant nor the Defendant has sought in submissions to distinguish arguments relating to these issues from the arguments set out above relating to the trial phase of the claim.

104. The Claimant sees detailed assessment proceedings as being an intrinsic element of the trial, Court of Appeal and Supreme Court phases of the case respectively and accordingly would say that the argument that costs of detailed assessment proceedings are included within the respective phases is the corollary of my finding on issue 4.

B. The Defendant's case

105. The Defendant adopts the same argument in respect of issues 5 and 6 as in respect of issue 4.

C. Discussion

106. The reasoning at paragraph 101 applies in respect of the costs of the CA Appeal and the SC Appeal with greater force. In these cases, there is no argument for a limitation of the scope of cover by reference to the end of an "*appeal period*" for the simple reason that no such phrase is used in the contractual documentation. The only reference is to an "*appeal*". It would greatly bend the usual meaning of the word "*appeal*" to find that an appeal did not encompass the assessment of costs on the appeal. Whilst the assessment of such costs might be by way of summary assessment of the Appeal Court itself or by detailed assessment before an appropriate Costs Judge, I see no reasons to conclude that the natural meaning should be restricted to exclude either.

107. Accordingly I find that, on the true interpretation of the policy, it covers "*own solicitor's disbursements and opponent's costs and disbursements*" of the detailed assessment proceedings relating to both the CA appeal and the SC appeal.

Issue 7 - If the finding on issue 2 is that, on the true construction of the ATE policy, the indemnity liability of DAS did include the basic costs and success fee of Miller Gardner, is Mrs Plevin and/or are Miller Gardner nonetheless estopped from recovering such costs and fee?

A. Introduction

108. Given my findings on issues 2 and 3, it is not necessary to decide this issue since there is no liability for the costs and fee to which the estoppel is said to apply. However for the sake of completeness, it is again appropriate to consider what my findings would have been on this issue, in particular since they involve consideration of factual issues.

109. This estoppel is stated by the Defendant at times to apply against Mrs Plevin and at other times to apply against Miller Gardner. It is clear that it relies on the conduct of Miller Gardner to establish the estoppel. However the liability that the estoppel is said to relate to is a putative liability of Mrs Plevin. I do not see that this difference creates any difficulty with the Defendant's argument, since it is abundantly apparent that the conduct said to give rise to the estoppel is conduct of Miller Gardner acting on the Claimant's behalf to ensure that she has the relevant insurance cover.

110. Since the burden of proving an estoppel lies on the Defendant, I shall deal with its case first.

B. The Defendant's case

111. The Defendant contends that such an estoppel arises from the following facts:

a. Miller Gardner were obliged under the 2008 TOBA to provide an estimate of its opponent's costs as well as disbursements but only its own disbursements. Given that the premium was assessed by DAS from the information that it provided, it is clear that the intention was not to insure in respect of Miller Gardner's own costs.

b. By letter dated 22 December 2010 referred to at paragraph 29 above, the Defendant indicated that they considered that the policy did not cover the Claimant's solicitor's own costs. In response, Miller Gardner provided a

schedule setting out details of the Claimant's own disbursements but not their profit costs or success fee.

c. Miller Gardner gave further such limited estimates, excluding their own costs and success fee, in March and May 2011.

d. The Defendant's letter dated 11 May 2011 makes it clear that its calculation of premium for Stage C is based on a potential liability for the Claimant's disbursements and the Defendant's own costs and disbursements.

e. In response to information about an increase in costs, the Defendant, in an email dated 12 September 2012, again expressed interest only in the Defendant's costs and the Claimant's disbursements. This is only consistent with the belief that they were not indemnifying in respect of the Claimant's solicitors' own costs.

f. Following the failure of the case in the first County Court trial, Miller Gardner, in a letter dated 8 October 2012, claimed only their own disbursements from DAS.

g. Cover given by DAS in respect of the CA appeal was based on costs estimates provided by Miller Gardner that did not include their own costs (see Miller Gardner's letter of 1 May 2013).

h. Cover given by DAS in respect of the SC appeal was based on costs estimates provided by Miller Gardner that did not include their own costs (see Miller Gardner's letter of 29 January 2014).

112. The Defendant therefore contends that there was a shared understanding between the parties as to the extent of cover and reliance by DAS, making it unconscionable to allow Mrs Plevin to recover her own solicitor's costs.

C. The Claimant's case

113. The Claimant contends that, even putting the Defendant's case at its highest, it cannot succeed in the absence of evidence that the mutual understanding was present from the outset. This is because there could be no basis for arguing either that there was a shared understanding of the circumstances in which the Defendant was liable under the policy

nor any unconscionability in the Claimant asserting her strict contractual rights under the contract if in fact there was no initial mutual understanding as to the limit of that liability.

114. On the sequence of events identified above, it cannot in any event be said that the mutual understanding was present from the outset. To the contrary, it is clear that Miller Gardner initially thought that their own costs were recoverable under the policy – if they had not, it is difficult to see why they would have included them in the costs estimates. The Claimant argues that a later "mutual understanding" would be nonsensical. The very facts relied upon by the Defendant to suggest a mutual understanding in fact demonstrate a difference of opinion that was never resolved between the parties.

115. In any event, the Claimant contends that there is no evidence that Miller Gardner shared any understating as to the extent of the Defendant's liability. It is true that, when DAS raised the issue in December 2010, Miller Gardner did not respond by putting their interpretation of the agreement forward as correct. But the Claimant contends that they never acted so as to give rise to a belief that they agreed with the Defendant's interpretation of the extent of cover.

116. Yet further, Mr Brown made clear in his evidence that, in asserting that the Defendant's liability was limited to the Claimant's disbursements and the opponent's solicitor's costs and disbursements, the Defendant was not relying on any mutual understanding. It was instead relying on its own belief as to the terms of the cover.

D. Discussion

117. It is difficult to find any basis for a shared assumption between the parties at a time prior to the Defendant sending its letter of 22 December 2010. Until then, the conduct of Miller Gardner in providing details of its own costs is clearly consistent with its belief that it could recover its own costs and success fee. But the very fact of that letter creates a problem with the third of the elements of a finding of estoppel by convention referred to by Briggs J in HMRC v Benchdollar Ltd, that "*The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter."* The truth is that the Defendant never relied upon any common assumption as to the terms of the policy –

rather it acted on its belief that the policy did not cover Miller Gardner's own costs and success fee. That is fatal to a finding of estoppel by convention.

118. Accordingly, in so far as I might have otherwise found that the Claimant was entitled to recover her solicitor's own costs and success fee pursuant to the insurance policy, that claim would not be defeated by an estoppel.

Issue 8 – Are Miller Gardner liable to repay monies advanced under the FFA?

A. Miller Gardner's case

119. Miller Gardner contend that the terms of the FFA were as follows:

    a. DAS would provide forward funding of disbursements on behalf of Miller Gardner in respect of cases insured by DAS within 7 days of receipt of a request;

    b. Miller Gardner would use the forward funding to pay disbursements as and when required and generally to assist its cash flow and/or working capital requirements;

    c. Miller Gardner would repay the forward funding within 7 days of recovery from the relevant opponent;

    d. Miller Gardner's obligation to repay the forward funding was limited to the amounts actually recovered from the relevant opponent.

120. The last of these is controversial. Miller Gardner contend that this term was agreed between the parties because, in so far as the disbursements were not recovered from the opponent, the payment would be covered by the Insurance Policy and therefore would be paid by DAS in any event.

121. The Claimant points to the alleged purpose of the FFA, namely to assist Miller Gardner's needs for working capital. There was no pressing need for disbursements to be advanced in order to discharge the liabilities since such disbursements were only payable at the conclusion of the case. Hence the effect of the FFA was to help Miller Gardner with its own capital requirements.

122. Whilst Mr Gardner does not in fact say in his evidence, written or oral, that the agreement was that his firm would not repay money that had been advanced under the

FFA in so far as it was not recovered from the relevant opponent, that obligation is to be inferred from the express statement in the email of 27 March 2012 of an obligation to repay within 7 days when the case was successful, which is said to imply that there is no obligation to repay where the disbursement is not recovered.

B. The Defendant's case

123. The Defendant says that the terms of the FFA are clear from the email of 27 March 2012. The obligation on DAS is to advance the monies when requested by Miller Gardner in accordance with the terms of the email and the obligation on Miller Gardner is to repay those disbursements in successful cases when it recovers costs. In an unsuccessful case, DAS will not get recovery of disbursements (because it would be liable to indemnify the Claimant against those in any event), but in a successful case with a shortfall, it was not intended that DAS would similarly be unable to recover.

124. There is no express agreement of the kind referred to by Mr Gardner, nor is such an agreement a necessary implication of what was expressly agreed.

C. Discussion

125. It is a striking feature of Mr Gardner's evidence that at no point, either in writing or in oral evidence, has he referred to any agreement that his firm's obligation to repay money advanced under the FFA was limited to the amount actually recovered from the relevant opponent. His case appears to be drawn from the argument that that is the effect of the agreement referred to in the email of 27 March 2012, coupled with the commercial sense of an agreement that such sums need not be repaid because they would be the subject of a claim under the policy if not recovered from the opponent.

126. It cannot be said to follow though that, just because in an unsuccessful case, DAS would be liable to indemnify Miller Gardner for the disbursements that there should be no obligation to account for any shortfall in recovered disbursements in a successful case. It might be argued that commercial sense, at least from the point of view of the insurer, would involve them wishing to ensure that Miller Gardner used its power and influence to minimise the shortfall on disbursements and that this could be achieved by their having to account for any shortfall between that claimed and that recovered. It is pertinent to note that, where the claim is successful, the liability to indemnify in respect of own disbursements is limited to the situation in which the court orders that the

Claimant pay part or all of those sums (see Clause 2 of the "*What is covered*" section of the Business Policy).

127. There is a respectable argument that reducing or disallowing an item of costs amounts to the court "*ordering that the Claimant pay part or all of those costs*" [11] and that therefore DAS are liable to indemnify in respect of any shortfall between the Claimant's liability for her own disbursement and the amount that the opponent is ordered to pay in respect of that disbursement, but such liability to indemnify would only arise where there had been judicial consideration leading to a court order. It does not follow that a liability to indemnify should or indeed does arise where the shortfall comes from the Claimant's solicitors accepting a reduced amount of costs.

128. Had the email been intended to have the consequence that Miller Gardner seek to argue for, it would have made clear that the obligation to refund disbursements was limited to the amount actually recovered from the opponent. In fact:

    a. The written document does not contain any such clause whether expressly or by way of necessary implication;

    b. Mr Gardner's evidence is not to the effect that any such clause was agreed whether expressly or by necessary implication.

129. In those circumstances, I reject the argument that Miller Gardner is liable to account to DAS for sums advanced by way of sums paid under the FFA only in so far as it actually recovered disbursements.

Issue 9 – What sums have been advanced pursuant to the FFA and not refunded to DAS?

A. Miller Gardner's Case

130. As noted above, Mr Gardner was unable to explain the figures relating to sums advanced under the FFA when giving oral evidence. This is because there has been a complex sequence of accounting between his firm and DAS following the various hearings.

[11] See PD44, paragraph 4.2 – an order that a party pay its own costs appears to be synonymous with an order that a party bear its own costs.

131. The starting point for looking at the monies advanced under the FFA is (the parties agree) the reconciliation attached to a letter from Miller Gardner to DAS dated 27 April 2017. This deals with sums advanced for the CA and SC appeals relating to counsel's fees and a filing fee. Taking the items in turn:

    a. Hodge Malek – it is agreed that the full amount of the forward funding has been repaid.

    b. James Strachan – it is agreed that the full amount of the forward funding has been repaid.

    c. John Campbell – it is agreed that there is a shortfall between the amount of disbursements recovered by Miller Gardner in respect of Mr Campbell and the amount paid to DAS. The sum of £14,478, which was set off against other liability of DAS to Miller Gardner should be set off against this.

    d. Robert Marven – DAS paid £44,986.50 in respect of Mr Marven's fees and has been repaid £19,297.50 (as part of the total figure of £173,482.74 paid to DAS by Miller Gardner in respect of the SC appeal). On the face of it therefore my judgment on the previous issue would leave the sum of £25,689 owing to DAS. However, Miller Gardner contend that the payment to Mr Marven was not in fact pursuant to the FFA but rather was paid to him direct and that therefore there is no obligation on its part to account for the shortfall in any event.

    e. Filing fee – it is agreed that the full amount of the forward funding has been repaid.

    f. Court of Appeal costs – it is agreed that forward funding of £66,060 was received by Miller Gardner. They contend that their liability to repay any sum relating to the CA Appeal was compromised by the payment from Paragon to DAS of £60,000 in July 2018. This is dealt with further below.

132. As regards the payment of Mr Marven, it is Miller Gardner's case that the direct payment by DAS of his fees was not made pursuant to the FFA. There is no evidence on its behalf as to the circumstances of this arrangement.

133. As to the balance of payments under the FFA in respect of the CA appeal, Mr Gardner's evidence, referred to above, was that the receipt of £60,000 by DAS amounted to full and final settlement of any liability to repay this sum. The payment is referred to in the email of 10 July 2018, which speaks of an agreement with someone called Bryn by which DAS would be paid "*£60k re counsel's fees (precise figure will be sent).*" He did not give evidence of any discussion in which this payment was expressly agreed to be in full and final settlement, but the tenor of his evidence was that that was the reason that the payment of £60,000 was agreed.

134. Miller Gardner draws attention to its simultaneous receipt of £65,000 from Paragon. If DAS had not been intending the payment of £60,000 to be in full and final settlement of any sums due back to it in respect of disbursements paid under the FFA for the CA appeal, why would it have agreed to Miller Gardner receiving this sum?

B. The Defendant's case

135. The Defendant starts from the proposition that, if the amount advanced by DAS under the FFA exceeds the amount repaid to it, it is entitled to recover those sums. For the reasons set out above, I agree.

136. In respect of the various items referred to at paragraph 131, the Defendant responds as follows:

    a. Hodge Malek –This is agreed. No sum is due.

    b. James Strachan – This is agreed. No sum is due.

    c. John Campbell – This is agreed. The sum of £22,200 paid by way of forward funding less the sum of £14,478 which has been set off against a separate liability from DAS to Miller Gardner, namely £7,722, is due from Miller Gardner to DAS.

    d. Robert Marven – The sum of £25,689 is owing to DAS. The payment to Mr Marven was made in the circumstances set out at paragraph 41(a) above, in which Mr Brown asserted the payment was made on the same basis as the payments under the FFA. However it was accepted that there is no evidence of a written agreement to that effect.

    e. Filing fee – This is agreed. No sum is due.

f. Court of Appeal costs – The Defendant does not accept that this figure was paid as a compromise of Miller Gardner's liability to DAS, but rather as a compromise of Paragon's liability to Miller Gardner, which the latter was accounting for to DAS.

C. Discussion

137. As identified above, the issues here are narrow.

a. Given the finding on issue 8, the payment in respect of Mr Campbell's fees is due and owing by Miller Gardner to DAS.

b. As regards the fees of Mr Marven, there is a lack of clear evidence of any agreement along the lines referred to by Mr Brown. Whilst, as Mr Brown said, there may have been exchanges about the terms of payment of Mr Marven, I can see no evidence from which to conclude that Miller Gardner agreed that payment to him be on the same terms as payment under the FFA such that the firm had a liability to account to DAS for any shortfall between that paid and that recovered. Accordingly, I reject the claim of DAS in this regard.

c. As regards the Court of Appel fees, the more natural reading of the email of 10 July 2018 was that the payment of £60,000 was being accepted by DAS in full and final settlement of the monies due to be repaid to it in respect of the FFA funding for the CA Appeal. As Counsel for the Claimant said in closing speeches, why would DAS have agreed the simultaneous payment of monies by Paragon to Miller Gardner in respect of fees that included exactly that which had been funded by DAS? Notwithstanding the unsatisfactory evidence as to the circumstances of an agreement that the payment was in full and final settlement of any liability under the FFA, it is overwhelmingly likely that this was the reason for the parties agreeing the payment and accordingly I reject the argument that Miller Gardner is further liable to DAS in respect of any monies forwarded by DAS under the FFA relating to the CA appeal.

Issue 10 – Are Miller Gardner entitled to deduct commission from premium recovered in respect of Mrs Plevin's ATE policy before accounting to DAS?

A. Miller Gardner's case

138. The Claimant contends that the issuing of schedules to include cover for the CA and SC appeals entitled it to commission pursuant to the terms agreed by Mr Gardner and Mr Mayhew. My attention is drawn to the fact that the court has the uncontradicted evidence of Mr Gardner to the effect that if a case went to the Court of Appeal it would be treated as a new policy. I am urged to find Mr Gardner to be both an honest and a reliable witness on this issue, as others.

139. The argument is put in one of three ways:

    a. That the 2012 TOBA applied because the provision of the additional cover for an appeal amounted to a new policy.

    b. That there was an oral contract providing for the payment of commission on existing cases if further cover was provided in respect of an appeal hearing, such contract being either an oral variation of the 2008 TOBA, an oral variation of the 2012 TOBA or a collateral contract to the 2012 TOBA.

    c. The Claimant was entitled to a reasonable consideration for its services pursuant to Section 15 of the Supply of Goods and Services Act 1982.

B. The Defendant's case

140. The Defendant draws attention to a number of very distinct weaknesses in the case against it.

141. First, the argument that the provision of cover for the appeal hearings amounts to a fresh ATE policy was expressly rejected by the Supreme Court in the SC application (Plevin v Paragon [2017] UKSC 23 - see in particular paragraph 16 of Lord Sumption's judgment, where the point is clearly made).

142. Second, neither the email of 27 March 2012 nor any other contemporary communication refers to a discussion or agreement between Mr Gardner and Mr Mayhew about commission in such circumstances. If the parties had agreed terms that

went beyond what was in the 2012 TOBA that was attached to that email, it would be highly surprising if they had not been recorded.

143. Third, even when Miller Gardner initially withheld the premium from DAS, they did not raise the argument that they now raise relating to commission.

144. Fourth, the written terms of the 2012 TOBA do not include provision for the payment of commission in the circumstances that Miller Gardner now argue for. As Robert Walker J put it in Harry Wake, Eastgate Motor Company (Lincoln) Ltd v Renault (UK) Ltd, CH 1995-E-No. 6591, "*A collateral contract is not to be lightly inferred, especially where the main contract is embodied in formal documents prepared by lawyers."* One might add that this is all the more so where the person alleging the collateral contract is himself a lawyer.

145. Fifth, the 2012 TOBA was not signed until after the alleged oral agreement was reached. In that case, the alleged oral agreement could not be a variation of the 2012 TOBA.

146. Sixth, the email makes no reference at all to the 2008 TOBA, only the new TOBA. In any event, the 2008 TOBA does not contain provisions relating to notifying the client of the payment of commission which would be a prerequisite to a properly compliant scheme for such payments[12]. In those circumstances, it is difficult to see how the alleged oral agreement could be a variation of the 2008 TOBA.

147. Seventh, the consideration for the service provided by Miller Gardner in introducing business to DAS on an appeal from a case funded by a CFA under the 2008 TOBA was contained in the TOBA itself. The very fact that the solicitors could write insurance at stages A and B in cases in which they wished to enter into a CFA was a benefit to the solicitors. Additional benefit was provided by clause 3.2 of the TOBA which allows the solicitors to retain investment income on premium held under the terms of the agreement.

C. Discussion

148. The starting point for considering this issue is the terms agreed by Mr Gardner and Mr Mayhew. As I have previously indicated, I have only Mr Gardner's account of the

[12] See paragraph 4.1 of the SRA Handbook which requires that a firm of solicitors properly account to their client for any pecuniary reward that they receive.

discussion. There is nothing in the manner in which Mr Gardner gave evidence to make me think that he was in any way trying to mislead the court. But his oral account of the discussion with Mr Mayhew was unconvincing. It lacked the detail that might be expected of a clear recollection. The lack of any contemporary note of the alleged agreement is striking and my concern that he may be inaccurately recalling the discussion is greatly increased by the failure to mention this reason for withholding premium when the dispute with DAS first came to the surface. Whilst I have no doubt that some discussion took place about Miller Gardner earning commission on business brought to DAS where other insurers had previously been involved (and an appeal would be an obvious situation where that might happen), I am not persuaded that there was any discussion of the payment of premium in the situation of someone such as Mrs Plevin whose case had been funded by a CFA backed by insurance entered into pursuant to the 2008 TOBA.

149. Given the decision of the Supreme Court in Plevin v Paragon [2017] UKSC 23 I can find no basis for concluding that the cover provided for the appeal hearings amounted to a fresh policy to which the 2012 TOBA applied.

150. It follows that Miller Gardner fail to show any entitlement to commission on premium for the appeal hearings.

Conclusion

151. I have set out my findings on the various issues before the Court as above. The parties have been unable to agree a consequential order and the matter will be listed for a further hearing to deal with consequential matters. Any question of permission to continue the claim angst the Third Party will be considered then. For the avoidance of doubt, the permission to continue the claim on handing down judgment is limited to the handing down of judgment itself and the order listing a further hearing.

CHRONOLOGY

Date	Event	Ref
June 2008	Miller Gardner instructed by Mrs Plevin in respect of PPI mis-selling claim against (1) LL Processing (UK) Ltd trading as Loan Line and (2) Paragon Personal Finance Ltd	2B/6/221/§4
19.06.08	Letter of engagement from Miller Gardner to Mrs Plevin headed "Re PPI Claim – Loan Line 9398" setting out terms of business	2C/1
19.06.08	CFA in respect of proposed claim against LLP	2B/6/247
19.06.08	CFA in respect of proposed claim against Paragon accompanied by document entitled "What we do next"	2C/6-6a 2C/11-14
10.07.08	Miller Gardner signs Terms of Business Agreement with Ultimate Corporate Solutions Limited	2C/16/62-77
20.07.08	Mrs Plevin signs letter of engagement	2C/4
25.07.08	Signed copy of CFA returned to Miller Gardner	2B/6/221/§5-6
18.08.08	Miller Gardner signs Terms of Business Agreement with DAS with effect from 1 July 2008 (signed by DAS on 01.09.08)	2C/35-47
15.10.08	Miller Gardner writes to DAS's broker, Financial Claims Service Ltd, to request stage 2 ATE policy for Mrs Plevin	2B/6/256
29.10.08	DAS writes to Miller Gardner confirming indemnity in place under ATE policy and enclosing copy of policy schedule for Post-issue stage with indemnity limit of £25,000 and premium of £1,575 inclusive of IPT. Schedule 1 referred in error to wording of D's Business Litigation Policy [2C/24-25] rather than its Personal Litigation Policy **[**2C/31-34]	2B/6/258-9 2C/17 2B/7/310-11/§5 2B/3/113/§19
24.11.08	FCS sends Miller Gardner copy of policy wording for Business Litigation Policy	2B/6/262-4
07.01.09	Mrs Plevin's claim issued against LLP (now in liquidation) and Paragon	2B/6/224/§11
15.09.09	Miller Gardner completes and returns questionnaire with details of prospects of success and estimated costs and disbursements for claim against Paragon	4E/2-4
22.02.10	Mrs Plevin settles claim against LLP in return for payment of £3,000 as an unsecured claim in the liquidation of LLP; each party bears its own costs	3D/2/317-318
09.12.10	Miller Gardner provides DAS with latest estimate of Mrs Plevin's costs and disbursements for purposes of Stage 3 premium	4E/7
22.12.10	DAS asks Miller Gardner to complete Stage 3 questionnaire on behalf of Mrs Plevin. Covering letter states Policy only covers Claimant disbursements and Defendant costs and disbursements.	4E/15
06.01.11	Miller Gardner returns completed Stage 3 questionnaire which includes estimates of Mrs Plevin's disbursements and Paragon's costs only (not own solicitor costs)	4E/17-18
10.03.11	Miller Gardner provides updated estimates of Paragon's costs and Mrs Plevin's disbursements	2B/3/154

12.05.11	Miller Gardner provides further updated estimates of Paragon's costs and Mrs Plevin's disbursements	2B/3/156
18.05.11	DAS provides Miller Gardner with details of calculation of Stage C premium	4E/23
June 2011	DAS produces revised version of Personal Litigation Funding policy wording	2C/34a-f
19.10.11	Mrs Plevin receives payment of £3,000 from FSCS in respect of claim against LLP	2B/6/224/§11
27.03.12	Email from Simon Mayhew of DAS to Miller Gardner attaching copy of revised TOBA and agreeing to forward fund disbursements on insured cases ("*FFA*")	4E/26
27.03.12	Miller Gardner and DAS enter into new TOBA ("*2012 TOBA*") with effect from 1 March 2012	2C/48-61
26.07.12	Miller Gardner provides DAS with updated estimates of Mrs Plevin's own costs and disbursements and Paragon's costs and disbursements	4E/31
12.09.12	DAS email to Miller Gardner expressing concern at increase in estimate of Paragon's costs and Mrs Plevin's disbursements	4E/39
13.09.12	Miller Gardner letter to DAS explaining increase in estimated costs	4E/40
19.09.12	DAS extends cover under Policy to cover trial of Mrs Plevin's claim against Paragon and issues policy schedule for Trial Period with indemnity limit of £136,000 and premium (for Stages A-C) of £180,185 including IPT	4E/46 2C/18
04.10.12	Trial of Mrs Plevin's claim against Paragon. Claim dismissed and Mrs Plevin ordered to pay indemnity costs with an interim payment of £60,000.	2B/6/225/§12
08.10.12	Miller Gardner writes to DAS claiming an indemnity under Policy for Mrs Plevin's counsel fees and disbursements	E/49-56
24.10.12	Mrs Plevin seeks permission to appeal to Court of Appeal ("*CA Appeal*")	2B/6/225/§13
05.12.12	DAS sends email to Miller Gardner purportedly giving 30 days' notice of termination of 2012 TOBA	4E/58
29.01.13	Miller Gardner writes to DAS repeating claim for an indemnity under Policy for Mrs Plevin's counsel fees and disbursements	4E/59-60
13.03.13	Miller Gardner writes to DAS seeking cover for CA Appeal and provides estimate of Mrs Plevin's counsel fees and disbursements and Paragon's costs (based on Miller Gardner's assumptions) for CA Appeal	4E/64-5
01.05.13	Miller Gardner provides estimates of Paragon's costs for CA Appeal and Mrs Plevin's counsel's fees.	4E/68
04.06.13	Mrs Plevin granted permission for CA Appeal	2B/6/225/§13
07.08.13	DAS extends cover under Policy to include CA Appeal and issues policy schedule for Appeal stage of case with Top Up Limit of Indemnity of £198,000 and a Total Combined Indemnity limit of £334,000 for a Top up premium of £262,350 inclusive of IPT	2C/19
08.08.13	Miller Gardner and Mrs Plevin enter into variation of CFA to cover CA Appeal ("*CA appeal variation* ")	2C/6b

16.12.13	CA allows Mrs Plevin's appeal and sets aside costs order in favour of Paragon. Mrs Plevin's claim remitted to County Court for re-hearing but Paragon granted permission to appeal to Supreme Court ("*SC appeal").* Remitted claim stayed pending SC Appeal	4E/71-73 2B/6/226/§15
03.01.14	Miller Gardner and Mrs Plevin enter into further variation of CFA to cover SC Appeal ("*SC appeal variation*")	2C/7
27.01.14	CA orders Paragon to pay Mrs Plevin's costs of CA Appeal but directs costs not to be assessed before conclusion of SC Appeal. Paragon ordered to pay £58,000 on account. Costs of claim in County Court reserved to judge hearing remitted proceedings.	2B/6/226/§15
29.01.14	Miller Gardner provides DAS with estimates of Mrs Plevin's counsel fees and disbursements and Paragon's costs for SC Appeal and requests cover in sum of £165,000	4E/76
11.02.14	Paragon files appeal to SC	1A/2/16/§30
03.04.14	Miller Gardner provides DAS with Paragon's estimate of counsel fees and solicitors' costs; estimate of Mrs Plevin's disbursements (including counsel fees)	4E/78-80
17.04.14	D agrees to extend cover under Policy to include SC Appeal and issues policy schedule for Appeal to Supreme Court stage, with Additional Top Up Limit of Indemnity of £602,000 and a Total Combined Indemnity limit of £936,000 for an Additional Top-up premium of £797,650	4E/83 2C/20
12.11.14	SC dismisses Paragon's appeal and remits Mrs Plevin's claim to County Court on question of relief	2B/6/227/§17
14.11.14	DAS emails Miller Gardner asking for copies of any agreements/emails in relation to FFA	4E/87
25.11.14	Miller Gardner provides copy of email dated 27.3.12 in relation to FFA	4E/88
05.02.15	SC affirms CA's costs order and orders Paragon to pay Mrs Plevin's costs of SC Appeal with payment on account of £165,000	2B/6/228/§17
06.02.15	DAS internal memo stating DAS is contractually obliged to provide forward funding under FFA	4E/100
02.03.15	Remitted relief hearing in County Court. Mrs Plevin obtains judgment for damages and interest of £4,500. issue of costs reserved to a subsequent hearing	2B/6/228/§18
24.03.15	Notice from DAS to Miller Gardner purporting to amend FFA to revert to original terms of 2012 TOBA in respect of funding of disbursements	4E/112-113
23.07.15	Mrs Plevin refused permission to appeal order of HHJ Platts on paper	3D/357
18.11.15	Mrs Plevin refused permission to appeal order of HHJ Platts on renewed oral hearing	
02.12.15	Letter from Miller Gardner to DAS enclosing schedule of forward funding in relation to Mrs Plevin's claim. Schedule shows total forward funding of £288,484.88 of which £168,469.22 had been used to pay disbursements and a balance of £119,835.66 had been retained by Miller Gardner against	4E/118

	future disbursements	
05.02.16	Email from DAS to Miller Gardner expressing surprise that forward funding had been retained and asking that unused monies be repaid	4E/123
08.02.16	Letter from A&M Bacon to Miller Gardner stating that they had informed by DAS that the Policy did not cover (1) detailed assessment proceedings or (2) remitted County Court proceedings	2B/6/285
09.02.16	Hearing in respect of costs in remitted County Court proceedings. Adjourned at Paragon's request.	2B/6/229/§19
11.02.16	Detailed assessment of Mrs Plevin's costs of SC Appeal concluded. Mrs Plevin's costs assessed at £751,457.84 (including ATE premium of £531,235) and Paragon ordered to pay costs of detailed assessment.	2B/6/229/§20
24.02.16	Letter from Miller Gardner to DAS setting out Miller Gardner's understanding of FFA	4E/124
29.02.16	Reply from DAS stating that if DAS had realised there was no pressing need to put Miller Gardner in funds re counsel's fees it would not have agreed to provide forward funding	4E/126
02.03.16	Letter from Miller Gardner to DAS in response to letter from A&M Bacon disputing lack of cover for detailed assessment proceedings and remitted County Court proceeding	4E/128
16.03.16	Letter from DAS to Miller Gardner stating that the following are not covered under the Policy (1) Mrs Plevin's own solicitor costs (2) costs of detailed assessment proceedings (3) remitted County Court proceedings	4E/145
30.03.16	Letter from Miller Gardner to DAS stating that they had relied on DAS "*as having full knowledge and understanding of the terms of the indemnity and for those reasons have not had cause previously to consider such terms*" and that, contrary to DAS's position, (1) Mrs Plevin's own solicitor costs, (2) the costs of detailed assessment proceedings and (3) the costs of the remitted County Court proceedings are covered under the Policy	4E/159
04.04.16	Paragon applies to SC to (1) vary or set aside SC costs order (2) review Costs Officers' decisions on detailed assessment (3) stay enforcement of costs award ("*SC applications").* Paragon also applied for wasted costs against Miller Gardner.	2B/6/229/§22
01.06.16	Draft Part 8 proceedings served by Miller Gardner on DAS	4E/182
21.06.16	Miller Gardner and Mrs Plevin enter into further variation of CFA to cover SC Applications ("*SC appeals variation*")	2C/15
28.06.16	D internal email confirming that DAS can continue to consider top-up cover on Miller Gardner's cases provided certain requirements met	4E/190
29.07.16	Letter from Clyde & Co on behalf of DAS setting out D's position regarding cover under Policy and containing reservation of D's rights	4E/197-203
05.08.16	Part 8 Claim Form issued.	1A/1/5
08.08.16	Miller Gardner asks DAS to extend cover under Policy to cover SC Applications	4E/204

25.08.16	Miller Gardner provides DAS with estimate of Mrs Plevin's costs and Paragon's costs for SC Applications	4E/206
18.10.16	D offers subject to approval (and without prejudice to its position in dispute) to extend cover to cover SC Applications	4E/221
8.11.16	D agrees (without prejudice to its position in dispute with C) to extend cover under Policy to cover SC Applications and issues policy schedule for Paragon's applications to Supreme Court with a Further Top Up Limit of Indemnity of £400,000 and a Total Combined Indemnity limit of £1,336,000 and further top up premium of £550,000 inclusive of IPT	4E/225 2C/22
06.02.17	Hearing in SC. Mrs Plevin confirms on instructions from DAS that by mistake the Business Litigation Policy instead of Personal Litigation Policy was incorporated; and that DAS would not rely on terms of Business Litigation Policy insofar as different and would in effect be bound by clause 4 of Personal Litigation Policy	2B/7/310/§5 1A/3/60/§14.1
15.03.17 29.03.17	SC dismisses SC Applications (and wasted costs application against Miller Gardner) and orders Paragon to pay Mrs Plevin's costs of SC Applications	2B/7/312/§9-10
27.04.17	Letter from Miller Gardner to DAS enclosing cheque for £173,482.74 in respect of forward funding for SC and stating Miller Gardner would not be returning premium recovered at that stage	4E/232
15.05.17	Email from DAS to Miller Gardner accepting cheque for £173,482.74 in part payment and requesting payment of £50,389 within 7 days and payment of recovered premium	4E/236
15.05.17	Letter from Clyde & Co stating that any recovered premium is held on trust for DAS and Miller Gardner, and asking Miller Gardner to explain basis on which it declines to return premium	4E/237
15.5.17	Detailed assessment of Mrs Plevin's costs of CA Appeal concluded. Paragon ordered to pay 80% of Mrs Plevin's costs of detailed assessment	1A/2/20/§51
16.05.17	Letter from Miller Gardner to DAS stating that "other than for indemnity claims" all monies forward funded for the SC proceeding had been repaid but some monies had been allocated to the CA proceedings	4E/239
19.05.17	Amended Claim Form	1A/1/5
14.06.17	Order that Claim proceed as Part 7 Claim	1A/13/500
22.06.17	Remitted costs hearing in County Court before HHJ Platts who orders Mrs Plevin to pay Paragon's costs of relief hearing on 2.3.15 from 27.1.15[13] to be assessed but otherwise orders no order as to costs in respect of proceedings in County Court	3D/2/287
04.07.17	Letter from Miller Gardner to DAS enclosing cheque for £362,817.35 in respect of premium recovered in SC proceedings (£531,235 less commission retained by Miller Gardner)	4E/246
04.07.17	Letter from Miller Gardner to DAS enclosing cheque for £150,182.64 in respect of premium recovered in CA proceedings	4E/247

[13] Paragon made an offer on 23.1.15 to pay Mrs Plevin £4,500 which Mrs Plevin rejected on 27.2.15. The judge held Mrs Plevin should have accepted Paragon's offer [1A/3/68/§55.2]

	(£185,108.84 less 20% commission retained by Miller Gardner)	
July 2018	Detailed assessment proceedings in respect of Mrs Plevin's costs of SC Applications compromised in sum of £500,000 to be paid by Paragon (of which £200,000 already paid). £235,000 paid to DAS, £65,000 paid to Miller Gardner	2B/2/50/§5-6