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CO/904/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2A 2LL
Friday, 1 March 2013

B e f o r e:
LORD JUSTICE ELIAS
MR JUSTICE CRANSTON
Between:

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THE QUEEN ON THE APPLICATION OF
(1) ASSOCIATION OF PERSONAL INJURY LAWYERS
(2) MOTOR ACCIDENT SOLICITORS SOCIETY
Claimants

- v -

SECRETARY OF STATE FOR JUSTICE
Respondent
(1) ASSOCIATION OF BRITISH INSURERS
(2) THE LAW SOCIETY
(3) UNITE
(4) THOMPSONS SOLICITORS
(5) UNISON
Interested Parties

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Mr P Nicholls QC (instructed by Kingsley Napley) appeared on behalf of the **Claimants**
Mr J Eadie QC and Mr M Chamberlain (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**
Mr C Béar QC and Mr James McClelland (instructed by DAC Beachcroft) appeared on behalf of the **First Interested Party**

Mr B Hooper (instructed by the Law Society) appeared on behalf of the **Second Interested Party**

Mr C Wynter QC (instructed by Unite) appeared on behalf of the **Third Interested Party**

Hearing date: 1 March 2013

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J U D G M E N T (As Approved)

1. LORD JUSTICE ELIAS: The claimants in this action are two lawyers' associations, APIL and MASS. They seek to challenge a decision to reduce the fixed recoverable costs payable in personal injury claims covered by the pre-action protocol for low value personal injury claims in road traffic accidents ("the protocol"). The effect of these changes, potentially, is significantly to reduce the fees which solicitors representing such claimants will be entitled to recover.

2. The claimants contend that the decision was taken on 14 February 2012 following a meeting where the Government discussed the proposal with one interest group, namely insurers and those who pay insurance premiums, but not others. It is not suggested that there is any general obligation on the Secretary of State to consult before making this decision, but the claimants say that the Government had embarked upon consultation and, having done so, they could not do it in a partial and unfair way.

3. The claimants are deeply concerned about the effect that a reduction in fees is likely to cause. They contend that it will affect the ability of solicitors to continue to practise in this area; that it may lead to a lack of representation for personal injury claimants, or at least a lack of quality representation; and many injured persons may find that they have to act for themselves, and may be tempted to accept lower settlements than would otherwise be their due.

4. They are supported in this contention by three of the interested parties before us, namely The Law Society, UNITE, and Thompsons Solicitors.

5. The court is not concerned with whether or not those submissions are correct - and the Secretary of State and the Association of British Insurers (another interested party who represent some 90 per cent of motor insurers) do not accept that they are - but the claimants submit that it is observations of this nature which they may have wished to make to Government in the course of consultations had they had the opportunity to do so.

6. The Secretary of State submits that the application should be dismissed for a variety of reasons, and is supported in this by the Association of British Insurers.

7. First, as a matter of principle the case is misconceived: there was no consultation exercise. It is entirely a matter for Government with whom it will discuss proposals before introducing changes of policy. The imposition of a duty of equitable dealing with competing interest groups would seriously hamper the working of Government and is rooted in neither principle nor authority.

8. Second, as a matter of fact the Secretary of State contends that the decision was taken well before the critical meeting on 14 February, and accordingly the factual premise of the claim is misconceived.

9. .Third, he contends that there has been gross and inexplicable delay in bringing the matter to court. The claimants did not issue their claim until 21 January 2013, almost a year after the decision was allegedly taken.

10. Fourth, the Secretary of State says that in any event relief should be refused, both because it would now be detrimental to good administration and also for the distinct reason that the matters which the claimants contend that they would want the Secretary of State to consider have in fact been fully considered by him, both before he took the decision and indeed during subsequent consultations which took place over the amount by which the fees should be reduced. In these circumstances, the Secretary of State contends that it is fanciful to think that any arguments now which might be advanced by the claimants could affect the decision in principle to reduce fees, even if they might have a bearing on the extent of any reduction.

The background

11. The Ministry of Justice has been concerned for some time about what it considers to be excessive costs in low value personal injury litigation. In April 2007 it proposed developing a new claims process for personal injury claims up to £25,000 in value. In fact, when the scheme was introduced in April 2010 following consultation, it was limited to claims up to £10,000. This still covers something in excess of half a million road traffic accident claims per year.

12. There are three stages to that process. The first involves completion of a claim notification form, which is submitted to the defendant and its insurer, and will lead to the admission or denial of liability. The second stage involves a provision of medical reports, consideration of interim payments and the formulation and consideration of settlement offers. The objective is that the parties should agree terms to settle by the end of this stage. The third stage is court resolution where matters have not been settled at stage 2.

13. At the end each of stages 1 and 2, the claimant's representative is entitled to payment of fixed costs or fees. The amount of those costs is set out in Table 1 in CPR 45.29. It currently provides for costs of £400 at stage 1 and £800 at stage 2. The amount of those costs was determined following consultation with lawyers' representatives on the one hand and representatives of the insurance industry on the other, and their negotiated agreement was confirmed by ministers. The fixed fees are set out in the CPR and the level of fees must, at least at the first stage, be determined by the Civil Procedure Rules Committee (CPRC), the body charged with making and amending the CPR (see Civil Procedure Rules Act 1997, section 2). The Secretary of State may, if he considers it expedient for the CPR to include the provision that would achieve a specified purpose, give the CPRC written notice to that effect (see section 3A(1). If the Lord Chancellor gives such a notice, the CPRC must make such rules as it considers necessary to achieve the specified purpose (see section 3A(3)). A notification was given to the CPRC in this case. Moreover, by section 3(3), the Lord Chancellor has a power of veto. He may allow, disallow or amend the rules as he thinks fit.

14. In January 2010, Sir Rupert Jackson's Final Report on his Review of Civil Litigation Costs was published. It has recommended a whole raft of reforms in relation to costs in civil cases. One of his proposals was that there should be a ban on the payment by solicitors to claims management companies, insurers and others of fees for the referral of personal injury claims (known as "referral fees"). At paragraph 2.5 of his Report, Sir Rupert explained this practice:

> "It is a regrettably common feature of civil litigation, in particular personal injuries litigation, that solicitors pay referral fees to claims management companies, before-the-event ('BTE') insurers and other organisations to 'buy' cases. Referral fees add to the costs of litigation, without adding any real value to it. I recommend that lawyers should not be permitted to pay referral fees in respect of personal injury cases."

15. Sir Rupert, later in his Report, dealt with observations which had been made to him to the effect that referral fees tended to reduce or replace marketing costs in a solicitor's firm. He accepted that this point had some merit, but only to a limited extent:

> "I accept that solicitors will still pay marketing costs if referral fees were banned, but those marketing costs would no longer be driven upwards by the ratcheting effect of referral fees. I see considerable force in the arguments advanced during Phase 2 that referral fees have driven up normal marketing costs."

16. There were two extensive consultations on aspects of Sir Rupert's proposals. One of these consultation papers, published in March 2011, proposed amongst other things the extension of the protocol to claims up to £25,000 in value. It did not, at that stage, address referral fees or the question of costs.

17. In September 2010, the Legal Services Board ("LSB") had published a discussion document on the regulatory treatment of referral fees. It cited research commissioned by the Board from the independent consultancy Charles Rivers Associates, which amongst other matters disputed the findings of Sir Rupert Jackson and claimed that there was "no evidence that increases in referral fees led to an increase in the price of legal services". The LSB was not in favour of the outright ban on referral fees, although it did accept that they needed to be subject to greater regulation.

18. The Government considered the conflicting representations and on 9 September 2011 announced that they did intend to ban referral fees. They considered that they added to the high costs and volume of personal injury litigation and contributed to the "compensation culture" which encouraged unmeritorious claims to be pursued.

19. The Law Society responded by a letter dated 22 September 2011. They were not opposed to the abolition of referral fees but strongly disputed the idea that those fees had increased legal costs, making the point that the costs were calculated without reference to any referral fees and that by no means all solicitors are parties to referral arrangements. The impact of referral fees on costs, however, remains a matter of considerable dispute, and the Government was plainly not convinced that referral costs had not led to fee inflation. When appearing before the House of Commons Transport Select Committee on 11 October 2011, the Under Secretary of State for the Ministry of Justice, Mr Djanogly MP, said this:

> "I believe that there is a notional amount within those fixed costs distributed to referral fees. In effect we want to reduce the fixed costs by that amount. However, the legal profession disputes that vociferously. They either say that there is no notional amount for referral fees or, if referral fees are banned, they will have to spend more on advertising and therefore they should keep that amount. There is going to be a negotiation."

20. The abolition of referral fees was achieved by the Legal Aid (Sentencing and Punishment of Offenders) Act 2012, sections 56-60. During the passage of that Bill, Mr Jack Straw MP tabled an amendment in which he proposed that the level of fixed costs in the protocol should be reduced in the light of the impact of the abolition of referral fees. The Minister, Mr Djanogly, gave a commitment that the Government was looking at that and observed:

> "I can also tell him that I do not intend to go to all the trouble of stopping the referral fees being paid to claims management companies, only to see those same fees stay with the lawyers rather than going back to consumers in lower insurance premiums or prices in the shops."

Meeting on 14 February 2012

21. The critical meeting at the heart of this case was the insurance summit, as it has been described, held at 10 Downing Street on 14 February 2012 between the Prime Minister and various interests from the world of insurance and other commercial groups. The purpose of the meeting was not simply to discuss the question of fees: it raised a series of other issues designed to reduce the cost of motor insurance.

22. There were various emails sent between the parties in the run-up to the meeting. Both sides place some reliance on an email of 9 February sent by the Minister to the Association of British Insurers, which included the observation that the Government would:

> "Commit to reducing the £100-£2,000 fee that lawyers can earn from small value personal injury claims. We can't give a figure until the consultation but we can say that the Government is committed to reducing the fee."

23. Other emails around this time show that there was a degree of bartering between Government and the ABI. The Government was indicating what steps it would take and was seeking undertakings from the insurance industry in return.

24. .The notes of the meeting of the summit include the following:

> "The insurance industry wanted two sets of legal reform. These were: (1) the reforms currently being taken through MOJ's LASBO Bill, which included the banning of referral fees; and (2) significantly cutting fixed legal fees for low level personal injury claims from £1,200 to more like £400 (it is currently €300 in Germany). This should disincentivise claims management companies from profiteering from minor personal injuries.
>
> The Prime Minister noted that much of this was already being legislated but the fixed legal fees of £l,200 must be significantly reduced and Government should not delay in enacting these changes. He tasked MOJ to achieve this more quickly than originally planned."

25. The subsequent press release indicated that the insurance industry had made a "commitment to passing savings on to customers resulting from a Government commitment to reduce the current £1,200 fee that lawyers earn from small value personal claims."

26. The claimants rely in support of their submissions on a number of other documents. On 3 November 2011, an officer of the MOJ wrote to MASS saying that any review of the fixed fees would need to be evidence based and that it would inevitably involve consultation. On 13 December 2011, there was an internal MOJ paper on the question of revisiting fixed fees, and it included as a memorandum a proposed draft letter which the Minister would send to consultees in which he requested evidence relevant to the question of fee levels. The claimants say that the memorandum envisaged the possibility that the fees could go up and down and therefore is consistent with the notion that it was proposed that there would at that stage at least be consultation over whether fees should be reduced at all.

27. Finally, particular emphasis was placed upon an email of 7 February 2012 from an official in the Cabinet Office to a representative from Zurich Insurance, in which the author said that the Cabinet Office was "exploring reducing the current £1,200 cap that lawyers can earn from small value claims", but went on to request the recipients not to share this information more widely because "this has not been agreed as yet and there will need to be a consultation process first".

28. On 28 February 2012, two weeks after the summit meeting, the Minister wrote to a range of persons in which he referred to the insurance summit and noted the Government's commitment to reducing fixed recoverable costs at the summit. He asked for input as to the appropriate level of revised costs and whether and how the current scheme needs to be amended to cover public and employer liability.

29. On 16 August 2012, more than six months after the decision, APIL's solicitors, Kingsley Napley, sent a letter to the MOJ raising several matters. They objected to an extension of the protocol to cover claims up to £25,000 and the Secretary of State subsequently conceded that the decision could not stand. They also raised the matters now advanced in these claims. The Government replied on 31 October that it was committed to reducing fixed recoverable costs and would consult further on the proposed new fees.

30. Meanwhile there had been discussion by Government with key stakeholders, including the claimants, about the proposed level of the new fixed costs. The first claimant responded formally to a call for evidence on 25 May 2012 and made comments about the proposed level of fixed costs, but did not mention or suggest that the decision in principle to reduce the level of fees was unlawful.

The law

31. I turn to consider the legal arguments.

32. .The claimants accept that there is no general duty to consult before a decision of this nature is taken. As Dyson LJ, as he then was, observed at paragraph 48 in R (on the application of London Borough of Hillingdon & Ors) v The Lord Chancellor & Ors [2008] EWHC 2683 (Admin), which is a case concerning a challenge to a decision to increase court fees:

> "Decisions made by public authorities in the exercise of their discretion will often yield benefit to some and loss to others. It is not the law that authorities must necessarily consult those who are liable to be

disadvantaged by a proposed decision before they can make the decision. Government and administration would be impossible if that were the case."

33. We were also referred to one other authority to like effect. In R (on the application of Bhatt Murphy (a firm)) v The Independent Assessor [2008] EWCA Civ 755, Laws LJ observed that:

> "Public authorities typically, and central government *par excellence*, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel."

34. The claimants' case is the Government here did in fact choose to consult; the documents emailed at that time are only consistent with that intention. Whether there is consultation is a matter of substance and not simply a matter of form, and the insurance summit was, in fact, a classic consultation exercise, particularly when seen in the light of the earlier correspondence. The Government had indicated what it was proposing to do, it invited comments, it received them and it made its decision. It took these comments into account in making that decision. The failure in the consultation exercise was that it was conducted with a group representing only one standpoint, namely insurers. There was no consultation with the representatives of claimants who may have wished to make powerful arguments opposing the proposal. The fact that the claimants were given the opportunity to make representations at a later stage on the extent of cuts did not remedy the omission; the parameters of that exercise had already been determined once the decision in principle had been taken to reduce fees.

35. Mr Nicholls QC, counsel for the claimants, relied in particular on a number of authorities to support his general proposition. In R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213, Lord Woolf MR, giving the judgment of this court, stated the central elements in a consultative exercise at paragraph 108 deriving them from the earlier *Gunning* case:

> "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken (R v Brent LBC ex parte Gunning [1985] 84 LGR 168)."

36. This principle was applied in R (on the application of Milton Keynes Council & Ors) v Secretary of State for Communities & Local Government [2011] EWCA Civ 1575, when the Court of Appeal was asked to quash in part two statutory instruments made by the Secretary of State. The Government was under no duty to consult, but it chosen to do so. However, it did not consider that extensive consultation was necessary because there had been detailed consultation a year earlier. As a consequence of that

earlier consultation, the principal arguments for and against the proposed changes were known and understood. It chose to consult on a limited basis with certain specified organisations only, setting a strict timescale. A number of councils contended that they too should have been consulted but were not on the list of consultees. The Court of Appeal rejected the argument on the facts, not least because the earlier exercise had allowed the claimants to make extensive submissions why the proposed action was undesirable. Pill LJ, with whose judgment Arden and MacFarlane LJJ agreed, accepted that the duty of fairness was in principle engaged, albeit not infringed here(para 32):

> "I do not accept the submission that a decision-maker can routinely pick and choose whom he will consult. A fair consultation requires fairness in deciding whom to consult as well as fairness in deciding the subject matter of the consultation and its timing."

This case supports the proposition that there may be circumstances where a selective consultation exercise will render a decision taken pursuant to it unlawful. I do not understand the Secretary of State to contend otherwise. His submission is that there never was a consultation exercise. There was no statutory obligation to consult and the Government was not choosing to consult over whether the decision to reduce fees should be taken, it was simply engaging with an interested party in a way which it considered to be beneficial to its decision making. The Secretary of State submits that the decision to reduce fees had already effectively been taken and that, analysed in context, the summit meeting was simply to ensure that the insurance industry would come on board and show a commitment to reducing premiums on the basis that the Government would reduce the costs of litigation.

37. I agree that a proper analysis of events strongly suggests that the decision in principle was taken before the meeting on 14 February. If that is so, then Mr Nicholls QC accepts that the claims cannot succeed. In my view, the response of the Minister, both before the Treasury Select Committee and in response to Mr Straw's proposed amendment, strongly suggests that the intention was to reduce the fees, but it was recognised that there was a conflict about how much of the current fees was referable to the abolition of the referral fee, and there would have to be a negotiation about the amount of any reduction.

38. Similarly, the email in advance of the summit meeting to the ABI stated in terms that the Government was committed to reducing fees. Moreover, the press report of the meeting which says that the Prime Minister had instructed that this should be done "more quickly than originally planned" is consistent with notion that it had already been planned.

39. I do accept that the email of 7 February to Zurich Insurance supports the claimants' case, but even that is consistent with the position that the commitment had not been made public and that there would need to be consultation over the amount of the reduction. Similarly, the internal memorandum and the draft letter are, I think, consistent with the position that it was proposed that there would be some reduction but that there would have to be consultation over the figure.

40. It does seem to be the case that the policy was not announced until the summit, at which point the Government was able to extract some commitment from the insurance industry. But in my judgment, reading the documents in the round, I think

there was never any real doubt about the Government's position, if one approaches the documents with normal political antennae. I should note too that in a recent report on the responses to consultation over the level of fees, it was stated that the Government had decided in principle in the autumn of 2011 that the abolition of referral fees should lead to a reduction in the fixed costs. It seems to me that that is an accurate statement of what the Government had in substance resolved to do.

41. It is interesting to note too that in the statements made in the course of this litigation on behalf of both the Secretary of State and the ABI, neither party understood that what they were doing was entering into a process of consultation.

42. The Government was plainly aware that there were different views as to whether it was justified to reduce fees in the light of the abolition of referral fees. The Law Society had signalled its strong opposition to such a move and given reasons for that opposition. The Minister referred to the conflict of views both before the Select Committee and in response to the Jack Straw amendment. In this context, it seems to me wholly unrealistic to suggest that the decision was only taken as a consequence of the views expressed by the insurance industry at the summit meeting. It was, of course, the case that the industry was in favour of reducing fees, but that was obvious; it did not require a meeting with their representatives to establish that fact. The Government wanted to be able to say, with the support of the industry, that it was envisaged that the change would lead to reduced insurance premiums and that it had obtained certain commitments in that regard. I would add that in the circumstances where a decision has effectively been taken, it would be both cynical and pointless to enter into consultations which could change nothing.

43. But even is we assume in the applicant’s favour that the Government was not finally persuaded to adopt this policy until the summit meeting, that would still not, in my view, convert this meeting into a consultation exercise of the kind which would trigger the panoply of procedural requirements identified in Gunning. Contact with interest groups (or "stakeholders", I think it is, given the modem spin) is the very warp and woof of democratic government; it is central to decision making. It means that Government is better informed of the implications of the different options, and will more likely to be made aware of potential pitfalls, political or otherwise, which the decision may create. But it cannot be the case that every time a minister deals with one group, he or she must hold a similar meeting with a group holding the opposite view. It must be for Government to decide what information it requires, and from what source and at what time, in order to facilitate its decision making. If the Government decides to enter into a formal consultation process, that exercise must satisfy the Gunning requirements if it is to be fair and meaningful. But, in my view, a court cannot justifiably infer that a minister has entered into a consultation exercise merely because a decision is taken after a meeting with a particular interest group, even where representations from that group have, in fact, proved decisive. The purpose of the meeting may have been to clarify a particular matter, or to gauge the strength of the group's opposition to a proposed decision, or simply so that the Government will be able to trumpet that group's support for the decision when it was announced. None of this could remotely be said to amount to consultation with all the baggage inherent in that process.

44. I agree with Mr Eadie that there is no principled basis for determining when the process amounts to consultation and when it involves discussions falling short of that. If a government is persuaded to a view as a result of information volunteered to it, Mr Nicholls QC accepts that that would not be consultation. But is it different if the Government solicits the same information? And if the Government seeks an exchange of views with one body, must it necessarily do so with respect to other potentially interested parties whenever it finds those views persuasive? And how do we determine whether it has found those views decisive? In my judgment, there is no safe mooring for the principle on which Mr Nicholls QC relies. It is not the function of the courts to map out the way in which Government approaches its task of decision making. If the Government chooses to go down the road of formal consultation, then the courts have the obligation to make sure it is fairly carried out, but in my judgment they should go no further than that.

45. The process of government would, in my view, grind to a halt if the nature of a government's obligations were as outlined by Mr Nicholls QC. Government must be able to take advice, obtain information, secure undertakings, and garnish support from various interest groups without being required to treat their polar opposites in precisely the same way. This is not unfair: it is simply practical governance. If Government is perceived to be deaf to some interest groups but not others, or unresponsive to interests to which it is ideologically unsympathetic, that is a matter for the ballot box; it is not a matter for the courts.

46. Since I have rejected the claims on the merits, it follows that the other grounds do not strictly arise, but I will deal with them briefly.

47. As to delay, there was a substantial period between the making of the decision under challenge (assuming, on the claimants' case, that it was made on 14 February) and the lodging of the claim. The claimants submit there has been no delay because no amendment has yet been made to the rules actually reducing fees. They submit that until that point, time does not begin to run. They place reliance on a number of authorities, including R v HM Treasury ex parte Smedley [1985] 1 QB 657, where the Court of Appeal indicated that normally it was not even appropriate to challenge a proposed Order in Council until it had been made; and R v Secretary of State for Health ex parte United States Tobacco [1992] QB 353, where certain regulations were successfully challenged for lack of consultation after they had been made.

48. In addition, they rely on the decision of the House of Lords in R v London Borough of Hammersmith and Fulham ex parte Burkett [2002] 1 WLR 1593 where their Lordships held that even if a claimant is out of time to challenge a resolution granting planning permission to a developer, he is not barred from challenging the actual grant of permission itself, even if it is substantially on the same grounds as he would have challenged the original resolution. So, says Mr Nicholls QC, in this case the claimants are entitled to challenge the decision in principle because they can still challenge the rules when actually made.

49. I do not accept that submission. In *Burkett*, the resolution itself is of no practical effect and did not impinge upon the interest of the individual claimants. Here, on the claimants' own case, the decision in principle is of very significant effect because it defined the scope of future consultation. Moreover, if one draws the analogy

with *Burkett*, then this is akin to the claim out of time against the resolution. The House of Lords accepted that the applicant in that case was out of time when challenging the resolution. The claimants are not in this action challenging the rules themselves, and it seems to me that *Burkett*, far from supporting the claimants' case, actually damages it.

50. There has now been extensive consultation on the fee reduction. The focus of the challenge is not the consultation process with respect to the reduction, but the decision in principle. In my judgment, the claimants could not simply sit back, involve themselves in the consultation over the proposed reduction in fees, and keep up their sleeve the challenge against the Secretary of State's decision in principle. Mr Nicholls QC advanced some explanation why, assuming there was delay, it was explicable and should not lead to a dismissal of their claim. They were seeking to resolve matters without going to court, and they were also seeking more information about a related matter of concern, namely the proposed extension of the scheme. It was necessary to obtain a report in respect of that matter and the report was not produced until July. I do not consider that that is a good explanation for failing to take these proceedings earlier, or at the very least for alerting the Secretary of State to the continuing concern which the applicants had about the legality of that decision.

51. Nor do I think this is a case where time should be extended. The basic case was revealed in the press statement following the meeting. By that stage, the claimants knew that consultations on fee reductions were in motion and yet they did nothing, and indeed it was only in May, I think, that they set any investigations in motion at all.

52. Mr Béar QC, counsel for the ABI, contended that there had been an abuse of process on the grounds that the claimants have deliberately delayed pursuing the claim in the hope that by the mere fact of the proceedings they will delay or disrupt the implementation of the new fee structure. He refers to the fact that there is no proper or satisfactory explanation as to why these applications were lodged so late. But I would not be willing to draw that serious inference on the material available here.

53. Mr Eadie QC and Mr Béar QC also submit that allowing the claim to proceed would cause a detriment to good administration. Two consultative processes have now been carried out on the assumption that a lawful decision has been made, and they would need to be reopened. Many hundreds of parties have, in fact, responded to those consultations. In my judgment, that does reinforce why it would be inappropriate to extend time or allow this case to be pursued out of time.

54. Finally, the Secretary of State and the ABI say that in any event it would be pointless to grant relief because the points which the claimants would wish to advance in any consultation exercise were well known to the Minister before the decision was taken. Moreover, they have since been reiterated in the consultation over the level of fees.

55. It must be said that in the usual case where there has been a failure properly to consult, or some unfairness in the consultation process, that ought to lead to a remedy for the claimants notwithstanding any practical problems that the remedy might create. A court should not readily refuse relief on the grounds that if it is granted and if consultation takes place it is likely to make no difference. That is often the position where procedural challenges succeed before the Administrative Court.

56. There is force in the ground that if the Secretary of State had determined that a formal consultation exercise should take place, then it would normally be assumed that it is for some purpose and that his mind is not totally closed. One might then infer that further information brought to his attention could cause him or her to change his mind. But I have been persuaded that in the very unusual circumstances of this case, it would not in fact have been appropriate to grant a remedy, even if I had found there had been no consultation. I say that for two reasons. The essential reason why it is submitted that the Secretary of State should not reduce fees is the link between the referral fees and the costs, and on any view it is absolutely plain that that was a matter that the Government had firmly in mind and fully understood, and yet it was not persuasive. Whatever obligations there might have been in relation to consultation with other parties who had had no opportunity to make representations, if such parties existed, I am persuaded that it really would be, in the exceptional circumstances of this case, quite unreal to say that the consultation exercise now could cause the Secretary of State to reach a different view.

57. I also accept the submission advanced in particular by Mr Béar QC that the subsequent consultation over the level of fees ought, in the very exceptional circumstances of this case, to be taken into consideration.

58. The Law Society has made representations that the level of fees should, if anything, be increased. Perfectly properly and entirely logically, they have run precisely the same arguments in relation to the level of fees as they would advance in relation to the question whether the fees should have been reduced as a matter of principle. We know that their submissions in relation to the level of fees have not succeeded. It must be fanciful to think that in circumstances where the Secretary of State has not been persuaded by these arguments that the level of fees should stay the same or be increased, he might nonetheless be persuaded that it was wrong in principle to reduce them.

59. So for those variety of reasons, and notwithstanding the attractive way in which Mr Nicholls QC advanced his case on behalf of the claimants, I am satisfied that this application for judicial review should not succeed.

60. I would grant permission if only because the matter is of some significance and affects potentially a large group of claimants, but I have no doubt that, having considered the matter carefully, this application should fail.

61. MR JUSTICE CRANSTON: I agree. Because of the importance of the issue, I wish to add a few remarks.

62. At the outset, I underline that this case is not about the merits of the decision announced at the Prime Minister's summit on 14 February 2012. The claimants and interested parties, the Law Society and Unite, Britain's largest trade union, have advanced powerful arguments about what they contend will be a reduction of access to justice which will result from that decision. Nor is this case about the value of consultation in contemporary deliberative democracies. Quiet apart from its contribution to the legitimacy of Government, consultation has the utilitarian advantages, spelt out in the Government's own guidance on consultation principles of July 2012, of improving the quality of decision making. The Law Society and Unite have said that, if consulted at the decision stage, they could have made valuable contributions to an evidence-based policy. Finally, this is not a case where legislation

mandates consultation. Nor, to use the categories of Laws LJ in R (on the application of Bhatt Murphy (a firm)) v The Independent Assessor [2008] EWCA Civ 755 at paragraph 50, has there been an unequivocal promise or established practice that the Government will embark on consultation.

63. For the reasons given by my Lord, neither the email exchange with the insurance industry in the run-up to the Prime Minister's summit, nor the Prime Minister's summit itself, constituted consultation. What occurred was nothing more than the mundane operation of the political process where Government was bargaining with the insurance industry to have it reduce insurance premiums for the quid pro quo, of the reduction of fixed recoverable legal costs. In my view, the claim seeks to judicialise what are the ordinary processes of political decision-making on watershed policy issues. In effect, the claimants' case is, as a matter of law, that they should have been at the Prime Minister's summit on 14 February 2012, or at least party to the negotiations between the Government and the insurance industry before the decision announced that day. That, to my mind, is a very bold, indeed startling, submission. As my Lord has explained, it cannot be the case that every time in the decision-making process the Prime Minister or a minister deals with one group, he or she must hold a similar meeting with a group holding the opposite view. It must be for Government to decide what information it desires, from which source it will obtain it, and, I would add, with whom and how it will bargain to a decision.

64. Absent statute or an unequivocal promise or established practice to that effect, there is no principle of public law that obliges the Government to consult on watershed public policy issues, or that obliges it, when it has chosen not to consult, to hold meetings with any person or group. In fact, authority is to the contrary (see R (on the application of London Borough of Hillingdon & Ors) v The Lord Chancellor & Ors [2008] EWHC 2683 (Admin) at paragraph 48, per Dyson LJ). There is no suggestion that the caveat in that paragraph (unfairness resulting in the abuse of power) is triggered in this case. Mr Nicholls QC referred to procedural fairness. In my view, that offers no guidance as to whether consultation ought to occur in this type of case. The judicial conclusion that procedural fairness demands consultation could be conceived by others as a gross intrusion into the political process. Mr Nicholls QC took us to R (on the application of Dudley Metropolitan Borough Council) v Secretary of State for Communities and Local Government [2012] EWHC 1729 (Admin). Quite apart from anything else, that was a case where Singh J made clear that the group affected (the relevant local authorities) constituted a small class of persons directly affected by the decision under challenge. By contrast, in her witness statement in this case Debora Evans, the Chief Executive of APIL, refers to the class affected by the decision in this case as being all those who have legitimate claims for damages in respect of personal injury from road traffic accidents or which involve employers' liability or public liability claims.

65. The legal mind conceives of rational argument, reasoned discussion and evidence-based decision-making. Politics in democracies is and ever will be a mix of argument, persuasion and bargaining, and an attempt to bring on side interest groups and public opinion. There has long been a criticism that some interest groups have privileged access to government. The solution lies not in the judicial but in the political sphere. For constitutional and pragmatic reasons, there must be boundaries to the

judicialisation of decision-making on watershed policy matters. This claim is well outside the field.

66. MR EADIE: My Lord, I ask for the costs of the Secretary of State in those circumstances.

67. MR NICHOLLS: I cannot resist that.

68. MR BÉAR: My Lord, there may be a little debate, I am conscious of the time, but I do ask for my costs.

69. LORD JUSTICE ELIAS: What was the basis on which you were allowed to intervene? Was nothing said about --

70. MR BÉAR: No, we were served as an interested party so we were in from the start. There are three parts of the costs which I seek. The first is our costs up to 8 February, because we were the party who brought about today's hearing. Up to 8 February, we were the only party on this side of the court who was actively involved. We filed our acknowledgement of service on that date, which was a document that required some work. We had already filed an application for expedition and we sent a letter to the court. We were the only party then seeking expedition. That then resulted in the order of the President of the Queen's Bench Division directing today's hearing. So we seek of our costs of that.

71. We seek our costs of the witness statement of Mr Dalton. It was important for the ABI to file its evidence. Obviously there was an accusation that it was, in Mr Nicholls QC's phrase, we of course entirely disagree, in cahoots with the Government, and it was necessary and proper for the ABI to seek to respond to that.

72. Thirdly, of course, the ABI is the paying party. In many judicial reviews the Government (Inaudible) the outcome of the decision, but here it is the ABI's members who pay over 90 per cent of litigation costs.

73. So within the principles set out in the Bolton case, there is a special interest which justifies separate representation. That, of course, is underlined by the factor which also applied in the Bolton case to allow the developer there to recover its costs.

74. LORD JUSTICE ELIAS: Do you have Bolton here?

75. MR BÉAR: It is summarised. I do not have it. It is summarised in the White Book. I can read it out, I have it on my iPad. I can read out what Lord Lloyd says: "The following propositions may be supported ... The Secretary of State will get the whole of his costs. It should not be shared with anyone else. A second set of costs is more likely to be awarded at first instance than in the Court of Appeal." He said the developers in that case were entitled to take the view that on the facts of that case they had a sufficiently independent interest requiring protection so as to justify separate representation, and that the scale of the development and the importance of the outcome for the developers were both of exceptional size and weight.

76. So that is a factor which applied in Bolton, and of course it also applies to my client's members who, as I mentioned earlier, are paying several hundred million pounds of costs (Inaudible).

77. LORD JUSTICE ELIAS: Let us hear Mr Nicholls about that.

78. MR NICHOLLS: I cannot oppose the Secretary of State's application for costs. I do oppose Mr Béar's application. The principle under Bolton is that the third party will not get his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary of State; or unless he has an interest which requires separate representation.

79. What is conspicuous about the ABI's evidence and submissions is that they traverse precisely the same territory as the Secretary of State. As your Lordship's judgment indicates, I think you identify one separate point which Mr Béar raised, which was the abuse of process point which you were against him, but all the other points he was echoing the Secretary of State, he was arguing the same perspective, putting forward the same arguments, therefore there was nothing separate which he was advancing, nor any separate interest which he was advancing because both he and the Secretary of State were seeking the same thing, that is to uphold the decision. Therefore, I say the ordinary rules should apply: one order for costs (Inaudible) the Secretary of State and no costs payable to the ABI.

(The bench conferred)

80. LORD JUSTICE ELIAS: No, Mr Béar, I am sorry. We are grateful for your submissions, but at your own costs be they.

81. MR WYNTER: My Lord, does that apply to us too? We both bear our own costs.

82. LORD JUSTICE ELIAS: I think it does.

83. Can I thank all counsel involved and all legal teams involved, particularly the quality of the argument. The documents came rather late in some cases, but we are glad at least they came. Thank you very much indeed.