Neutral Citation Number: [2019] EWHC 2183 (Ch)

Case No: HC-2014-1272

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 08/08/2019

Before :

LADY JUSTICE ROSE DBE

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Between :

PETER WILLERS	**Claimant**
- and -	
(1) ELENA JOYCE **(2) JOHN NUGENT** **(in substitution for and in their capacity as Executors of the Will of ALBERT GUBAY, deceased)**	**Defendants**
- and -	
(1) DE CRUZ SOLICITORS (A FIRM) **(2) DE CRUZ SOLICITORS LIMITED** **(3) HUGO PAGE QC** **(4) ADAM CHICHESTER-CLARK**	**Defendants for the purposes of costs/Costs Respondents**

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MR P. MITCHELL QC and MR T. SHEPHERD (instructed by Laytons LLP) appeared on behalf of the Costs Applicants.

MR J. CARPENTER (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the First and Second Costs Respondents.

MR P. LAWRENCE QC (instructed by Kennedys Law LLP) appeared on behalf of the Third and Fourth Costs Respondents.

Hearing dates: 9 and 10 July 2019

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Approved Judgment: Non-Party Costs

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

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LADY JUSTICE ROSE

Lady Justice Rose:

Background

1. I handed down the judgment dismissing Mr Willers' claim for malicious prosecution and abuse of process on 13 December 2018 after a trial lasting 16 days ('the Malicious Prosecution Claim'). That judgment is reported at [2018] EWHC 3424 (Ch) and sets out in detail the background to this claim ('the Judgment'). I adopt the same abbreviations in this ruling as I used in the Judgment.

2. On 14 December 2018 the Executors, Mr Nugent and Ms Joyce, issued an application for four parties to be added as defendants for the purposes of costs only in accordance with CPR r 46.2(1)(a). Those parties ('the Costs Respondents') were:

    i) De Cruz Solicitors, a firm of three partners who had acted for Mr Willers under a conditional fee agreement entered into on 9 July 2010 and had the conduct on his behalf of the Langstone Action (as described in paragraphs 147 onwards of the Judgment). I shall refer to the firm De Cruz Solicitors as "the Firm".

    ii) De Cruz Solicitors Ltd, a company which was incorporated on 23 August 2013. It took over the practice of the Firm on 10 December 2013 and had the conduct of the Malicious Prosecution Claim on behalf of Mr Willers. I shall refer to De Cruz Solicitors Ltd as "the Company" and I shall refer to the Firm and the Company together as "De Cruz";

    iii) Hugo Page QC a barrister at Blackstone Chambers who had been leading counsel acting for Mr Willers in both the Langstone Action and the Malicious Prosecution Claim.

    iv) Adam Chichester-Clark a barrister at 3 Stone Buildings who had been junior counsel acting for Mr Willers in both the Langstone Action and the Malicious Prosecution Claim. I shall refer to Mr Page and Mr Chichester-Clark together as "the Barristers".

3. At a hearing on 20 December 2018 to deal with the consequential matters arising from the Judgment, I made an order joining the Cost Respondents to the proceedings and giving directions for the filing and service of evidence in answer to the application. In a separate order also dated 20 December 2018 I dismissed the Malicious Prosecution Claim and ordered Mr Willers to pay the Executors' costs of that claim on the standard basis, such costs to be the subject of detailed assessment unless agreed. I ordered Mr Willers to make an interim payment on account of those costs of £1 million by 4 pm on 31 January 2019. That extended period for him to make the interim payment reflected the fact that I refused permission to appeal and refused an application for a stay of execution but allowed Mr Willers time to pursue a further application for permission to appeal to the Court of Appeal if so advised. Permission to appeal against the Judgment was refused by order of Lewison LJ dated 19 February 2019. Lewison LJ also refused a further stay of execution.

4. Mr Willers did not make and has not made the interim payment I ordered. As at the date of the hearing of this application, nothing had been paid towards the Executors'

costs and no steps have been taken to have those costs assessed. I am told that the total costs of the Executors for the Malicious Prosecution Claim are about £1.9 million. It is assumed for the purposes of this application that Mr Willers' assets comprise only a house which he jointly owns with his wife in the Isle of Man. The house is currently on the market with an asking price of £2.65 million but not all of Mr Willers' share of the proceeds would be available to pay the Executors' costs, not least because on 19 February 2018 Mr Willers executed a charge over his 50% beneficial interest in favour of the Company in order to secure all of his outstanding liabilities to the Company. It is likely therefore that unless the Executors can obtain an order for costs against the Costs Respondents, they will recover almost nothing from Mr Willers in respect of the costs of their successful defence of the Malicious Prosecution Claim.

5. At base the Executors' application that the Costs Respondents pay the Executors' costs of the failed Malicious Prosecution Claim is based on the assertion that the Costs Respondents were the real parties to the claim because the principal purpose of the claim was to recover as damages for the tort of malicious prosecution an amount equal to the unpaid fees owed by Mr Willers to the Costs Respondents for the legal services they provided to him in the Langstone Action. Those unpaid fees are the costs which were disallowed when Mr Willers' costs of the Langstone Action, which Langstone had been ordered to pay him, were subject to detailed assessment by the costs judge. The Executors assert that the direct, personal financial interest that the Costs Respondents had in the Malicious Prosecution Claim means that that claim having failed, they as well as Mr Willers should be liable to pay the Executors' costs. Their interest went further in a significant way than the interest that any lawyer has in a successful outcome if he is providing services under a conditional fee agreement. The claim on which they were working was itself a claim for their unpaid fees in the earlier proceedings. The Executors also ask for the non-party costs order against the Costs Respondents to direct that the costs be assessed as against them on the indemnity basis even though the costs order made against Mr Willers when the Malicious Prosecution Claim was dismissed was an order that the costs be paid on the standard basis. Evidence in support of the application was filed primarily by Mr Thomas, the partner in the firm Laytons LLP who had conduct of the Malicious Prosecution Claim on behalf of the Executors.

6. The Costs Respondents say that the interest of De Cruz and the Barristers in the Malicious Prosecution Claim is no different in kind from the interest which a lawyer has who is either working under a conditional fee arrangement or who is working on a conventional fee arrangement in the knowledge that, realistically, he is unlikely to be paid for his services unless his client wins. The fact that success in the Malicious Prosecution Claim might result in them being paid not only for their services in the Malicious Prosecution Claim itself but also the unpaid fees in respect of their services in the earlier Langstone Action does not, they say, make any difference. That additional factor did not make any difference to the way in which the Malicious Prosecution Claim was conducted from start to finish and it should not make any difference to the analysis as to whether this is one of the rare situations in which legal advisers should be made subject to a non-party costs order. As an ancillary matter, De Cruz argue that any non-party costs order should be made against the Company only and not against the Firm. The Barristers take an additional point that they were led to believe at an earlier stage of the litigation that they would not be the subject of a non-

party costs application. They rely on that as additional reason why it would be unjust to make them subject to such an order now.

The costs of the Langstone Action

7. I need set out only some of the background to explain why the Executors have taken the unusual step of pursuing Mr Willers' solicitors and counsel for their unpaid costs of the Malicious Prosecution Claim. In that claim, Mr Willers alleged that Mr Gubay had maliciously brought the Langstone Action against him. As I describe in section V of the Judgment (paragraphs 147 onwards), the Langstone Action was commenced by Langstone against Mr Willers on 26 May 2010 claiming £1.95 million. On 28 March 2013 Langstone served notice of discontinuance of all its claims against Mr Willers. The Langstone Action was brought to an end by order of Newey J on 16 April 2013. Newey J ordered that:

    i) Langstone pay Mr Willers' costs of the action, such costs to include both his costs of defending the action and of his Part 20 claim against Mr Gubay;

    ii) Langstone pay Mr Gubay's costs of defending the Part 20 proceedings;

    iii) Langstone make an interim payment on account in the sum of £1 million to Mr Willers' solicitors. This was paid out of security for costs that had been paid into court by Langstone at an earlier stage;

    iv) Mr Willers' application that Mr Gubay be jointly and severally liable with Langstone for the payment of his costs was dismissed;

    v) The application that Langstone pay Mr Willers' costs on the indemnity basis was also dismissed.

8. Following the order of Newey J there was a protracted and highly contentious assessment of the costs conducted before Master O'Hare. De Cruz commenced the costs assessment by filing its bill of costs on 23 August 2013 claiming a total of £3,461,483.31. This included a success fee under a conditional fee agreement entered into by Mr Willers with De Cruz of 90% and hourly rates of £450, £200, and £140 for different grades of fee earners. There were many hearings and attempts to appeal the Master's various orders. On 30 October 2014 Master O'Hare handed down an interim ruling in which he reduced the success fee to 43% and the hourly rates to £400, £200, and £130. At some points Langstone submitted that it did not have sufficient funds to pay any further interim costs orders. On 25 June 2015 Langstone made a Part 36 offer in respect of Mr Willers' costs in the sum of £1,450,000 and Mr Willers accepted that offer on 17 July 2015. The final order on costs made by Master O'Hare therefore provided:

    i) by consent, Mr Willers' bill of costs was assessed at £1,450,000, (rather than £3,461,483.31). This sum took into account the costs claimed in the bill, interest, costs otherwise payable by Mr Willers to Langstone (for various interlocutory matters where Mr Willers had been ordered to pay Langstone's costs) and all interlocutory costs liabilities where Langstone had been ordered to pay Mr Willers' costs.

ii) Langstone was ordered to pay Mr Willers' costs of the detailed assessment.

iii) Langstone was ordered to make an interim payment to Mr Willers of £250,000.

9. By mid July 2015, Langstone had paid Mr Willers all the monies that it was required to pay in respect of Mr Willers' costs of the Langstone Action.

The Costs Shortfall claim in the Malicious Prosecution Claim

10. The claim form in the Malicious Prosecution Claim was issued on 3 March 2014. The Particulars of Claim did not initially quantify the claim in respect of any shortfall in recovered costs of the Langstone Action. Mr Willers' pleaded case in the Malicious Prosecution Claim sought recovery of damages from Mr Gubay's estate under various heads; damage to his reputation, damage to health, loss of earnings and:

> "the difference between the liability for the costs incurred by Mr Willers in the Langstone Action and those received after assessment on the basis that the action should never have been prosecuted in the first place and/or that such costs are a foreseeable result of commencing litigation;"

I shall refer to the amount claimed as the Costs Shortfall.

11. The Defence pleaded to this claim was as follows:

i) Mr Willers was "put to proof that his legal representatives have an extant, non-contingent right to enforce their claimed costs against him; and in particular he is put to proof that there is no agreement, understanding, or other factor that would permit him to avoid paying those costs to them in the event this action fails";

ii) the quantum of the Costs Shortfall was not admitted;

iii) it was denied that the Costs Shortfall was recoverable as a matter of law. In particular it was averred that the judgments of Master O'Hare on the proper construction of the conditional fee agreements and the appropriate uplift were binding on Mr Willers such that he was estopped from seeking now to recover those costs which had already been assessed against him;

iv) it was denied that the costs which were not assessed as due from Langstone on detailed assessment were caused by anything done or not done by Mr Gubay.

12. Mr De Cruz's witness statement in opposition to this application says that at the time the Malicious Prosecution Claim was brought he had no idea how much of Mr Willers' costs of the Langstone Action would be recovered from Langstone on assessment. The amount of that shortfall was not known until the detailed assessment of the Langstone Action costs was completed in about July 2015.

13. Ultimately the amount claimed under this head was £2,011,482 (plus interest) being the difference between Mr Willers' bill of costs of £3,461,483 and the costs as assessed of £1,450,000. The £2,011,482 comprises:

i) £487,147 unpaid fees of Mr Page excluding interest; this is owed to Mr Page by the Firm rather than by the Company;

ii) £452,509 unpaid fees of Mr Chichester-Clark excluding interest; this is owed to Mr Chichester-Clark by the Firm rather than by the Company;

iii) £1,071,826 unpaid fees of De Cruz excluding interest.

The funding arrangements between Mr Willers and his legal team

14. There are two stages at which it is necessary to consider the arrangements between Mr Willers, De Cruz and the Barristers for payment by him for their legal services. The first is in relation to the funding of Mr Willers' defence to the Langstone Action and the second is in relation to his prosecution of the Malicious Prosecution Claim. So far as the fees in the Langstone Action were concerned, much of the defence was undertaken by the Firm and the Barristers on the basis of conditional fee agreements (CFAs). The prosecution of the Malicious Prosecution Claim purportedly took place under conventional fee arrangements whereby Mr Willers was invoiced for work done. However, as I describe below, in fact the Company and the Barristers recognised and accepted that they would never be paid those fees unless or until Mr Willers succeeded in one or more pieces of litigation in which he was involved with the Executors.

Legal services in the Langstone Action

15. Mr De Cruz's evidence is that De Cruz has often acted for clients who were unable to pay their fees upfront. He estimates that about half their fee income comes from conditional fee agreements (CFAs) or deferred fee agreements. He describes how he met Mr Willers in 2010 when Mr Willers approached the Firm to act for him in the Langstone Action. Mr Willers made it clear that he had limited financial resources; at that point Mr Willers was unemployed and was already being sued by Mr Gubay in the Isle of Man Proceedings which I describe in paragraphs 137 onwards of the Judgment.

16. Mr De Cruz took the view that the Firm would be prepared to take the matter on under a CFA but only if they were able to instruct Leading and Junior Counsel to act on the same basis. Mr Page and Mr Chichester-Clark were both willing to enter into CFAs with the Firm although Mr Page was paid on a private basis until his fees reached £50,000 at which point he entered into a CFA.

17. A CFA dated 9 July 2010 was entered into between Mr Willers and the Firm. It covered his defence and any counterclaim in the Langstone Action and also the conduct of the Part 20 claim that was issued by Mr Willers against Mr Gubay when Mr Willers filed his defence to the Langstone Action in August 2010. It also covered any appeals, proceedings taken to enforce a judgment or order and negotiations about assessment of the costs. Mr Willers' obligation was that if he won the case he would pay basic charges, disbursements and a success fee. Basic charges were defined as work done from the date of the agreement until the end of the agreement. Basic charges were calculated for each hour engaged at the rates set out in the CFA. The success fee was 100% of the basic charges. The agreement pointed out that Mr Willers could not recover from his opponent the part of the success fee that related to

the cost to De Cruz of postponing receipt of the charges and disbursements. This was specified as being 10% of the total success fee.

18. Under the heading "What happens if you win?" the CFA stated that if Mr Willers and Langstone could not agree the amount of costs recoverable, the court would decide how much he could recover. If the amount agreed or allowed by the court did not cover all De Cruz's basic charges and disbursements then Mr Willers would be liable to pay the difference. As regards the success fee, paragraph 4 of a schedule to the CFA stated:

> "If the court carries out an assessment and disallows any of the success fee percentage because it is unreasonable in view of what we knew or should have known when it was agreed, then that amount ceases to be payable unless the court is satisfied that it should continue to be payable.
>
> If we agree with your opponent that the success fee is to be paid at a lower percentage than is set out in this agreement, then the success fee percentage will be reduced accordingly unless the court is satisfied that the full amount is payable.
>
> It may happen that your opponent makes an offer that includes payment of our basic charges and a success fee. If so, unless we consent, you agree not to tell us to accept the offer if it includes payment of the success fee at a lower rate than is set out in this agreement.
>
> As with costs in general, you remain ultimately responsible for paying our success fee."

19. Under the heading "What happens if you lose?" clause 5 of the CFA provided that if Mr Willers lost he would not have to pay any of the basic charges or success fee but would have to pay disbursements and his opponents' legal charges and disbursements.

20. Clause 6 dealt with payment for advocacy. It provided that "The cost of advocacy and any other work by us, or by any solicitor agent on our behalf, forms part of our basic charges. We shall discuss with you the identity of any barrister instructed, and the arrangements made for payment." It then dealt separately with barristers who had a CFA with De Cruz and barristers who did not. It provided that where the barrister did have a CFA with De Cruz if Mr Willers won, he would normally be entitled to recover their fee and success fee from his opponent. If he loses he pays the barrister nothing.

21. An amendment was made and agreed to by Mr Willers on 16 July 2010. This expanded the definition of a "win" to cover a settlement on a "drop hands basis" where each party walks away and bears their own costs. That was then included as a "win" in which event of course the success fee would be recoverable.

22. De Cruz entered into CFAs with Mr Page and Mr Chichester-Clark. The CFA between Mr Page and De Cruz is dated 12 November 2011 and that with Mr Chichester-Clark is dated 7 July 2010 although it appears only to have been signed on

2 November 2011. De Cruz was obliged to pay interest to the Barristers on fees due at the rate of 4% per annum and that interest was then included in the amount which Mr Willers was obliged to pay the Firm.

23. After the Firm had transferred the practice to the Company in December 2013, no further work was done under the CFA between Mr Willers and the Firm. Thereafter the Company acted for Mr Willers on an ordinary private retainer. There was an assignment entered into between Mr Willers and De Cruz in January 2014 by which he assigned certain rights under the costs order of Newey J to them in return for an extension of time for payment until the end of the costs assessment in the Langstone Action, which as I have said occurred in July 2015.

24. The claim for damages in the sum of the Costs Shortfall was the subject of a request for information made by the Executors in the Malicious Prosecution Claim to find out what the arrangements were between Mr Willers and the Costs Respondents for payment of those fees by Mr Willers. In the Requests for information about the Costs Shortfall claimed as a head of damages in the Malicious Prosecution Claim, the Executors asked Mr Willers whether there was any agreement between him and De Cruz that they would not demand payment from him of the Costs Shortfall for their services in the Langstone Action. In answers given on 5 March 2017 to those requests, Mr Willers said:

i) neither the Firm nor the Company had entered into any agreement with Mr Willers, other than the assignment in 2014, further deferring payment of any sums due under the Langstone CFA;

ii) he had not sought to have the fees charged to him by the Firm assessed because "he believes the Bill of costs to be fair and reasonable";

iii) there was no agreement with De Cruz under which Mr Willers' liability to De Cruz would be forgiven either in whole or in part in the event that he did not obtain judgment for the entire amount of the Costs Shortfall in the Malicious Prosecution Claim;

iv) there was no arrangement with, or assurance given by, the Barristers that in the event that Mr Willers did not recover enough damages to pay all their fees, they would not seek to recover all the monies owed to them from De Cruz; he said that the Barristers expected their fees to be paid in any event. In response to a question what arrangement or understanding had been reached between De Cruz and the Barristers regarding the time for payment of their outstanding fees Mr Willers replied:

> "Mr Page QC's fees are payable on a conventional basis. There is no other agreement or understanding, save that Mr Page QC has indicated to [the Firm] that, regardless of the result of these proceedings, he is currently minded not to enforce [the Firm's] the obligation to him until [the Firm] and/or [the Company] make a further costs recovery from Mr Willers".
>
> The same answer was given in respect of Mr Chichester-Clark.

v) in response to a request to explain why, if there was no agreement to defer payment, the Barristers had not pursued De Cruz for the sums owing to them, the answer was that they did not "wish to force Mr Willers to sell his home to satisfy their fees pending determination of Mr Willers' claims against Mr Gubay."

vi) if the damages in the Malicious Prosecution Claim were paid to Mr Willers, they would be paid directly by the Executors to De Cruz "in the conventional way".

25. In his witness statement Mr De Cruz said that De Cruz had not written off the debt owed by Mr Willers in respect of the costs of the Langstone Action. It remains payable. He accepts that if Mr Willers had recovered any damages or costs in the Malicious Prosecution Claim, De Cruz would have insisted on that money being used to discharge the outstanding costs liabilities. The Malicious Prosecution Claim was not the only potential source of money because there remained the outstanding remnant of the Isle of Man Proceedings in relation to the Mount Murray claim (see paragraphs 145 and 146 of the Judgment). He said:

> "43. De Cruz did not enforce Mr Willers' liability for the balance of the costs of the Langstone Action, because it was not apparent that he could pay them and I did not want to see Mr Willers bankrupted or forced to sell his home before the conclusion of the [Malicious Prosecution Claim]. However, Mr Willers was always aware that he would remain liable for those costs until they were paid. We discussed his liability on a regular basis and he assured me that they would be paid. It was in order to reinforce the liability and Mr Willers' promise to pay that he executed the charge [over his share in his house]."

26. As to the liability of De Cruz to the Barristers, Mr De Cruz acknowledges that the Firm remained and remains liable to pay the fees of the Barristers and that if the Barristers demanded payment of their fees from the Firm, the Company would be obliged to indemnify the Firm in accordance with the agreement by which the solicitors practice was transferred by the Firm to the Company in December 2013. His evidence is:

> "However, I never thought it at all likely that the Barristers would do so in the absence of Mr Willers being able to discharge the liability, so this was no more than a theoretical concern."

27. In summary, therefore, there is considerable force in the description given by Mr Thomas in his evidence on behalf of the Executors in this application of these arrangements:

> "27. Viewed objectively, the position is thus that De Cruz (the Firm) and De Cruz (the Company) were both extending credit to Mr Willers in relation to the sums allegedly owing after the Langstone Action, on an indeterminate basis, with the expectation - although apparently no formal agreement with Mr

> Willers - that repayment would never be sought unless and until Mr Willers came into some cash (i.e., that there was at least initially no question of Mr Willers undertaking to sell the matrimonial home in the event the litigation was unsuccessful); in circumstances where that extension of time incurred interest charges from counsel; and where the only route by which Mr Willers could possibly come into some money apart from selling his home was apparently via litigation with the Executors or parties he claims to be closely related to them; …".

Legal services for the Malicious Prosecution Claim

28. When Mr Willers first approached De Cruz about the possibility of bringing a claim for malicious prosecution against Mr Gubay, Mr De Cruz agreed that the Company would act for Mr Willers under an ordinary private fee paying retainer. However since Mr Willers had no readily available financial resources, Mr De Cruz says:

> "I agreed that the Company would act for Mr Willers under an ordinary private fee paying retainer. However, since Mr Willers had no readily available financial resources, we were prepared to defer payment of our fees until such time as he was able to pay. A potential source of payment was the [Isle of Man Proceedings] within which Mr Willers had made a counterclaim for around £5 million. That was due to be tried from 25 March 2014. And of course, if Mr Willers succeeded in the [Malicious Prosecution Claim], he would expect to recover his costs from Mr Gubay. The Company was able to retain Mr Page QC and Mr Chichester-Clark on the same basis. They were the obvious barristers to instruct as they already knew the circumstances of the Langstone Action inside out and they were willing to act on a deferred fee basis."

29. In their statements in opposition to the non-party costs application, the Barristers say very little about their expectations as regards either their unpaid fees from the Langstone Action or their fees for acting in the Malicious Prosecution Claim. Mr Page accepts that when he was asked to act in the claim, he understood that Mr Willers did not have "ready cash with which to pay his lawyers" and that meant it was unlikely that he would find other counsel willing to act. Mr Page says that he could of course have insisted on payment of his fees at that stage and refused to assist Mr Willers unless payment was forthcoming. But he says: "it did not seem to me that this would be the honourable thing to do, and I believe that Mr Chichester-Clark and Mr De Cruz felt the same". He says that if he had thought it was improper to act he would not have done so:

> "Mr Willers owed his solicitor a lot of money at the end of the Langstone action, in which he had been wholly successful, and if he had won the malicious prosecution proceedings he would have recovered damages that would have paid off some or all of that liability. It was a liability that he would otherwise have had to meet from the assets that I have described above, subject

> (of course) to the outcome of the IoM proceedings. I accept, without hesitation, that if Mr Willers recovered substantial damages, then it is likely that he would have used these to defray his liability to De Cruz and that in that event De Cruz would be likely to discharge the liability that firm owed to counsel. That did not and does not seem to me to affect the fact that it was Mr Willers's claim, properly brought to recover damages for loss which he personally had suffered as a result of the matters complained of against Mr Gubay."

30. Mr Chichester-Clark's evidence is to similar effect. He says that before the commencement of the Malicious Prosecution Claim he did consider whether he should continue to act for Mr Willers without insisting on being paid his fees in full before he did so. Ultimately, he says, he considered that it was proper for him to continue to act for him because his understanding was and remains that lawyers may properly act, knowing that they may not be paid their costs unless the client wins.

31. I therefore find the position to be that De Cruz and the Barristers have provided invoices to Mr Willers for their legal services in the Malicious Prosecution Claim. Mr Willers has not paid any of those invoices and payment will not be enforced by De Cruz against Mr Willers or by the Barristers against De Cruz unless or until Mr Willers somehow finds the funds to make those payments.

The law

32. Section 51(1) of the Senior Courts Act 1981 provides that subject to rules of court, the costs of and incidental to all proceedings in the High Court "shall be in the discretion of the court." Section 51(3) provides that "The court shall have full power to determine by whom and to what extent the costs are to be paid". Subsection (6) confers on the court the jurisdiction to make an order in relation to wasted costs which is not in issue here.

33. The jurisdiction to make costs orders against non-parties was first recognised in *Aiden Shipping v Interbulk* [1986] AC 965. In *Taylor v Pace Development Limited* [1991] BCC 406, 408 Lloyd LJ warned of the danger of laying down too many principles for the guidance of judges in the exercise of this jurisdiction. He said: "there is only one immutable rule in relation to costs, and that is that there are no immutable rules". Guidance has been given by the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd & ors* [2004] UKPC 39, [2004] 1 WLR 2807 ('*Dymocks'*). Lord Brown of Eaton-under-Heywood giving the judgment of the Board in *Dymocks* summarised the principles to be applied as follows: see [25]

    i) costs orders against non-parties are to be regarded as exceptional; but in this context that 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.

    ii) This is inevitably a fact specific jurisdiction but some considerations will often be in play.

iii) The discretion will not be exercised against "pure funders" that is 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 who in no way seek to control its course. In their case the public interest in a funded party getting access to justice is given priority over the interest of the successful unfunded party recovering his costs.

iv) 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, a concept repeatedly invoked throughout the jurisprudence.

v) It is not necessary that the non-party be the only real party to the litigation provided that he is a real party in very important and critical respects.

34. That guidance was described as authoritative by the Court of Appeal in *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23, [2016] 4 WLR 17 at para 62, However, Moore-Bick LJ giving the judgment of the court in *Deutsche Bank*, stressed that there are a wide range of circumstances in which the courts have made non-party costs orders and that cases "all turn to a greater or lesser degree on their own facts". He said at para 21 that the critical factor in each case is the nature and degree of the third party's connection with the proceedings since that will ultimately determine whether it is appropriate to make an order. The only immutable principle was therefore that the discretion must be exercised justly: para 62.

35. The key issue between the parties in this application was whether different principles apply where the application for a non-party costs order is made against the legal advisers to the unsuccessful paying party. Mr Lawrence QC appearing for the Barristers, (and whose submissions were adopted by De Cruz) argued that a line of cases in which such applications were largely unsuccessful shows that the principles are indeed different. This is because the countervailing public interest in an impecunious claimant being able to access the courts strictly limits the circumstances in which it is appropriate to contemplate making a non-party costs order against the claimant's lawyers.

36. The first is *Tolstoy-Miloslavsky v Aldington* [1996] 1 WLR 736 ('*Tolstoy*'). Lord Aldington succeeded in a claim against Count Tolstoy for libel. Some years later, using the same solicitors, Count Tolstoy brought a fresh action against Lord Aldington seeking to have the original judgment set aside on the grounds of fraud. That second action was struck out as an abuse of process. The judge at first instance made a non-party costs order against Count Tolstoy's solicitors directing that they should pay 60% of the costs of the fresh action. The order was set aside on appeal. Rose LJ noted that both counsel and solicitors had provided their services to Count Tolstoy in the struck out action free of charge. Lord Aldington applied for a non-party costs order on the grounds that by acting without fee, the solicitors had maintained the action and put themselves in the position of third party funders. The solicitors argued that the court could only make costs orders against solicitors either under the wasted costs jurisdiction or under the court's inherent jurisdiction in relation to breaches of

duty to the court. They also argued that the judge had been wrong to hold first that a solicitor acting without fee was to be equated to a third-party funder and secondly that acting without fee in a case which was without merit and which constituted an abuse of process gave rise to impropriety. The Law Society and the Bar Council which had intervened in the case supported the argument that the wasted costs jurisdiction comprised the whole jurisdiction to award costs against legal representatives. Alternatively, they argued that even if there was jurisdiction in relation to solicitors, a decision that a wasted costs order was not called for should normally be conclusive against resort to section 51(1) and (3). Lord Aldington argued that the solicitors knew that their client would not be able to pay costs if he lost and yet they funded the litigation by making their services available for free.

37. Rose LJ held that the judge had reached the right conclusion but by the wrong route. He said that section 51(1) and (3) "do not confer jurisdiction to make an order for costs against legal representatives when acting as legal representatives". It was inconceivable that Parliament would have introduced the wasted costs regime against legal representatives by way of subsections (6) and (7) if the earlier subsections were already sufficiently wide to enable it to make costs orders against solicitors. There was no authority where it was accepted by the court that section 51(1) and (3) or their statutory precursors confer jurisdiction in relation to legal representatives. He said at 745H that there are only three categories of conduct which can give rise to an order for costs against a solicitor: (i) the wasted costs jurisdiction; (ii) where the solicitor acts in breach of his duty to the court and (ii) "if he acts outside the role of solicitor, e.g. in a private capacity or as a true third-party funder for someone else". Rose LJ referred to the enactment of the conditional fee provisions of section 58 of the Courts and Legal Services Act 1990 as being inconsistent with any intention on the part of Parliament to widen the liability of solicitors to costs orders save under the wasted costs regime. He went on at 746B:

> "There is, in my judgment, no jurisdiction to make an order for costs against a solicitor solely on the ground that he acted without fee. The access to justice which this can provide, for example in cases outwith the scope of legal aid, confers a benefit on the public. Section 58 of the Act of 1990, which legitimises conditional fees, inferentially demonstrates Parliament's recognition of this principle. For it would be very curious if a legal representative on a contingency fee and, therefore, with a financial interest in the outcome of litigation, could resist an order for costs against himself but one acting for no fee could not. Whether a solicitor is acting for a remuneration or not does not alter the existence or nature of his duty to his client and the court, or affect the absence of any duty to protect the opposing party in the litigation from exposure to the expense of a hopeless claim. In neither case does he have to "impose a pre-trial screen through which a litigant must pass": see *per* Sir John Donaldson M.R. in *Orchard v. South Eastern Electricity Board* [1987] QB 565, 572-574."

38. Rose LJ did however accept that the wasted costs jurisdiction was engaged and confirmed the judge's order on that ground.

39. Roch LJ in *Tolstoy* agreed that a wasted costs order was appropriate. He held that a costs order could not be made against the solicitors under section 51(1) and (3). He said: (750D)

> "… A person who is not a party to proceedings can be ordered to pay costs in those proceedings if he has made himself a quasi-party, for example, by being a party to separate proceedings which have been heard together with the proceedings in which the costs order is sought, or by funding the proceedings or by initiating them for some purpose of his own and it is reasonable and just to make the order. The legal representative who acts as a legal representative does not make himself a quasi-party and no jurisdiction to make an order for costs against him under section 51(1) and (3) arises. However, a legal representative who goes beyond conducting proceedings as a legal representative and behaves as a quasi-party will not be immune from a costs order under section 51(1) and (3) merely because he is a barrister or a solicitor.
>
> In this case, in my judgment, neither solicitors nor counsel acted in a way which made them liable to the jurisdiction of this court under section 51(1) and (3) to make a costs order against a person who is not a party to the proceedings. Acting pro bono is not, of itself, sufficient to make a legal representative a quasi-party. More is required."

40. Ward LJ in a concurring judgment agreed with the reasons given by Rose LJ why section 51(1) and (3) have no application to solicitors acting as such: see page 751B.

41. In *Floods of Queensferry Ltd v Shand Construction and another* [2002] EWCA Civ 918, [2003] Lloyd's LR 181 Mr Flood was the principal director and majority shareholder of the claimant subcontractor company. When the subcontractor failed to beat a payment into court, it was ordered to pay substantial costs of the defendant but failed to do so. The defendant sought a non-party costs order against Mr Flood and against the claimant's solicitors. Buxton LJ cited the words of Rose LJ in *Tolstoy* as to the special position of solicitors as regards applications under section 51(1) and (3). The gravamen of the defendant's complaint was that the solicitors had deferred payment of their fees until the outcome of the case was known. Buxton LJ said at [35] that everything that the solicitors were said to have done wrong so as to attract a costs order was "a risk they took in their capacity as legal advisers" to the claimant. He agreed with the judge that one could have very extreme circumstances in which a solicitor was both acting as a solicitor and also acting as a commercial funder of the litigation but that was patently not this case. He also noted that determining whether a solicitor has crossed the line stipulated by Rose LJ between acting as a solicitor and acting effectively as a third party was a matter of delicate judgment: (at 36). Hale LJ in a short concurring judgment in *Floods* drew a distinction between those who provide money to pay for legal services and those who provide those legal services:

> "80. There are two good reasons for the distinction. First, such services are of enormous benefit to the proper administration of justice, including securing equality of arms in access to the courts. That was a particular feature in this case. Secondly, there are strict professional rules as to the way in which and the terms on which such services can be provided. Thus if solicitors offer normal legal services on terms which are not contrary to the rules governing the profession and do not act in ways that fall within the wasted costs jurisdiction under section 51, one would not, as a general rule, expect them to be vulnerable to an order that they pay the other side's costs.
>
> 81. The services supplied by the solicitors in this case were not, as far as anything of which we have been made aware is concerned, anything other than those of an ordinary solicitor acting for, if I may say so, a challenging client in complicated litigation. … They simply took a risk and extended credit to their client. It would be a sad day if solicitors could not extend credit, even to their litigation clients, without fear of vulnerability to a section 51 order. These solicitors were just like a builder who rebuilds a fire damaged house expecting that the home owner will pay him out of the proceeds of his home insurance policy. That is why the application under section 51 against them fails."

42. The judgment in *Floods* came shortly after the Court of Appeal handed down its judgment in *Hamilton v Al Fayed (No 2)* [2002] EWCA Civ 665, [2003] QB 1175. This was a case of "pure funders" rather than solicitors. A large number of individuals had together contributed a fighting fund to enable Mr Hamilton to bring his ill-fated libel action against Mr Al Fayed. They were motivated the judge found by "an act of charity through sympathy with his predicament and in some instances affinity to the Conservative Party." Mr Hamilton lost following a five-week trial, he did not pay the costs order made against him and became bankrupt. Mr Al Fayed argued that the provider of a substantial amount of the funding should make an appropriate contribution to paying his costs. The trial judge rejected the section 51 applications. On appeal, Simon Brown LJ noted that conflicting principles were in play and only one could prevail. He described the conflict as "Should the law accord priority to the funded party gaining access to justice or to the unfunded party recovering his costs if he wins?" He concluded that on balance the unfunded party's ability to recover his costs must yield to the funded party's right of access to the courts to litigate the dispute in the first place. The law's policy was plainly to favour access to justice. He recognised that Mr Al Fayed had been resoundingly vindicated by the jury in his contest with Mr Hamilton and yet at the end of the day he had been left hugely out of pocket. Mr Al Fayed had paid the price of the policy of the law to favour access to justice over the recoverability of costs.

43. Chadwick LJ in *Hamilton v Al Fayed* agreed that the tension between the principle that a party who is successfully defending a claim ought not to be required to bear the costs of his defence and the principle that a claimant should not be denied access to

the courts on the grounds of impecuniosity has to be resolved in favour of the second of those principles. He said:

> "66. It is important, therefore, that a court which is invited to make an order for costs against persons who have, in one way or another, assisted a claimant to obtain the legal representation which will put him on an equal footing with the defendant should recognise that, if such orders become commonplace, the form of assistance which has led to the making of the order is unlikely to be forthcoming in future cases. It is one thing to make a finite monetary contribution to the claimant's fighting fund or to contribute time and skill pro bono or under a no-win/no-fee arrangement; it is quite another thing to accept an unlimited liability to contribute to the defendant's costs if the claim fails."

44. Hale LJ said in *Hamilton v Al Fayed* she had been reluctantly persuaded to agree. The courts had accepted that an impecunious individual cannot be prevented from litigating just because he may not be able to pay the other side's costs if he loses. She noted that our system of adversarial justice depends heavily upon the use of lawyers to conduct litigation. However hard the courts try to accommodate litigants in person, it is unrealistic to suggest that such litigants are not often at a considerable disadvantage. It is also a disadvantage for the court (at 82). If that general policy is accepted, the court cannot start drawing distinctions according to whether or not it approves of the litigation in question, still less of the individual parties to the litigation. She noted that it might be more practicable to distinguish on the basis of whether the party funded had a reasonable prospect of success in the litigation. But, she said, experience with legal aid has shown that this is difficult to predict in advance. Lawyers give advice on the basis that what their client tells them is honest and accurate. It is unreasonable to expect funders to be any more sceptical. In practice, there has to be a general approach, whether for or against making such orders, even if there may sometimes be exceptions (at 85).

45. A rare example of a case where a non-party costs order was made against a solicitor, and hence a case relied upon by the Executors, is *Myatt v National Coal Board and another (No 2)* [2007] EWCA Civ 307, [2007] 1 WLR 1559 ('*Myatt*'). In that case the claimants were former coal miners suing the defendant for damages for noise-induced hearing loss. The claimants entered into conditional fee agreements in similar terms with the same solicitors. The claims were settled and the detailed assessment of costs was ordered. On the detailed assessment, the costs judge found as a preliminary issue that the conditional fee agreements were unenforceable. This had serious consequences both for the claimants who would have to pay some of the disbursement costs out of their damages and also for the solicitors who might not be able to recover their profit costs from their own clients. The solicitors had entered into similar conditional fee agreements in about 60 other cases so the financial consequences for the solicitors were very serious. The claimants appealed. The Court of Appeal dismissed the appeal and the defendant sought an order that its appeal costs be paid by the solicitors. Dyson LJ described the issue before the court as whether, despite the claimants' financial interest in the appeal, there was jurisdiction to order that the solicitors should pay some or all of the defendant's costs and if so how that

jurisdiction should be exercised. He cited *Tolstoy* and *Dymocks*. He focused on the third of Rose LJ's three situations in which a costs order may be made against a solicitor, namely "where if he acts outside the role of solicitor, e.g. in a private capacity or as a true third-party funder for someone else" and on the reference in *Dymocks* to the non-party being a "real party" to the action. Dyson LJ held that it was possible for the solicitor to be "a real party … in very important and critical respects" for the purposes of this jurisdiction even where he was the solicitor on the record with conduct of the litigation on behalf of the unsuccessful party. He said:

> "10. Let us now suppose that the solicitors have the major financial interest in the outcome of the appeal but that the claimants have a modest financial interest in it as well. It would be very surprising if the existence of the claimants' modest financial interest meant that the solicitor's financial interest counted for nothing when deciding what order for costs it was just to make. Why should the existence of the claimants' modest financial interest deprive the court of the jurisdiction to make an order against the solicitors, which absent that interest it would undoubtedly have?"

46. Dyson LJ accepted that Rose LJ in *Tolstoy* did not have in mind the kind of hybrid situation that had arisen in the case before him. But he recalled that Lord Brown said in *Dymocks* that the non-party need not be the only real party to the litigation provided he is *a* real party in very important and critical respects. There was no good reason why those observations should not apply with equal force to solicitors as to others. He held that it was inescapable on the facts before him that the main reason why the expensive appeal was launched was to protect the solicitors' claim to their profit costs from these and their other clients. He noted that the claimant and the solicitors had not said whether the claimants would have pursued the appeal in any event but thought it was most unlikely that they would have done so. The fair and just order to make in the case was to order the solicitors to pay 50% of the defendant's costs in the appeal. That took account of the claimants' real financial interest in the success of the appeals and also the fact that the solicitors had not been warned that an application for costs might be made against them. Lloyd LJ in a concurring judgment referred to the observations of Rose and Roch LJJ in *Tolstoy*. He said:

> "19. Those observations do not, and did not purport to, set out in definitive terms exactly what is the borderline between the case where a solicitor acts purely as such in the ordinary way on behalf of the client and is therefore immune from the jurisdiction of the court under sections 51(1) and (3), and on the other hand a case where the solicitor's acts are such that he is within the scope of that jurisdiction."

47. He said later in paragraph 22, that there may be cases of litigation funded on a conventional private basis where it may be said to be in the interests of the appellant's solicitors that an appeal be brought on the question of costs, for example if the opponent is clearly able to pay, whereas the client would have greater difficulty in paying. He said: "Such a case would however be fundamentally different from this one as regards the profit cost element because here the claimants were and are not at risk at all for the profit costs" (at 22). He sought to limit the relevance of the decision

to cases where the litigation is funded by a CFA and where the issue is as to the enforceability of the CFA. He did not regard it as fatal to the application that there was nothing that one could point to in the conduct of the solicitors as attributable to their role as a quasi-party rather than as legal representative to the claimants. He concluded by saying:

> "26. … It seems to me that, taking the essence of what Lord Brown says in that passage [*sc.* in *Dymocks*] together with what the Court of Appeal had said on that particular point in the *Tolstoy-Milosavsky* case, it is correct to regard [the solicitors] in the present case in relation to the conduct of the appeal as having acted in part for the sake of their own benefit in a respect which was of no interest or concern to their clients and as having acted as a matter of business to seek to establish their right to be paid, not by their own clients in practice, the profit costs on these four cases and all the others of which these were representative.
>
> 27. In those circumstances, which could be common in relation to cases where the enforceability of a CFA is at stake but would be most unusual in any situation, it seems to me proper to regard the solicitors as having acted in respect of the appeal in a dual capacity; acting for their clients, certainly, and with a real interest of those clients to protect, but primarily acting for their own sake . . ."

48. Sir Henry Brooke agreed with both judgments.

49. I was also referred to the judgment of David Donaldson QC (sitting as a Deputy High Court Judge) in *Harcus Sinclair (a firm) v Buttonwood Legal Capital Ltd & ors* [2013] EWHC 2974 (Ch). In that case the solicitors Harcus Sinclair had brought interpleader proceedings in respect of money entrusted to them as a stakeholder for the funding of substantial litigation brought in the Commercial Court. The claimant in the underlying litigation was referred to as AREF and it had been funded by a party referred to as BLC. The interpleader proceedings were decided in favour of BLC and BLC then sought their costs from the solicitors who had acted for AREF in both the interpleader proceedings and the underlying proceedings, called Rylatt Club. It was asserted that victory for AREF in the interpleader proceedings would have brought a benefit to Rylatt Club in that it would have been paid sums which it had earned or disbursed on AREF's behalf in the underlying action. Mr Donaldson noted that there are many cases in which a solicitor provides at least some element of financing for his client. That factor together with the possible benefits if victory enables the client to pay the solicitor was not, he held, a factor which could properly open the door to an order against the solicitor: (at 14). He said (at 15):

> "15. What the court must seek is therefore some element which indicates that - as it is sometimes put in the case-law - the solicitor has, at least to some extent, acted outside his role as a solicitor for his client, or, as I would add, for a purpose outside that role. While this may be problematic where the applicant cannot identify any act which is not explicable or called for by

> the proper discharge of the solicitor's professional obligations to his client in the conduct of the litigation, that is not always fatal. In such a case, it will in my view be of great, and possibly decisive, importance whether the interests - and hence the motivations - of the solicitor and the client or in any significant respect incongruent. That was so in *Myatt v National Coal Board* [2007] 1 WLR 1559 where the solicitor had a substantial and apparently much greater additional interest in a successful appeal in that it would create a binding judicial precedent enabling him to recover his profit costs in 60 other similar cases. *Myatt* was however unusual in both its facts and results. Typically, the solicitor's interest is no more than a direct linear consequence of his client's potential success: he will be paid if his client is paid and not if not. Moreover, even if there were a significant lack of congruence, the degree of the discrepancy - possibly combined with other factors in a discretionary evaluation - may still make it inappropriate to make any order for costs, or lead the court to limit the order to only part of the costs."

50. Mr Donaldson's reference to the need for something more than simply the payment of the fees riding on the success of the litigation echoes what was said by Lord Neuberger of Abbotsbury MR in *Sibthorpe v Southwark London Borough Council (Law Society intervening)* [2011] EWCA Civ 25, [2011] 1 WLR 2111. That case was primarily relied on by Mr Mitchell QC, appearing for the Executors, in relation to a point on champerty relevant to the question of indemnity costs. In *Sibthorpe* the conditional fee agreement between the unsuccessful clients and their solicitors contained a provision by which the solicitors indemnified the clients against the risk of having to pay the council's costs if they lost their cases. At 50, the Master of the Rolls discussed where the border between proper and improper conduct lies:

> "However, as Lloyd LJ said in argument, suffering a loss if the claimant loses is the economic mirror image of enjoying a profit if the claimant win. Thus, there is no doubt but that, as a result of the indemnity, the solicitors had an interest in the outcome of the claim, over and above the statutorily sanctioned interest due to the no-win no fee agreement and 10% uplift. However, it is by no means unknown, and perfectly proper, for solicitors to conduct litigation for a client knowing that, unless the client wins, the solicitors may find it impossible, or will find it hard, to recover their fees. Further, it is common for solicitors, particularly in high profile cases, to publicise the fact that they acted for the successful party in litigation. In each such case, the solicitor has an interest in the outcome of the litigation. An even more everyday point is that solicitors, and barristers, have a very real interest in winning a case for their client, especially when the client is substantial: there is a significantly greater prospect of further instructions from the client."

Discussion

51. Mr Mitchell submitted that in the light of the arrangements for the payment of fees in both the Langstone Action and the Malicious Prosecution Claim, there were two ways in which the Costs Respondents had a personal stake in the Malicious Prosecution Claim brought by Mr Willers. The first was because they had granted Mr Willers a valuable financial accommodation relating to the fees from the Langstone Action. Despite there apparently being no arrangement to that effect, De Cruz had not pressed Mr Willers for payment of the Costs Shortfall and the interest accrued on those and the Barristers had also refrained from insisting that the Firm pay the fees owed or interest. The second was that they in effect acted without payment in the Malicious Prosecution Claim, expecting to be paid only if Mr Willers won the claim and recovered damages and his costs from the Executors. They were therefore going to be the principal beneficiaries of any success in the Malicious Prosecution Claim. This he submitted distinguished their position in an important respect from the position of lawyers who act in proceedings for an impecunious client knowing that they will only be paid if the client wins. Their conduct was, in addition, champertous because the arrangements for legal services for the Malicious Prosecution Claim did not fall within any of the statutory exceptions allowing for conditional fee agreements or damages based agreements.

52. Mr Mitchell argued that the Costs Respondents were in the same position as the solicitors in *Myatt*. They were established creditors of Mr Willers with a cast-iron claim for at least some of the Costs Shortfall from the Langstone Action. Without the Malicious Prosecution Claim, they had no prospect of obtaining payment of that debt unless Mr Willers won the Lottery or won another of his cases against Mr Gubay. The head of damages for the Costs Shortfall in the Malicious Prosecution Claim had all along been the primary purpose of bringing the claim. The other heads of damages for loss of earnings and damage to health had clearly not stood up even to the brief scrutiny to which they were subjected in the Judgment.

53. Mr Lawrence picked up on the word "immune" used by Dyson LJ in *Myatt* to argue that "immunity" usefully described the nature of the protection that legal advisers enjoy from the jurisdiction to make non-party costs orders. This special protection was not simply a matter of promoting the comfort and prosperity of lawyers. It is essential, particularly in contemporary conditions if anything resembling satisfactory access to justice is to be achieved. If lawyers consider that they face any risk that if the case goes wrong, as cases do, and is lost they will end up being sued for the costs incurred by the successful counterparty, then in almost all circumstances they simply will not act.

54. In my judgment the principle that emerges clearly from the decisions of this Court in *Tolstoy*, *Floods* and *Hamilton v Al Fayed* is that there is a strong public interest in ensuring that impecunious claimants can have access to justice even if that means that successful defendants are left substantially out of pocket. Because of this, legal representatives should not be at risk of a third party costs order unless they are acting in some way outside the role of legal representative. The nature of the role of the legal representative means that the indicators useful in considering the liability of, for example, a pure funder, such as whether he has been closely involved in making decisions about the conduct of litigation or whether he has a substantial financial interest in the success of the litigation do not work. The legal representative will

always be closely involved in taking decisions about the conduct of the litigation and will always have a financial interest in the outcome, particularly where he is working under a conditional fee agreement or because although he is invoicing the client regularly for work done, he knows that in practice he will never be paid unless the client wins the case.

55. The key question at the heart of this case is whether the fact that the damages claimed in the Malicious Prosecution Claim included a substantial amount of money still owed to De Cruz and the Barristers from the Langstone Action makes a difference. Mr Mitchell argues that it does because there was a debt undoubtedly owed (though of unknown amount) to the legal team and that was the primary purpose of bringing the Malicious Prosecution Claim. It makes all the difference because in effect the litigation was being conducted for the benefit of the Costs Respondents rather than for the benefit of Mr Willers. Mr Willers was not, it appears, going to be pursued by the Costs Respondents for the Costs Shortfall unless he came into some funds.

56. I confess I have found a decision in this case very difficult. On balance I have concluded that this is not a case in which De Cruz and the Barristers have acted outside the role of legal representatives to such an extent as to bring themselves within the costs jurisdiction under section 51(1) and (3).

57. First, it is significant, in my view, that the additional interest that the Costs Respondents had in the success of the Malicious Prosecution Claim over and above the recovery of their fees for their work on that claim was also an interest in recovering fees for providing legal services to Mr Willers to defend himself in the Langstone Action. The Supreme Court in the preliminary issue decision held that it was not an abuse of process for Mr Willers to claim the Costs Shortfall as a head of damage in the malicious prosecution claim. Lord Toulson JSC said (at 58) that the notion that the costs order made by Newey J at the end of the Langstone Action has necessarily made good the injury caused by Mr Gubay's prosecution of the claim was almost certainly a fiction and the court should try if possible to avoid fictions, especially where they result in substantial injustice.

58. Secondly, there is a more particular aspect of access to justice arising in this case than the general point discussed in the cases which I have cited. The risk that the legal team which acted successfully to defend the client in the earlier civil claim is potentially liable to pay the costs of the defendant to the malicious prosecution claim if some of those costs remain unpaid would in many instances force the client to instruct a new legal team. It would be expensive for Mr Willers to instruct a new legal team to fight the Malicious Prosecution Claim rather than use the existing legal team who are already familiar with the background. In a malicious prosecution claim, the claimant is always going to have been the successful defendant in the earlier proceedings which he now alleges were maliciously prosecuted against him. It is always going to be preferable from his point of view to be able to engage lawyers who understand the background and what happened in the earlier claim rather than instruct new lawyers who will then need to get up to speed with all the previous history before being able to advise on what is often going to be a speculative claim. There is also an equality of arms point in that the Executors would have no restriction on using their same legal team with their high level of familiarity with all the issues, whether or not they had paid all the fees incurred in the earlier proceedings.

59. Thirdly, it is important that legal representatives know when they first take on a client whether they are exposing themselves to the potential claim for costs from the opposing party at the end of the day. Litigation takes many twists and turns and it would be unsatisfactory for a legal representative who takes on a client without suspecting that such a risk existed then to be placed in the dilemma of whether to continue acting once the risk becomes apparent. That was not the case here, of course, because at the date the Malicious Prosecution Claim was brought it was already likely that there would be a costs shortfall although the extent of that differential was not yet known. Everyone was also already aware at the time the Malicious Prosecution Claim was lodged that Mr Willers had no funds to pay either his ongoing legal expenses or the Costs Shortfall. But there may be cases in which the facts are not so clear cut. I agree with the comment of Hale LJ in *Hamilton v Al Fayed* that it is better to have a general approach to these cases rather than for liability to turn on nuances of fact in particular cases - even though in a particular case it may lead to a hard result.

60. Fourthly, Mr Mitchell urged that the judgments of this court have stressed that every application for a non-party costs order must be decided on its own facts and that limited assistance is to be derived from citation of earlier authorities. He pointed to the way that Lloyd LJ had limited the scope of the decision in *Myatt* (at 27) to cases involving the invalidity of a CFA. In the same way, he argued, any order made in this case could be expressly limited to cases involving claims for malicious prosecution of an earlier civil claim so that there was no real danger of creating some widely applicable exception to the *Tolstoy* line of cases.

61. I was initially attracted to the idea that the distinction that Mr Mitchell drew between this case and the *Tolstoy* and *Floods* cases did justify a further, narrowly confined, exception to the general principle that legal representatives who, formally or informally, forego payment of their fees are not thereby liable for the successful party's costs. This is the first case in which an action for malicious prosecution has been brought for the allegedly malicious prosecution of an earlier civil claim. In a more conventional malicious prosecution claim where the previous prosecution was criminal, it is very unlikely that the acquitted defendant would have a large liability for unpaid fees owing to his defence legal team which he then claims as part of his loss arising from the malicious prosecution. There is a policy question as to whether, despite the access to justice and equality of arms points made earlier, the team which advised a successful defendant in this kind of bitterly fought litigation is also then the team advising him on the benefits and disadvantages of pursuing a further round of litigation against the same foe. Would it be better for a fresh team to advise on the merits of that further round of litigation; a team that does not have quite as much of their own money at stake as the Cost Respondents had? I have however concluded that it is not appropriate to take this factor into account in deciding whether to make the order in this application. It is a matter for a professional regulator to address if that is thought necessary and is not appropriately dealt with by creating the potential threat of a non-party costs order.

62. Further I must not fall into the trap of assuming that the Costs Respondents were encouraging Mr Willers to bring and pursue the Malicious Prosecution Claim. It is clear from cases such as *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056 that a solicitor or barrister who enters into a CFA still owes to the client exactly the same duties that he would owe to the client and to the court if he were being paid on a

conventional basis. He must disregard his own interests in giving advice to the client: see Lord Woolf MR at p, 1065. Mr Willers has refused to waive privilege in respect of his communications with and advice from his legal team either in the Langstone Action or in the Malicious Prosecution Claim. Mr Lawrence reminded me of the authorities arising in the wasted costs jurisdiction which make clear that where the legal representatives are prevented, by the refusal of their client to waive privilege, to rely on what passed between them in order to defend themselves against a costs application, the court should give them the benefit of any doubt arising as to what is likely to have occurred: see *Ridehalgh v Horsefield* [1994] Ch 205 and *Medcalf v Mardell* [2001] 2 AC 678. Given their inability to reveal what advice they gave, I should assume that they gave honest advice unaffected by their financial interest in Mr Willers recovering the Costs Shortfall just as one must assume that it was unaffected by their recognition that they would not get their fees for their services in the malicious prosecution claim itself unless that claim was successful.

63. I doubt whether Mr Mitchell is right in submitting that the making of an order in these circumstances would remain confined to its narrow facts. Mr Carpenter in his concise and persuasive submissions on behalf of De Cruz has convinced me that it would not be right to try to carve out a further exception because there are a number of scenarios in which the damages claimed in second proceedings include the unpaid costs of the solicitors incurred in the first proceedings. For example, the client may have entered into a commercial contract which has been carelessly drafted for him by his solicitors so that there is an ambiguity that on one construction makes him subject to an onerous financial obligation which he did not intend to undertake. The client goes to new litigation solicitors who act for him in the contract claim against the contract counterparty. The contract claim may be expensive and the litigation solicitors may extend credit to him if he is impecunious. Suppose he loses the contract claim and has to perform the onerous obligation to his counterparty as well as pay the counterparty's costs for the contract claim. He may wish to pursue his former solicitors for professional negligence in drafting the contract. He would include in his claim his own reasonably incurred fees owed to his litigation solicitors. It would not be right for the litigation solicitors to have to insist that the client pays all their outstanding fees before they could agree to act because there is a risk that they will be considered a "real party" to the professional negligence claim if some of those fees cannot be paid until the drafting solicitor pays up. Mr Carpenter gave further examples of a disputed will where there might be expensive litigation between beneficiaries over the terms of the will and the losing party may then sue the solicitor who drafted the will in negligence. If the losing beneficiary then wishes to use in the negligence proceedings the same solicitors who acted for him in the beneficiary proceedings, he should not be precluded from doing so just because he wishes to claim in the negligence proceedings the fees charged by them for the unsuccessful litigation and some of those fees are outstanding because of his impecuniosity. A similar situation may arise in respect of the negligent conveyancing of a house where there may be litigation, for example over a disputed right-of-way which the conveyancer did not notice and the same solicitors may be used in the proceedings between the neighbours and the later proceedings in negligence against the conveyancer.

64. These examples satisfy me that it is not possible to make an exception to the protection that the authorities clearly confer on legal representatives in this case without opening up solicitors to potential non-party costs applications in many

spheres in which they act for a client who is claiming as damages the fees which the client owes them for work done for him in earlier proceedings. There is no principled way to draw a line between those cases and the present case. In each case it would be unfair either to deprive the client of the services of his former lawyers or in effect to require those lawyers to pursue the outstanding earlier costs by, for example insisting that the client sell his house, cash in his pension, or dispose of other assets in order to pay their fees.

65. The question in this application does raise as a matter of principle whether the fact that the fees riding on the success of the claim are not only the fees for work in that claim but also fees outstanding from an earlier claim means that the solicitor to whom those fees are owed is acting in the subsequent claim as a "real party" or acting outside the scope of his role as a legal representative. In my judgment he is not.

66. Fifthly, the Executors argued that this case was marked by a particular feature, namely that there was a conflict of interest between the Costs Respondents and Mr Willers arising from the terms of the CFA between De Cruz and Mr Willers. Although this was dealt with in relation to indemnity costs, the passage I have quoted above from the judgment of Mr Donaldson QC in *Harcus Sinclair* indicates that a congruence or lack of congruence between the interests of the solicitors and the interests of the client is a factor when considering whether the solicitor has acted outside his role as solicitor for his client.

67. Mr Mitchell argued that there was a conflict of interest in that it was in De Cruz' interest for Mr Willers to assert that he owed them every penny of the Costs Shortfall. Mr Mitchell referred to Mr Willers' statement (quoted in paragraph 24 (ii) above) that he had not challenged De Cruz' bill of costs because he believes the bill of costs to be fair and reasonable. He described this statement as extraordinary given the extent to which those costs were disallowed by Master O'Hare and the terms of the Master's rulings on those costs. He points also in particular to the term of the CFA which, he says, gives Mr Willers an unanswerable defence to any attempt by De Cruz to claim from him anything more than the 43% success fee allowed by the Master: see paragraph 18 above.

68. I regard this point as unrealistic. It would be wrong to speculate as to what would have happened as regards the claim for the Costs Shortfall if the Malicious Prosecution Claim had succeeded on liability. I described the difficulties and the further legal and factual issues that would have arisen in paragraphs 323 – 326 of the Judgment. If the quantum awarded at the end of the trial had been substantially less than the total Costs Shortfall it seems to me unlikely, given the extremely generous stance that the Costs Respondents have so far adopted towards Mr Willers, that they would have pursued him for the shortfall of the shortfall. If they did demand payment of the whole sum, I do not accept Mr Mitchell's suggestion that Mr Willers would somehow be prevented or estopped from pursuing his rights under the Solicitors Act on the basis of what he had said about the reasonableness of the fees in the course of the Malicious Prosecution Claim. I consider that it was in Mr Willers's interests to seek in the claim to recover from Mr Gubay as much as possible of his own liability to the Cost Respondents and I do not see that he had, at least before the conclusion of the Malicious Prosecution Claim, a non-congruent interest in getting into an argument over fees with his legal team.

69. It could be said that there was a divergence of interest between the Costs Respondents and Mr Willers because it was a matter of indifference to Mr Willers whether the claim for the Costs Shortfall succeeded. If it did succeed he would pay the outstanding fees; if it did not succeed he had no reason to think that the Costs Respondents would press him for payment when they had forborne to press him so far. However that would not be right as a matter of fact. At the time the Malicious Prosecution Claim was brought, Mr Willers was pursuing his counterclaim in the Isle of Man Proceedings claiming millions of pounds from Mr Gubay and then his Executors in the Isle of Man: see paragraphs 143 to 146 of the Judgment. If he had succeeded in that counterclaim he may well have been required to pay the Costs Shortfall from those damages and then would clearly have an interest in pursuing the Malicious Prosecution Claim for reimbursement of those sums. This case is different from the *Myatt* claim where the interest of the coal miner claimants was very clearly a small amount financially as compared with the much larger sum in jeopardy for the solicitors. The value of the Costs Respondents' interest in the outcome of the litigation is not many times greater than the value of Mr Willers' interest as was the case in *Myatt*. Further, in *Myatt* the ability of the solicitors to recover their profit costs from the claimants was an interest at least different from, if not actually in conflict with, the interest of the Claimants who would not be liable to their solicitors for those profit costs if the appeal failed. The recovery of the Costs Shortfall in the Malicious Prosecution Claim cannot be described as of no interest or concern to Mr Willers, to adopt Lloyd LJ's wording in *Myatt* para 26.

70. Allied to the question of conflict of interest is the question of who was in control of this litigation. The Executors rely on the text of a letter sent in September 2018 by Mr Thomas of Laytons to Mr De Cruz setting out the terms of a conversation they had had on 17 February 2017 shortly after a failed mediation but as part of ongoing negotiations to settle the Malicious Prosecution Claim. The admissibility of this letter in this application was the subject of a judgment by Andrews J on 12 April 2019: [2019] EWHC 937 (Ch). It included the following paragraph: (VDC being Mr De Cruz)

> "VDC then turned to what seemed to be the main purpose of the call. He said Mr Willers (PW) owes 'us' £3.5M. He said that any settlement would need to include that as otherwise PW would retain liability to his lawyers. He asked if there was any sum in excess of £3.5M that the executors would be willing to offer on the 'clean break' basis. He explained that PW would need 'something for himself' as well as the £3.5M. VDC explained that the £9M offer comprised the £3.5M plus £5.5M for PW. VDC explained that PW would need to pay off the £3.5M in full and that anything else was for him.
>
> I said the parties were a long way apart. I explained that the executors were fed up at the end of the mediation and that they felt they had gone as far as they could. They had their own responsibilities and were prepared to fight the case.
>
> VDC seemed to take that on board but repeated his comment that PW would need to pay off the lawyers in full. I commented that the lawyers themselves would need to take a

> view as to PW's solvency (the point being that the lawyers themselves are at risk). VDC initially queried this and said "lack of liquid assets" but then when I made the point that DeCruz and PW had given us extensive details as to PW's lack of solvency he did not demur further (maybe further investigation needed). VDC again said there was no way of bridging the gap without PW discharging his liability to his lawyers.

71. The Executors argued that this showed that it was the Costs Respondents who were in control of the litigation and appeared to have been put in a position where they could dictate the amount of damages at which Mr Willers could settle and had determined that that amount could not be less than the £3.5 million he owed them. This showed that the Costs Respondents had overstepped the role of legal representatives and were the real parties to the dispute as they firmly intended that the litigation should continue regardless of Mr Willers' preferences unless the damages offered covered the totality of their outstanding costs.

72. Mr Carpenter downplayed the significance of the Attendance Note arguing that it should not be taken out of context, that context being it was one conversation in a lengthy negotiation between the parties' solicitors. He memorably described it as "self-evidently the tip of an iceberg floating in an ocean of privilege". That privilege covered not only the without prejudice discussions between the solicitors and more importantly what passed between Mr Willers and his lawyers none of which has been disclosed.

73. I agree with Mr Mitchell that it is difficult for the Costs Respondents to dismiss the relevance of the attendance note given that they fought tooth and nail before Andrews J to keep it private. However, I do not accept that the note can bear the weight that the Executors seek to place on it. It would not be right to conclude on the basis of Mr De Cruz's negotiating position in this particular telephone conversation that the Costs Respondents had been given a veto by Mr Willers over the terms on which a settlement of the Malicious Prosecution Claim could be reached. Mr Carpenter also points out that subsequently, on 17 September 2018, in the course of correspondence about the possibility of having a second mediation, De Cruz wrote to Laytons that Mr Willers was prepared to mediate in good faith on the basis that he might accept less than £9 million in settlement of his claims and less than £3.5 million in respect of his costs of the Langstone Action. There was apparently no agreement or arrangement between the Costs Respondents and Mr Willers as to how any lump sum received in settlement would be allocated as between Mr Willers and the Costs Respondents. In my judgment the Attendance Note is not sufficient to establish that if Mr Willers had wearied of the proceedings and decided to settle for a modest nominal payment, the Costs Respondents would have refused to allow him to abandon the claim if that meant the Costs Shortfall would never be met.

74. The Costs Respondents also argued that the application must fail because the Executors have not established causation. They submitted that in order to succeed the Executors need to show that if the Costs Respondents had not acted for Mr Willers then the Executors would not have incurred the costs which they now claim from the Costs Respondents. Mr Carpenter referred me to *Excalibur Ventures LLC v Texas Keystone Inc* [2014] EWHC 3436 (Comm), at para 140 and to the observations of

Morritt LJ in *Globe Equities Ltd v Globe Legal Services Ltd* 1999 WL 477655 at para 28 where he stated that it had not been disputed that the conduct of the non-party must have been a cause of the applicant incurring the costs it seeks to recover at least to some extent.

75. I find it difficult to discern from these cases what the nature of the counterfactual is that the court is required to consider when deciding whether the respondent to the non-party costs application has caused the costs claimed to be incurred. Is the counterfactual that no other solicitor would have been prepared to take on the conduct of the litigation if the cost respondent had refused or is it just that a different solicitor might have had the conduct of the litigation and pursued it differently? The causation element appears to have been discussed primarily in cases where the application is made against a funder who can show that even without his funds there was sufficient money contributed to ensure that the litigation would have been pursued: see *Hamilton v Al Fayed* and *Excalibur Ventures*. That is a very different situation from the current case. It is difficult to see what role causation can have where the basis of the solicitors' liability to pay costs is that because they stepped outside their role as legal representatives, they were a "real party" to the proceedings even if they do not have to be the only real party. If I had otherwise been minded to make the order against these Costs Respondents I would not have been deterred from that course by a problem with causation. I regard it as doubtful that the Malicious Prosecution Claim would still have been brought if Mr Willers had had to find a different legal team to act for him.

76. I therefore dismiss the application for a non-party costs order against the Costs Respondents. The interest that the Costs Respondents had in the success of the Malicious Prosecution Claim was not so different from the direct financial interests that lawyers commonly have in litigation as to make them a real party in substantial and critical respects.

Other issues

77. Since I have found that this is not a case where it is just to make a non-party costs order I do not need to deal with the ancillary issues that arose, as to whether there is any proper distinction to be drawn between the Firm and the Company, or between De Cruz and the Barristers or whether it would have been appropriate to order costs to be paid on the indemnity basis.