Neutral Citation Number: [2013] EWCA Civ 278

Case No: A2/2011/1168+3115(B) + 3118(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (Mr Justice Eady)
ON APPEAL FROM THE NORWICH COUNTY COURT
9CL07336

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/04/2013

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE RICHARDS
and
LORD JUSTICE LEVESON

- -

Between :

GAVIN FLATMAN	**Appellant**
- and -	
GILL GERMANY	**Respondent**

and Between :

RICHARD WEDDALL	**Appellant**
- and -	
BARCHESTER HEALTH CARE LIMITED	**Respondent**

- -
- -

Mr James Carpenter (instructed by Godfrey Morgan Solicitors Ltd trading as GMS Law) for the Appellants in both cases, and for GMS Law
Mr Simon J Brown and **Mr Richard Sage** (instructed by Plexus Law) for the Respondents
Mr David Holland Q.C. (instructed by the Law Society) appeared on behalf of the Law Society as Interveners.

Hearing dates : 6, 7 March 2013

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Judgment

Lord Justice Leveson :

1. These appeals (which relate to two entirely unconnected cases) are the consequence of the costs regime that presently operates in relation to personal injury litigation. They are focussed on applications for discovery as to funding arrangements made by unsuccessful claimants in personal injury litigation. Underlying these limited procedural requests, however is an issue as to the extent to which solicitors acting on behalf of claimants can fund or 'prime pump' litigation for those of limited means when proceeding pursuant to a conditional fee agreement ('CFA') and no 'after the event' insurance cover ('ATE cover') without thereby exposing themselves to adverse orders for costs should the claims fail.

2. The facts underline the potential for profit by solicitors against the limited downside risk and although the costs regime will change with the coming into force of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, for certain types of litigation, the issues with which this appeal grapples will still arise. Indeed, in one sense, they may become more acute if Defendant's insurers can undermine the principle of qualified one way costs shifting (which will limit recovery of costs by insurers in failed personal injury actions) by pursuing the solicitors acting for the claimant who fails.

3. It is for that reason that Rix LJ took the unusual step of granting permission to bring second appeals in what, after all, is limited to an issue concerned with costs. The concern has also led to an intervention by the Law Society (whose participation in the actions was approved by Rix LJ) with the result that there has been a wide ranging analysis of the position, which, on the face of it, extends beyond the very limited issue which falls to be resolved and covers the circumstances generally in which it may be appropriate to make a third party costs recovery order against solicitors acting for the losing party.

4. Notwithstanding the significant issues raised by the Law Society's intervention, these appeals are, in fact, limited to the disclosure of information in two specific cases. In one case, all the information has now been made available and, in the other, partial information was (unrealised by either of the parties) disclosed at a very early stage. On the basis of what they now know, in the first case, the insurer has instituted a claim for the recovery from the solicitor of the costs incurred in successfully defending the personal injuries claims. This court is not specifically concerned with the question whether such an order should be made in that case or such an application instituted in the other case.

Facts

5. The background litigation can be summarised shortly. As long ago as 8 September 2005, Mr Gavin Flatman suffered injury following an accident on his motorbike which he alleged had been caused by gravel which had been strewn over the road and which was the responsibility of Ms Gill Germany trading as Old Macdonald's Children's Centre. He brought an action for damages with the benefit of a conditional fee agreement without having obtained ATE cover, claiming, among other sums, loss of earnings for three years. On 21 January 2010, the action came for trial at the Norwich County Court before His Honour Judge Moloney Q.C. He dismissed the claim on the basis that Mr Flatman had not discharged the burden of proof. On the

face of it, therefore, the defendant (or her insurer) was entitled to recover the costs incurred in defending the action.

6. The defendant insurer's costs, as claimed, amounted to £14,420.51 but it quickly became apparent that Mr Flatman was impecunious and, without ATE cover, on the face of it, the sums would be irrecoverable. This situation is to be contrasted with the costs that would have been claimed had the action succeeded. Mr Flatman's solicitors (to whom I shall refer as GMS Law although there has been an issue as to whether this should be Godfrey Morgan Solicitors Ltd trading as GMS Law or a firm going under the name Godfrey Morgan Solicitors prior to incorporation) would have claimed £41,304.78 (that is, £20,652.39 plus an uplift to reflect the conditional fee agreement of 100%) inclusive of VAT. Because counsel was engaged under a CFA, the disbursements (consisting of the court fee, a medical report and a fee for records) were £2,035.82. It is a matter of concern that so much time could apparently have been spent by the solicitors on what is comparatively straightforward litigation.

7. Because Mr Flatman was unemployed at the time of the accident and claiming substantial loss of earnings, the defendant's solicitors suspected that the disbursements had been defrayed by GMS Law. On 21 December 2010, therefore, they applied to Judge Moloney for an order that GMS Law be joined as a party, for an order revealing how the claim had been funded, and (on the assumption that their suspicions were justified) an order that the solicitors pay the defendant's costs. On 20 January 2011, Judge Moloney dismissed the application. On 10 November 2011, Eady J allowed an appeal from that refusal and required the solicitors to disclose how the claim had been funded.

8. The second action concerned a claim for personal injuries sustained very differently. On 6 September 2006, Mr Richard Weddall was on duty as a deputy manager of a care home operated by Barchester Healthcare Ltd when, because of the ill-health of another member of staff, he called on other employees looking for a volunteer to act as a replacement. One of those he called (by the name of Marsh) was clearly drunk and, beyond declining to assist (as he was entitled to do) felt that Mr Weddall had been mocking him, so he rode to the care home and violently attacked Mr Weddall, ultimately being sentenced to 15 months imprisonment for the attack. Mr Weddall sought to recover damages on the grounds that his employers were vicariously liable for the assault by Mr Marsh. He was represented by the same solicitors (GMS Law), as were the insurers. On 9 November 2010, Judge Moloney dismissed the claim on the basis that Mr Marsh was "acting personally for his own reasons": that decision, to the effect that the employers were not vicariously liable for the tort of their employee, was later upheld by the Court of Appeal: see [2012] EWCA Civ 25.

9. Back in the county court, again the question of costs was raised. The estimate by GMS Law of its profit costs amounted to £23,500 inclusive of VAT and, as Eady J observed, it is reasonable to suppose that had the claim succeeded, the solicitors would have claimed some £47,000 taking account of an uplift of 100%. Again, no ATE insurance was in place. Once again, I repeat that it is a matter of concern that so much time could apparently have been spent by the solicitors on litigation which was likely to turn entirely on a narrow point of law, namely the issue of vicarious liability.

10. Eady J recorded that GMS Law had said that one set of court fees was paid by Mr Weddall and that the cost of the medical report had been deferred to the end of the

trial. No further information was then forthcoming and, again, the defendant's solicitors were concerned that the most likely source of funding was the solicitors themselves. On 16 November 2010, an application for further information was made; on 25 January 2011, this was similarly dismissed by Judge Moloney. Again, Eady J allowed the appeal from that order.

11. Since then, in relation to this second case, there have been some comparatively startling developments which have generated further disclosure: this material was admitted for the purposes of these appeals by Rix LJ. It is clear that, following the hearing before Eady J, GMS Law were engaging with Mr Weddall in relation to the costs. On 17 April 2012, Mr Weddall wrote to the solicitor for the insurer in these terms:

> "My solicitor, GMS law have sent me a Bill of Costs … As I have very little savings, no assets and in a low paid job, I am unable to pay these horrendous costs.
>
> I was unhappy that the case proceeded without insurance in place etc and have advised GMS law accordingly. See the attached copy letter. …
>
> I have never been in debt and feel due to bad advice have become a victim of the no win no fee syndrome."

12. The letter to his own solicitor (referring to a Bill of Costs of £50,000) is clear. It is worth setting out in full because it underlines the perils associated with the present funding mechanism for this type of litigation:

> "The objection I have to this Bill is it would never have come to this had my views been listened to and respected by GMS law during the case.
>
> (1) The case should have been stopped when the original barrister only gave me a 20-25% chance of winning.
>
> (2) I stressed throughout the case that <u>I only wished to proceed with the relevant insurance in place</u>, a stance which you agreed with. Several of my letters refer to this."

13. There then follows reference to four letters (16 March 2010, 22 April 2010, 4 May 2010 and 25 June 2010) recording his requirement that before court action was taken, insurance should be in place and identifying that the solicitors themselves would not expect him to proceed without that insurance. The letter goes on:

> "At the end of the day, no insurance was forthcoming, four companies were approached in September 2010 (very late in the day) and none were prepared to offer any terms. Any solicitors dealing in the best interests <u>of his client</u> would have called it a day. [Mr Weddall's emphasis]
>
> However, the case was then bulldozed through as I was left with little/no alternative as you were stating I would be liable to

> your costs in excess of five figures (£10,000 plus) if I did not proceed!
>
> I feel the decision to proceed on your part, without the insurance, was totally wrong, a gamble at my expense, to protect your own investment in the case. You were not dealing in my best interests by proceeding at this stage."

14. That led to orders by Rix LJ and disclosure by GMS Law of a considerable amount of material in excess of that which Eady J had ordered and which may be thought to render the appeal (in this case) academic but, in the light of the wider issues and its possible relevance to *Flatman v. Germany*, it is worth summarising what has emerged. First, there is a signed CFA dated 4 January 2007 between Godfrey Morgan Solicitors (i.e. the predecessor to Godfrey Morgan Solicitors Ltd trading as GMS Law) and Mr Weddall which makes it clear that "If you lose then you remain liable for the other sides costs *(sic)*". The agreement does not deal with disbursements but in a longer document "No Win No Fee Conditional Fee Agreements: what you need to know", it is asserted that "If you lose, you do not pay our costs nor success fee but you pay our disbursements". Disbursements are listed as medical notes, court fees, experts' fees, accident report fees, travelling expenses and insurance premiums.

15. Further, on 11 May 2009, Mr Weddall paid £18.46 in respect of the costs of obtaining GP notes and, on 26 May 2009, £50 for hospital notes. In June 2009, Counsel advised that the prospects of success were 20-25% and, as early as July 2009, Mr Weddall said that pursuing the case would be "a huge gamble … losing what money I have got towards my retirement". The response from the solicitors was to "move to a more favourable barrister at a later point in time". Proceedings were issued 8 weeks later.

16. By 5 March 2010, GMS Law were advising that they would have to pay the defendant "a couple of grand approx" if they discontinued. Later that month, it is clear that Mr Weddall did not appreciate that proceedings had been commenced. By then, Mr Morgan the solicitor believed that £3,000 would be required to meet the defendant's costs. He sought to explain why the barrister had advised that the prospects were low for reasons unconnected to the merits and suggested another barrister's opinion.

17. On 31 March, the defendant's solicitors made a Part 36 offer to allow Mr Weddall to discontinue with no order for costs. This offer was followed by fresh counsel's advice that his prospects of success were 51% and possibly 60% if there was further evidence. That advice led to the letter from Mr Weddall of 22 April ("I could not risk continuing without the insurance which you fully understood"). As for the offer, on 4 May 2010, he wrote noting that the defendants believed that his claim was backed by ATE insurance and expressed his thoughts that the claim continue "provided we have the insurance at a reasonable cost" but that if there was no insurance, the Part 36 settlement was the next best option. He also spoke of coming to "an amicable agreement" to close the matter with his own solicitors.

18. On 25 June, Mr Weddall wrote to the solicitors to the effect that "when we last met ... you said that you would not expect me to proceed without insurance, which I am unable to do". On 8 July, GMS Law replied:

> "I, of course, would not expect you to proceed with the case if you could not get insurance, I appreciate that the last thing you want to have to do is to go bankrupt if you were not successful.
>
> In turn, you will of course appreciate as you kindly offered in your previous correspondence that if we do not proceed with the action then you in turn would pay the costs and disbursements which have been incurred."

19. In the event, insurance was not available (with one insurer expressing the view that counsel had over-estimated the prospects of success) and the solicitors wrote that insurers were "becoming more and more contentious" and that Mr Weddall had "nothing to lose – if you don't own a house with equity". No suggestion of seeking to negotiate acceptance of the Part 36 offer to discontinue with no order for costs appears to have been made; neither did the solicitors refer back to the terms of the 'no win no fee' agreement.

20. There is no mention in the disclosed correspondence of payment either of the fees payable on commencement of the claim (and its increased value) or the allocation fee. Whether these sums were paid by the solicitors or not is unclear from the correspondence; there is certainly no suggestion that Mr Weddall had paid. Suffice to say that, in the light of this information, there was more than enough to enable the defendant's insurers in *Weddall* to decide whether it is appropriate to pursue a third party claim for costs or a wasted costs order against GMS Law or whether, alternatively, in an effort to recover the outlay on costs, to seek to pursue GMS Law through Mr Weddall and any potential claim that he might have by way of breach of contract or other duty to recover whatever sums he is ordered to pay by way of costs. Indeed, proceedings have now been commenced to do so. For the purposes of this appeal, to such extent as Rix LJ did not do so, I would admit this evidence in that case.

21. The disclosed information does, however, have a wider significance. That is the window that it opens on the very difficult pressures (if not conflicts) that it creates and the need for clarity about the circumstances in which it is appropriate to consider third party costs orders against the instructed solicitor. This remains significant in *Flatman* and, in the light of the full argument that has been advanced, needs to be addressed: to the extent that it permits of a similar fact argument in relation to the possible conduct of the solicitors in the *Flatman* action, therefore, I also take the view that it could be of relevance in that action.

22. Before leaving the facts, it is necessary to add that Mr Brown sought to refer to two further facts regarding the personal position of Mr Godfrey Morgan who was the solicitor with conduct of both these actions. The first concerns his appearance before the Solicitors Disciplinary Tribunal (which concerned the purported provision of ATE insurance with an unregulated insurer) and the decision of a costs judge in *Morgan v Spirit Group Ltd* striking out an entire bill of costs when an attempt was made to recover a premium in respect of a policy of legal expenses insurance with an insurer who could not be traced and about whom Mr Morgan did not provide adequate information. It is sufficient if I indicate that I do not consider that either of these circumstances affect the issues which are now before the court and I reject the application to rely on them.

23. In order to decide whether the orders to provide information should be upheld (even though, in relation to *Weddall*, the issue is academic because the information has now been provided), it is necessary to consider, first, the principles whereby an order for costs can be made against a third party (in this case the claimant's solicitors); secondly, the impact of the CFA regime upon those principles; thirdly, the approach to orders for disclosure; and, finally, the orders of Eady J and whether it was or is appropriate to order disclosure in these particular cases (irrespective of the answer to the different question whether or not there is sufficient to lead to an application to the court to order the solicitors to pay the costs, let alone make such an order).

Third Party Costs

24. The starting point is s. 51 of the Senior Courts Act 1981 which provides a power to determine to what extent the costs of litigation should be paid whether by one of the legal representatives or a third party (see *Aiden Shipping Ltd v Interbulk Ltd* [1986] 1 AC 965). The circumstances in which an order could be made against a solicitor were the subject of some elaboration in *Tolstoy-Miloslavsky v Aldington* [1996] 1 WLR 736, in these terms (per Rose LJ at 745):

> "…there are only three categories of conduct which can give rise to an order for costs against a solicitor: (i) if it is within the wasted costs jurisdiction of section 51(6) and (7); (ii) if it is otherwise a breach of duty to the court, such as, even before the Judicature Acts, could found an order, e.g. if he acts, even unwittingly, without authority or in breach of an undertaking; (iii) if he acts outside the role of solicitor, e.g. in a private capacity or as a true third party funder for someone else."

25. These principles were expanded in *Dymocks v Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2004]1 WLR 2807 by Lord Brown of Eaton under Heywood in these terms (at para. 25):

> "(1) Although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such 'exceptional' case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction ….
>
> (2) Generally speaking the discretion will not be exercised against 'pure funders', described in para 40 of *Hamilton v Al Fayed (No 2)* [2003] QB 1175, 1194 as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". …
>
> (3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the

> proceedings fail, he will pay the successful party's costs. The non party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation… Nor, indeed, is it necessary that the non-party be 'the only real party' to the litigation in the sense explained in the *Knight* case [*Knight v FP Special Assets Ltd* (1992) 174 CLR 178] provided that he is 'a real party in … very important and critical respects'."

26. In the *Knight* case, the High Court of Australia dealt with the issue in this way (per Mason CJ and Deane J at page 192):

> "For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. The category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."

27. Applying these observations to the position of a solicitor, in *Myatt v National Coal Board (No 2)* [2007] 1 WLR 1559, Dyson LJ explained the current position at [8]-[9]:

> "In my judgment, the third category described by Rose LJ in the *Tolstoy-Miloslavsky* case should be understood as including a solicitor who, to use the words of Lord Brown in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd*, is 'a real party … in very important and critical respects' and who 'not merely funds the proceedings but substantially also controls or at any rate is to benefit from them'. I do not accept that the mere fact that a solicitor is on the record prosecuting proceedings for his or her client is fatal to an application by the successful opposing party, under s.51(1) and (3) of [the Senior Courts Act 1981], that the solicitor should pay some or all of the costs. Suppose that the claimants had no financial interest in the outcome of the appeal at all because the solicitors had assumed liability for all the disbursements with no right of recourse against the clients. In that event, the only party with an interest in the appeal would be the solicitors. In my judgment, they would undoubtedly be acting outside the role of solicitor, to use the language of Rose LJ."

28. Thus, as Eady J put it, if a funder is "a real party" in the sense that he has an interest in the outcome of the litigation it may not matter that it would be inappropriate to describe that funder as "the real party". Eady J went on:

> "It may suffice, depending upon the circumstances, that the funder has something to gain alongside the nominal party. In the case of a solicitor, for example, it is not necessary to demonstrate that in the event of the litigation leading to a successful outcome he would be the sole beneficiary. Even though his client may recover compensation for himself, the solicitor could still be regarded as benefiting, or potentially benefiting, from the case to the extent that a costs order should be made against him."

29. Mr Brown, for the insurers, points to the observation of Balcombe LJ in *Symphony Group v. Hodgson* [1994] QB 175 (at 192E), that the categories which cover the situation in which a non-party may be liable for costs are neither 'rigid nor limited'. He argues that, as a matter of 'fairness and reasonableness' those who encourage litigation by committing their funds to it for substantial financial gain should have a corresponding liability for the consequences. He cites *Floods of Queensferry Ltd v Shand Construction Ltd* [2003] Lloyds Rep 181 and *Golding v First Tier Tribunal* [2012] EWHC 222 (Admin) but all these cases do is to recognise, in the former, that a solicitor who extends credit to his client and, in the latter, that a tax advisor who acted *pro bono* but did not fund litigation or pay fees, did not fall within the s. 51 regime.

30. As to the former, Mr Brown submits that there is a clear distinction between funding and deferring the time for payment; that may be so but, in this case, it seems to me that it is a distinction without a difference. To such extent as the solicitors were deferring payment by their client of disbursements, on the basis of *Floods of Queensferry Ltd* (per Hale LJ at para 81) they did not come within s. 51; but, in relation to Mr Weddall, in the document 'What you need to know', the client's liability to pay disbursements in the event that the claim does not succeed is clear.

31. Putting the issue on a wider canvas, the Law Society, on the other hand, submits that a solicitor who funds disbursements on behalf of a client on the basis that the costs will be recovered from the other side in the event of success but will not be recovered from the client if the claim fails (at least in cases, such as these, of moderate complexity in which the disbursements are modest) is not acting in circumstances which are outside the ordinary run of cases. Neither can it be said, it is submitted, that the solicitor is either 'the real party' to the litigation, the person 'with the principal interest' in its outcome, or is acting 'primarily for his own sake'. Thus, without more, the solicitor should not be made liable to a third party costs order.

32. *Myatt* was also concerned with the need to warn a solicitor acting for an opposing party of the possibility that an order for costs will be sought although such a step requires good grounds for believing that the relevant solicitor has gone outside the normal role (properly described) of a solicitor. Both the submission of the Law Society and the requirement to warn requires a consideration of what, in the context of a CFA, that 'normal role' is or should be. It is to that issue that I now turn.

The Effect of the CFA regime

33. In line with the approach of Eady J, it is worthwhile setting the scene for CFAs with the explanation provided by Lord Bingham in *Callery v Gray (Nos 1 and 2)* [2002] UKHL 28, [2002] 1 WLR 2000 in these terms (at page 2002D):

> "1. My Lords, for nearly half a century, legal aid provided out of public funds was the main source of funding for those of modest means who sought to make or (less frequently) defend claims in the civil courts and who needed professional help to do so. By this means access to the courts was made available to many who would otherwise, for want of means, have been denied it. But as time passed the defects of the legal aid regime established under the Legal Aid and Advice Act 1949 and later statutes became more and more apparent. While the scheme served the poorest well, it left many with means above a low ceiling in an unsatisfactory position, too well off to qualify for legal aid but too badly off to contemplate incurring the costs of contested litigation. There was no access to the courts for them. Moreover, the effective immunity against adverse costs orders enjoyed by legally-aided claimants was always recognised to place an unfair burden on a privately-funded defendant resisting a legally-funded claim, since he would be liable for both sides' costs if he lost and his own even if he won. Most seriously of all, the cost to the public purse of providing civil legal aid had risen sharply, without however showing an increase in the number of cases funded or evidence that legal aid was directed to cases which most clearly justified the expenditure of public money.
>
> 2. Recognition of these defects underpinned the Access to Justice Act 1999 which, building on the Courts and Legal Services Act 1990, introduced a new regime for funding litigation, and in particular personal injury litigation with which alone this opinion is concerned … The 1999 Act and the accompanying regulations had (so far as relevant for present purposes) three aims. One aim was to contain the rising cost of legal aid to public funds and enable existing expenditure to be refocused on causes with the greatest need to be funded at public expense, whether because of their intrinsic importance or because of the difficulty of funding them otherwise than out of public funds or for both those reasons. A second aim was to improve access to the courts for members of the public with meritorious claims. It was appreciated that the risk of incurring substantial liabilities in costs is a powerful disincentive to all but the very rich from becoming involved in litigation, and it was therefore hoped that the new arrangements would enable claimants to protect themselves against liability for paying costs either to those acting for them or (if they chose) to those on the other side. A third aim was to discourage weak claims and enable successful defendants to recover their costs in actions brought against them by indigent claimants. Pursuant to

> the first of these aims publicly-funded assistance was withdrawn from run-of-the-mill personal injury claimants. The main instruments upon which it was intended that claimants should rely to achieve the second and third of the aims … are conditional fee agreements and insurance cover obtained after the event giving rise to the claim."

34. Mr Brown argues that one of the most important policy imperatives concerned the inability of successful defendants to recover costs if, as is visualised, solicitors act for those who neither take out after the event insurance nor have the means to meet an adverse order for costs but who have been supported financially by their own solicitors.

35. With that policy in mind, it is necessary to turn to the legislation. Section 58 of the Courts and Legal Services Act 1990 (as amended) makes CFAs lawful. A conditional fee agreement is defined by s. 58 (2)(a) as "an agreement with a person providing advocacy or litigation services which provides for his fees and expenses or any part of them to be payable only in specified circumstances". The term 'expenses' is not defined by the Act and at the core of this appeal has been its true meaning. Mr Carpenter for the solicitors, supported by Mr Holland Q.C. for the Law Society, argues that as a matter of ordinary language and on authority the word "expenses" includes own side's disbursements; Mr Brown for the insurers argues that, as a matter of principle and established use, a disbursement is to be distinguished from a solicitor's expense, which has important and practical implications in areas such as VAT.

36. The line between the practical effect of these different approaches is fine. Mr Brown argues that because disbursements are not included within the permissible category of costs, they cannot be made the subject of payment by the client conditional on success. That is not to say that the solicitor must insist on prepayment of disbursements by the client; the agreement, however, must require the client to remain responsible for them (whether or not the solicitor goes to the trouble and expense of pursuing repayment if the client, having lost his action, is impecunious). Mr Carpenter and Mr Holland argue that as a matter of ordinary language, once the solicitor has paid the cost of a disbursement (such as a court fee or a medical report) it becomes an expense and can be subject to a prior agreement that it will not have to be reimbursed (as opposed to a subsequent decision that it is not worth pursuing). This distinction can be remarkably fine: if photocopying of the court bundle is done in house, it is a cost to the solicitor; if it is sent out to a copying firm, it is a disbursement.

37. The significance of this narrow question of statutory construction goes back to the test identified in *Tolstoy-Miloslavsky* because it is argued that the solicitors could not be acting 'outside the role of a solicitor' (so as to bring themselves within the third category identified by Rose LJ) if they were doing no more than the legislation which set up CFAs rendered lawful and not caught by the laws of maintenance or champerty.

38. Mr Brown took the court to different examples of the use of the terms 'expenses' and 'disbursements' but it seems to me that the phrase "fees and expenses" must be construed in the context of the legislation in which it appears. On the face of it, once

it is conceded (as seems to me is inevitable) that the solicitor does not have to be in funds before incurring costs (such as the obtaining of a medical report), that cost has been borne by the solicitor (at least for the time being) and becomes an expense of providing advocacy or litigation services. To put it another way (which may be more relevant to the precise question which has to be answered), the cost may have to be the subject of an account to the client as a disbursement but the credit afforded to the client in respect of that cost is part of the service provided by the solicitor to his client.

39. The same conclusion can be reached following a consideration of *Jones v Wrexham Borough Council* [2008] 1 WLR 1590. The issue in that case was whether or not a CFA, properly construed, was a 'CFA Lite' as defined in Reg. 3A Conditional Fee Agreements Regulations 2000 ("under which ... the client is liable to pay his legal representative's fees and expenses only to the extent that the sums are recovered in respect of the relevant proceedings, whether by way of costs or otherwise"). Regulation 3A(2) made it clear that "no account is to be taken of any obligation to pay costs in respect of the premium of a policy taken out to insure against the risk of incurring a liability in the relevant proceedings".

40. The case turned on the meaning of the Regulations and, as Richards LJ observed during the course of argument, it is not appropriate to seek to construe the statute by reference to the construction of the delegated legislation made under it but Waller LJ (with whom Longmore LJ agreed) made it clear:

> "28. I would add (although words used in the Regulations might, I accept, be construed differently) that insofar as Mr Bacon was suggesting that in Regulation 3A the word 'expenses' might not include solicitor and own client disbursements, I would reject the same. Section 58(2)(a) provides as follows:-
>
> > "A conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances."
>
> 29. If Mr Bacon were right that in Regulation 3(A) "expenses" excluded disbursements, that would also have to be true of the word "expenses" in s.58(2)(a). As Mr Morgan submitted, that would have the effect of a solicitor being unable to agree that disbursements should only be paid in specified circumstances. That cannot have been Parliament's intention."

41. Mr Brown argues that the decision in *Tolstoy-Miloslavsky* was not cited nor were the consequences being considered; the comments should be regarded as "wrong and/or *per incuriam*". He also refers to the observations of Hughes LJ, as indicating a contrary view, when he said (at para. 73):

> "Under the paradigm form of CFA the client escaped his own solicitor's charges if he lost. He did not escape (i) his own-side disbursements or (ii) the other-side costs of the successful

> defendants who would ordinarily obtain an order that he pay them."

42. In fact, Hughes LJ was merely reciting the history of CFAs, going on to explain that "the CFA and the ATE policy have moved towards making the client less and less exposed to the payment of costs, not only of his own side, but also of the other side" (para 76). Although he did not specifically discuss s. 58(2)(a), he did deal with the same language in the Regulation and said (at para 81):

> "The test created by Regulation 3A(1) focuses on own-side costs. It says nothing about other-side costs. I agree that the expression "fees and expenses" in Regulation 3A(1) includes own-side disbursements. Of course there is for some purposes a significant distinction between fees, expenses and disbursements, but in the context of this Regulation the inclusion of disbursements seems to me the clear natural meaning of the words; there appears to have been no issue between the parties about this until a late stage in the written submissions to this court on second appeal."

43. Mr Brown uses these last words to submit that the matter was not given sufficient attention but I wholly reject that submission. Neither do I consider that anything that Hughes LJ said could be taken to differ from the approach of the majority as to the meaning of s. 58(2)(a) of the Act.

44. There was a rather sterile argument as to whether the interpretation of Regulation 3A (and, by inference, s. 58(2)(a) of the Act) was part of the *ratio* of the case or *obiter*. It is unnecessary to resolve that issue: in my judgment, the construction of s. 58(2)(a) as discussed by Waller LJ – and thus the primary point of contention in this appeal – was clearly correct. *Tolstoy-Miloslavsky* was simply not relevant to *Jones* and the proper approach to the jurisdiction to make non party costs orders cannot impact on the construction of the law relating to CFAs: if anything, the reverse is true.

45. In my judgment, therefore, the legislation does visualise the possibility that a solicitor might fund disbursements and, in that event, it would not be right to conclude that such a solicitor was 'the real party' or even 'a real party' to the litigation. As for the policy imperative argued by Mr Brown, after the event insurance is not a pre-requisite of bringing a claim on a CFA (see *King v Telegraph Group* [2005] 1 WLR 2282 at paragraph 100 and *Floods of Queensferry Ltd v Shand Construction Ltd (supra)* at paragraph 37). The fact that a litigant can (or cannot) afford an expert report or the court fee says nothing about his or her ability to fund the costs incurred by opponents in an unsuccessful claim and, indeed, Eady J (at paragraph 25 of his judgment) recognised that the solicitor could advance disbursements with a technical (albeit improbable) obligation for repayment.

46. That much is also clear from the fact that solicitors are entitled to act on a normal fee or conditional fee for an impecunious client whom they know or suspect will not be able to pay own (or other side's costs) if unsuccessful (see *Sibthorpe v Southwark BL* [2011] 1 WLR 2111 at paragraph 50; *Awwad v Geraghty* [2001] QB 570 at 588; *Dophin Quays Developments Ltd v Mills* [2008] 1 WLR 1829 at paragraph 75.

47. In those circumstances, contrary to the submissions of Mr Brown, I agree with the issue of principle advanced by the Law Society (and Mr Carpenter) that payment of disbursements, without more, does not incur any potential liability to an adverse costs order. That, however, is not an end of this appeal because the issue in fact decided by Judge Maloney and Eady J was not to order costs but, rather, to order disclosure of information prior to the insurers considering whether to apply for an order of costs. That is a different question and requires separate consideration.

Disclosure

48. The starting point is the test set out by Blake J in *Thomson v Berkhamsted Collegiate School* [2009] EWHC 2374 QB based on the observations of Lord Brown *Dymocks Francise Systems (NSW) PTY Ltd v Todd (above).* Having observed (at paragraph 17) that if the case was inherently weak, it was inherently improbable that an order would be made and that if overwhelming, it was unlikely that ancillary orders for disclosure, inspection or cross examination would be necessary, he summarised in the following principles (at paragraph 18):

> "(i) The order for payment of costs by a non-party would always be exceptional and any application should be treated with considerable caution.
>
> (ii) The application should normally be determined by the trial judge who could give effect to any views he had expressed as to the conduct of the non-party without constituting bias or the appearance of bias.
>
> (iii) The mere fact that someone has funded proceedings would generally be insufficient to support an application that they pay the costs of the successful party. Pure funders, as described at the case of *Hamilton v Al-Fayed No. 2* [2002] EWCA Civ 665 reported [2003] QB 117 at [40], will not normally have the discretion exercised against them. That definition of "pure funders" means those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business and in no way seek to control its course.
>
> (iv) It is relevant but not decisive that the defendant has warned the non-party of the intention to seek costs or that the non-party's funding has caused the defendant to incur the costs it would not otherwise have had to incur;
>
> (v) The conduct of the non-party in the course of the litigation and other than as a pure witness of material fact is of relevance and potential weight.
>
> (vi) Most of the decided cases on the exercise of the court's discretion under section 51 concerned commercial funders or corporate bodies closely associated with the party who incurred the costs liability which they were unable to satisfy. In the family context, the courts have been reluctant to impose third

> party costs orders against those family or friends who in the interests of access to justice assist a party to come to court for philanthropic and disinterested reasons.
>
> (vii) In determining these applications the court must exercise its case management powers to ensure that the application does not turn into satellite litigation that results in prolonged, complex and over-extended arguments about costs about costs. For that reason the inherent strength of the application is always a relevant factor."

49. Blake J then (at paragraph 19) commendably summarised the factors to be considered when considering whether disclosure was necessary for the fair determination of the application in these terms:

> (i) The strength of the application as it now appears unassisted by disclosure;
>
> (ii) The potential value to the fair determination of the application of the documents of which the claimant seeks disclosure and whether they are likely to elucidate considerations highly probative of the exercise of the court's discretion, or threaten to drag the application into a side alley of satellite litigation with diminishing returns for the overall issue;
>
> (iii) Whether on a summary assessment it is obvious that the documents for which disclosure is sought will be the subject of proper legal professional privilege;
>
> (iv) Whether the likely effect of any order the court might be minded to make will be proportionate and just in all the circumstances."

50. The rationale of Eady J (contrary to the view of Judge Moloney and the subject of express disagreement by Judge Stephen Davies in *Tinseltime Ltd v Roberts* [2012] EWHC 2628 TCC) was only that, by funding disbursements, the solicitors might have stepped "outside the 'normal role' of a solicitor": for the reasons that I have set out above, I do not consider that funding disbursements alone is sufficient to justify that conclusion.

51. When pressed to justify why an order for disclosure might be justifiable on grounds other than speculation, Mr Brown pointed to the obvious weakness of the cases as giving rise to the inference that the clients were not risking their own money and, in those circumstances, might be being indemnified by the solicitors. The difficulty with that argument is that the inherent weakness of a case might be thought to be a reason why a solicitor would not risk his own money funding it in the hope of recovery with a suitable uplift. In the event, however, howsoever the information has come to light (there being some issue as to whether it is a consequence of these proceedings or as a result of an attempt to assess and then potentially enforce the order for costs), the information now available in *Wedall* reveals what might be a state of affairs very different from mere funding of disbursements.

52. If what is alleged by Mr Weddall is made good, the solicitors have pressed on with this litigation without ATE insurance, contrary to his express instructions and in circumstances where what they might have recovered by way of costs is by no means insubstantial: to use the words in *Hamilton v Al Fayed (No 2)* [2003] QB 1175, 1194, it is arguable that the solicitors were taking a lead in the litigation and effectively seeking "to control its course". This latter possibility more than justified full disclosure and, given the circumstances, is sufficient (on the basis of a 'similar fact' argument) equally to justify disclosure in cases being conducted at the same time by the same solicitor on a CFA without ATE insurance: that would include *Flatman v Germany*.

53. In the circumstances, in the light of what is now known, I would dismiss the appeal both in *Weddall* and in *Flatman* (albeit for reasons different to those advanced by Eady J). In the former case, discovery has now been provided and a costs application is underway. In the latter case, some information has been made available (albeit that both parties have overlooked that fact until a late stage in the appeal) but I see no reason why, in the unusual circumstances that have arisen, disclosure should not also be provided. Unless waived by Mr Flatman, legal professional privilege may impact on documents the disclosure of which is now sought and any order must permit an argument about privilege to be taken.

54. I appreciate that what has emerged in *Weddall* would not normally become known to a successful opponent in the absence of some sort of disclosure. I equally recognise that insurers will not wish to go to the expense of a costs assessment and enforcement exercise against an impecunious litigant simply in the hope that some detail will emerge which might alert them to the prospect that costs might be recovered against the solicitor. It is, however, a comparatively straightforward matter to deal with. The Law Society makes it clear that if solicitors have agreed to indemnify their client (as is entirely lawful: see *Sibthorpe*), the solicitors could not then seek to deny the existence of that indemnity or prevent their client from relying upon it. For my part, without seeking disclosure of documents, I see no reason why a successful insurer should not obtain an order for costs in principle against the claimant, together with an interim payment on account and invite the claimant to reveal the extent to which the litigation had been supported by any third party and to provide any reason why the costs order should not be enforced. I appreciate that it will not assist in many cases: examples such as *Weddall*, however, stand a prospect of being exposed thereby permitting the insurer to decide what, if any, further steps need to be taken.

Conclusion

55. Although I agree that the basis on which Eady J ordered disclosure of information and documents was not justified in law (and, thus, I endorse the principled objection to his order which is what caused the Law Society to intervene in the appeals), that which has emerged from Mr Weddall clearly justified the order that Eady J made and it has, in fact, been complied with: in those circumstances, I would dismiss the appeal in his case. Further, because the argument that the approach of the solicitor in that case (that is to say, *prima facie*, to press on regardless of specific instructions not to do so without ATE insurance) could – I do not say will – justify an order for costs against the solicitor, I consider it equally sufficient to require disclosure in a similar case undertaken by the same solicitor at the same time. I would therefore dismiss the appeal in Mr Flatman's case as well.

56. It is abundantly clear from the written arguments in this case that substantial issues as to costs of the appeal will arise. In my view, the parties should exchange and lodge skeleton arguments on costs issues within 14 days, with 7 days thereafter to respond to the skeleton argument of the other side; this does not apply to the Law Society. In the absence of good reason to do otherwise, a decision on costs could then be reached on paper.

Lord Justice Richards:

57. I agree.

Lord Justice Mummery:

58. I also agree.