Neutral Citation No.[2023] EWHC 827 (SCCO)

Case No: SC-2022-BTP-000916

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE
IN THE MOBILE TELEPHONE VOICEMAIL INTERCEPTION LITIGATION ("MTVIL")

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

Date: 04/04/2023

Before:

COSTS JUDGE ROWLEY

- -

Between:

Various Claimants	**Claimants**
- and -	
News Group Newspapers Limited	**Defendant**

- -
- -

Simon Browne KC and Sara Mansoori KC (instructed by **Hamlins**) for the **Claimants**
Clare Reffin and **George McDonald** (instructed by **Clifford Chance**) for the **Defendant**

Hearing dates: 2, 3, 6 and 7 February 2023

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Approved Judgment

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

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COSTS JUDGE ROWLEY

Costs Judge Rowley:

Introduction

1. This judgment arises from the preliminary issues hearing held over four days in February and deals with all aspects raised, save for the application regarding the claimants' election as to production of certain documents, which I dealt with during the course of the hearing. This judgment therefore deals with the following issues:

    i) Hourly rates

    ii) Recoverability of counsels' success fees

    iii) Quantum of solicitors' success fees

    iv) Quantum of counsels' success fees

2. For completeness, I should record that I put the claimants to their election, in accordance with paragraph 13.13 of PD 47, in respect of (i) the Costs Sharing Agreement ("CSA") and (ii) the Common Costs Conditional Fee Agreement ("CCCFA") entered into with Hamlins LLP by each of Simon Browne KC, Sara Mansoori KC, David Sherborne and Julian Santos. I declined to put the claimants to their election in respect of the agency agreement between Hamlins LLP and the Legal Research Team.

3. I also declined to put the claimants to their election, at least at this stage, in respect of the individual CFAs entered into by the claimants with their respective solicitors. This was very largely on the basis that the defendant's request concerned issues said to arise out of the Court of Appeal's decision in BNM v MGN Ltd [2017] EWCA Civ 1767. The extent to which those issues arise, in my view, would be dealt with more satisfactorily with the benefit of specific figures following further progress in the detailed assessment. As a result, although I received some submissions from Simon Browne KC for the claimants and George McDonald for the defendant on the BNM issue, it has essentially been put back to an appropriate point in the line by line assessment due to take place on numerous dates starting from 20 March 2023.

4. Finally, I record my appreciation of the written and oral submissions of all four counsel (Mr Browne and Sara Mansoori KC for the claimants; Clare Reffin and Mr McDonald for the defendant). In litigation, which is as long-running and time-consuming as this, there is an almost limitless amount of points and examples that could have been raised. I consider the balance was well struck in providing examples to support points made and explanations of the unusual features of this litigation and yet avoiding unending repetition.

The Mobile Telephone Voicemail Interception Litigation

5. The length of time the Mobile Telephone Voicemail Interception Litigation ("MTVIL") has been proceeding can be measured by the fact that the first managing judge (Vos J) has since been elevated to the Court of Appeal and the position of Master of the Rolls and the second managing judge (Mann J) has retired. The third and current managing

judge, Fancourt J, has just celebrated his second anniversary having taken over from Mann J from 1 March 2021.

6. In order to assist the incoming managing judge, Mann J ordered both sides to prepare a "primer" document of no more than 25 pages setting out the general picture of how the litigation had developed from the first claim in 2007 and more particularly the managed litigation which began in 2011. Entirely naturally, the parties referred me to the same documents as part of my pre-reading before the preliminary issues hearing. As the defendant's skeleton argument points out, the primers are written from very different viewpoints, and they lead into the submissions made by the parties on the issues that are before me.

7. Similar "phone hacking" proceedings have been brought against Mirror Group Newspapers ("MGN") and judgments in that litigation have been referred to in these proceedings, particularly Gulati & Ors v MGN [2015] EWCA Civ 1291 and two decisions of Andrew Gordon-Saker, the Senior Costs Judge, in respect of Various Claimants v MGN on 9 November 2016 ([2016] EWHC B29 (Costs) and 12 December 2017. In the MGN proceedings, the cases were brought in "Waves." Here, they have been brought in "Tranches" with one tranche starting after the previous one concluded as follows:

- Tranche 1 ("T1") - 15 April 2011 to 27 February 2012
- Tranche 2 ("T2") - 27 February 2012 to 4 July 2014
- Tranche 3 ("T3") - 5 September 2015 to 25 March 2019
- Tranche 4 ("T4") - 26 March 2019 onwards

8. The costs of bringing the claims have long been regulated by the court. For example, Vos J set hourly rates for the purposes of budgeted costs in 2012. In respect of T4, Mann J made an Order for T4 Costs Arrangements (the "Costs Arrangements Order") on 3 April 2019. That order tied in with one made on 26 March 2019 concerning consequential matters following on from the final T3 claims having settled.

9. The Costs Arrangements Order appointed Hamlins LLP as the Lead Solicitor for the T4 Claims. As such, it was to maintain a register of the T4 Claims that were issued and joined the managed litigation by the claimant subscribing to the CSA. Each such claimant would then be liable for a share of the common costs incurred by Hamlins LLP as solicitor agent together with counsels' fees and disbursements. That share could be claimed from the defendant in the event of success. The defendant could seek a share of its costs from the claimant if the claim failed. Each claimant's share would be worked out based upon the number of two monthly periods during which the claimant's claim was on the register and the number of other claimants present during the same periods.

10. These common costs were in addition to the individual costs incurred by the claimant in instructing their own solicitor to pursue the claim.

11. The bill of costs before me runs for the period of 26 September 2020 until 7 September 2021. Several CMCs took place during that period and Fancourt J heard those that took

place in June and July 2021. By then preparations for the forthcoming trial in November 2021 were fully in the parties' and the court's mind. In the following paragraphs I have set out some of the introductory paragraphs of Fancourt J's rulings in June 2021, July 2021 and October 2021 which encapsulate much of the submissions before me as to the nature of the MTVIL.

12. The extracts are not in chronological order. The first is from 27 July 2021 ([2021] EWHC 2187 (Ch)) and describes the nature of these "phone hacking" cases:

> "2. These claimants and numerous others have brought claims against NGN for invasion of privacy in their private telephone messages (both left and received), with unlawful information gathering alleged to have led to the publication of articles about the claimants in the News of the World and The Sun newspapers.
>
> 3. For each individual claim relating to unlawful information gathering and articles published about an individual there is also a generic claim based on allegations of institutionalised phone hacking and unlawful information gathering followed by destruction and concealment of data in an attempt by NGN to hide the unlawful activity that had allegedly been going on. Proof of the generic claim, even if it does not relate to publications against the claimants specifically, will form the basis of a claim for higher and/or aggravated damages against NGN by each claimant.
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> 4. There has been substantial rolling disclosure in relation to the generic claim. All the generic disclosure that has accumulated to date has been made available to each individual claimant. In the current tranche of MTVIL claims, there have been numerous applications for further generic disclosure, often based on information newly obtained by previous disclosure applications or by new witness evidence. That process is by and large completed, so far as the trial due to start in November this year is concerned."

13. The relationship between the generic work and the individual (or "Claimant specific") work is fundamental in these proceedings. A specific order detailing how the generic work would be dealt with was originally made on 20 April 2012 and has been extended during the life of the MTVIL. It specifies not only the lead solicitor but also the counsel team which was to be used and the requirement for any claimant who wished to benefit from the managed litigation to enter into an agreement (the CSA) to share the costs of the generic work. The bill before me is purely in relation to "common costs" i.e. costs relating to the generic work during the 12 months or so from 26 September 2020. It is the second bill for such work in this tranche of the proceedings.

14. The second passage is from Fancourt J's ruling on 16 June 2021 ([2021] EWHC 1737 (Ch)). It concerns one of the "numerous applications for further generic disclosure" referred to above by the Judge. In his June judgment, Fancourt J decided that he did not need to rehearse in any detail the history of such applications but would make three broad points at the outset:

> "4. First, as I have said, there has been a long process of generic disclosure applications, the results of which often lead to further disclosure applications, and the volume of generic disclosure already given is huge. That is not to say that it is complete and, indeed, it is part of the Claimant's case that it never will be complete, owing to the destruction of data, but a great deal of material on the basis of which the Claimants will, at trial, invite the drawing of conclusions is already available. Many claims in this and previous tranches of this litigation have settled on the basis of what has been disclosed so far.
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> 5. The second point is that against the background of a generic case that has been evolving since at least 2012, a six-week trial of the 32 or so remaining individual claims is due to start at the beginning of November this year. A considerable amount of work remains to be done to prepare for a trial if the claims do not settle in the meantime. Trial witness statements have not, for the most part, been exchanged. Claimant-specific statements are due by the end of July, and generic witness statements by mid-September. There is also some Claimant-specific disclosure outstanding, as I have said.
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> 6. The factual background and the facts relating to the allegations of unlawful information gathering and concealment and destruction are complex. There is very much more than enough detail in the case already to fill a very busy six weeks. Indeed, if no further claims were to be settled by November, it is most unlikely that all the claims could be tried at that time. The time remaining, both between now and November and the time available at trial, simply cannot accommodate much more in the way of applications for generic disclosure and the lengthy processes of downloading, searching and assessment of results, and volumes of further documents that arise as a consequence, if both sides are going to be able to prepare for trial and the trial will be a manageable and fair process.
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> 7. The third point, which mitigates the second point to some extent, is that no claim in these proceedings has yet come to trial. All claims in the previous three tranches eventually settled, and many claims in this fourth tranche have already settled, as well as other claims where it has not been necessary for a claimant to issue a claim form. There is therefore a proper sense in which these proceedings are being managed for settlement, and considerations of what is likely to promote or facilitate settlement are, therefore, material considerations."

15. The Claimants' position is that the additional disclosure is required to fill in gaps where previous disclosure has been inadequate or the documentation is incomplete by reason of the deliberate deletion of emails, for example. As further documentation has been provided, the scope of the activities on which claims can be brought has been extended

and that in turn raises more questions, some of which can only be dealt with by additional documentation.

16. The Defendant points to the enormous amount of disclosure that has been provided during the course of the four tranches and disputes that further documentation is, in the main, actually required. The Defendant's central point is encapsulated in the final sentence of the above passage – that its intention is to settle the claims made and has managed to do so successfully. The acid test being that there have been no trials at all in the MTVIL. Ignoring the odd case which has been discontinued, all claimants who have brought claims have had them resolved in terms of damages as well as any private apology or statement in open court.

17. The regularity of settlement is referred to in the third decision of Fancourt J on 7 October 2021 ([2021] EWHC 3083), which postdates the period covered by the bill in these proceedings (it ends on 7 September 2021) but precedes the trial which was due to start in the first week of November 2021. The decision concerned which of the remaining claims should be heard at the trial. One was not ready and Fancourt J decided that the remaining three should all proceed as follows:

> "2. I am working on the basis that, in the context of this litigation, in view of everything that has happened in the past and the way it is being managed, it is, in my view, highly likely that at least one of those claims will have settled by the beginning of November, maybe more than one, and maybe all of them. If that is not the case and no claim has settled by, I think it is Monday, 25 October, a week before the start of the trial, then counsel and I can review at that stage whether it remains feasible for all three claims to be tried and/or whether all of the 50 selected articles relating to Mr Gascoigne's claim can and should be tried in that trial.
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> 3. It is important, in my view, to identify the claims to be tried now as a first step in seeking carefully to manage the whole trial and the generic claim within the trial. The material in the generic claim is now vast. There can be no more than four weeks in any event, and possibly only three weeks or a little more that, that will be available at the trial for those generic claims. It is, therefore, abundantly clear that not every issue, sub-issue and factual, or even legal dispute in them, can be tried; nor can every potentially relevant witness be called by the parties.
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> 4. It is clear that only those generic issues that are relevant to the claimant-specific claims should be tried, and within that category, only the main and most important issues can be tried within a period of three to four weeks. I will not embark at this stage on any analysis of what are the relevant and important issues, but the parties, and then ultimately the court, will do further work on that in due course.
>
> 5. It is clear that the claimants will have to cut their cloth to fit the time that is available, both in respect of the witnesses that

> they wish to call on the generic claim and the claimant-specific claims for that matter, and the length of their cross-examination of the defendant's witnesses. Equally, I will be astute to ensure that the defendant is given only a proportionate time to cross-examine the claimant's witnesses, not an unlimited and disproportionate time, particularly bearing in mind the extent of non-admissions rather than denials of the claimants' generic claims."

18. This extract highlights a track record of cases settling within the curtilage of the court, even if not actually at the court door. Numerous T3 claims were listed for hearing on several occasions but all settled prior to those hearings taking place. Mann J unusually called for a copy of the without prejudice correspondence in order to inform his view as to why the settlement of cases which had been marked as test cases kept on occurring. He then quizzed Mr Sherborne who, alone of the Claimants' counsel, was instructed by the individual claimants, about why the test case claimants made offers shortly after the CMC at which they had been nominated as test claimants.

19. Mr Sherborne's response was that it was incumbent upon the claimants to set out a without prejudice valuation of sums which they would be prepared to accept since otherwise they would be criticised by the defendant and the judge in a manner that had previously occurred. Mr Sherborne also criticised the defendant for making large and unexplained increases on previous offers which the claimant could do nothing but accept. Mr Sherborne was quite happy to provide his own explanation of this conduct which was that it was to avoid the hearing. Indeed, he pursued this point sufficiently ardently for the judge to query whether Mr Sherborne was suggesting that some form of admission of liability could be extracted from the levels at which the settlements had been reached.

20. The upshot of this CMC in February 2018 was that the remaining 51 cases in T3 were all to be prepared for the hearing listed in October 2018 and a decision on which cases would be chosen for the hearing would be made closer to the event.

21. The Defendant had made a concerted effort to settle the remaining T3 claimants in the previous September with 71 of the 73 claimants receiving offers. I was taken to a number of the communications between claimants and the defendant regarding the settlement of claims which had started in September 2017 and which concluded in the first half of 2018.

22. By September 2018, there were only 6 claims left to choose from as the test cases (with a further 5 having been deemed too "big" to be dealt with in the October hearing). The last ordinary sized claim settled in October 2018 and the last large claims settled in January 2019 before their trial which had been listed in February 2019. T3 concluded at this point and the cases which had been stayed pending the resolution of T3 were brought into play as the first claimants for T4.

23. In addition to abandoning the approach of staying most cases in favour of a limited number of test cases in the tranche going forward, the MTVIL procedure for T4 brought in its own valuation procedure. Following the close of pleadings for individual Particulars of Claim, disclosure based on those documents would be provided by the defendant within 8 weeks of service of the defence. The claimant would then have 5

or 6 weeks (depending on the number of articles involved) in which to set out a without prejudice valuation of the claim. Ms Reffin described this unusual procedure as being something by which the defendant put great store as a springboard for settlement. The wording of this unusual provision is contained at paragraph 8 of the CMC order dated 3 April 2019 and is as follows:

> "Each Claimant will write to the Defendant on a without prejudice basis stating the amount in pounds sterling at which the Claimant values his/her claim. Such valuations will be provided within a reasonable time of the provision of Claimant-specific standard disclosure and in any event, for claims in which up to 100 articles are relied on by the Claimant, within 5 weeks of such disclosure; and for claims on which over 100 articles are relied on by the Claimant, within 6 weeks of such disclosure."

24. Ms Reffin was keen to impress upon me the settlement statistics in the tranches. According to her, 480 claims in T2 and 587 claims in T3 were settled without any trial taking place. These figures included pre-proceedings settlements – and as such did not feature in the common costs claims – but did not include other claims which settled via a separate compensation scheme. As far as cases in the MTVIL itself are concerned, the figures would obviously fluctuate during the tranche as cases came on to the register and others came off following settlement.

Tranche 4

25. The fourth tranche began on 26 March 2019, immediately after T3 came to an end. The cut-off date for claims to be brought in T4 was initially set at 29 November 2019. That date was subsequently extended and eventually became 29 May 2020.

26. Up to 25 September 2020, there were 5 CMCs in T4 leading towards a trial due to start on 12 October 2020. However, all of the cases eligible for trial had settled by that point and so a further CMC took place on 12 October 2020. One of the orders given by Mann J on that date was for an immediate assessment of the T4 common costs from 26 March 2019 until 25 September 2020. That bill was served in July 2020 and was ultimately settled by the parties. It is known as Common Costs Bill 1 or "CCB1".

27. The directions in October 2020 set a further trial date in November 2021. There were 4 more CMCs during this period and the detail of which awaits the line by line assessment. They regularly involved issues of disclosure but also concerned matters regarding the timing of the exchange of witness statements and requests from journalists for disclosure of documents to members of the media who were following the phone hacking story.

28. In Ms Mansoori's submissions regarding the nature of these proceedings, she highlighted one of the disclosure issues which came to a head at the November 2020 CMC. This issue concerned documents held at the defendant's "Enfield Archive." It transpired that 28 lever arch files of documents, which had been given to the Metropolitan Police for their investigations into individuals at the News of the World, had not formed part of any disclosure exercise thereafter.

29. Ms Mansoori referred to the defendant's skeleton argument for the CMC which complained of the endless disclosure being sought and an argument which she paraphrased as "enough is enough." The defendant's submissions regarding the absence of an index to enable a search was essentially a matter of semantics since the subject matter in the boxes containing the files could be narrowed by documentation that was available (but was not described as an index). By the time of the hearing, the principle of disclosure of these documents does not seem to have been in issue. The dispute concerned the defendant's wish to vet the documents for relevance before they were disclosed. Mann J did not think this was necessary, not least because it appeared that the defendant's then solicitors had already been involved in reviewing the documents before they were handed over to the Police. Mann J was obviously puzzled by the defendant's approach and said, at paragraphs 6 and 7 of his ruling:

> "6. Mr Hudson on behalf of the defendant does not oppose the production of those documents as such, and does not oppose that way of dealing with what was originally a much wider application for disclosure but he does, remarkably to my eyes, seek to carry out certain reviews of those documents before they are handed over.
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> 7. I say remarkably, because at least one, if not two of the exercises that Mr Hudson proposes, involve his client in, in my view, completely unnecessary costs against a background in which with some justification the defendant has frequently been complaining about the large costs of this action and in particular the disclosure aspects of this action, and in a further narrow particular disclosure going to the generic case. It is to the generic case that these documents are said to go."

30. The judge ordered the disclosure to be provided without any vetting by the defendant and Ms Mansoori prayed in aid this hard-line opposition by the defendant to the disclosure of documentation that should have been provided previously in support of the claimants' view of the litigation being hard fought and full of complexity. Ms Reffin highlighted on more than one occasion the managing judge's disquiet at the large costs of the action particularly in relation to disclosure which the claimant seemed endlessly to be seeking in the defendant's view.

31. Ms Mansoori described how the analysis of that disclosure, once obtained, led to substantial requests for further information and documentation which, in turn, led to further applications during the period of this common costs bill. Applications were also made by the claimants in respect of claimant-specific disclosure in respect of which "custodians" should be searched for the purposes of the defendant's standard disclosure in the individual cases.

32. There were sufficient other matters being raised by the parties that Fancourt J, having recently taken over as managing judge, held a directions hearing to decide what matters would be dealt with at the next CMC. One application made at this time was an application to strike out the claim of Sir Simon Hughes and/or for summary judgment in the defendant's favour on that claim.

33. The basis of the defendant's application had been set out in the defence to the claimant-specific particulars of claim. Paragraph 1 of the defence contended that the claim was barred by compromise, abuse of process/estoppel in accordance with the Henderson v Henderson (1843) 3 Hare 100 principle and/or limitation grounds. Supporting that argument was the contention that the claim which Sir Simon Hughes had previously brought against the defendant included any claims made against the Sun newspaper in addition to the News of the World. As such, the new claim that he brought based upon articles in the Sun had already been dealt with.

34. Ms Mansoori relied upon a letter written by Sir Simon Hughes' solicitor Mark Thomson of Atkins Thomson dated 30 April 2021. In that letter, Mr Thomson expressed the view that he and counsel considered it to be clear that the defendant's application was "plainly not appropriate" and invited it to be withdrawn. Given the absence of any explanation for that considered view, it did not seem to me to be particularly surprising that Clifford Chance, the defendant's then solicitors, responded on 7 May 2021 indicating that the defendant:

> "…has no intention of withdrawing its application. Our client is confident of its position and will seek full cost recovery if it succeeds in striking out your client's claim or obtains summary judgment. This is a heavy application and, if our client succeeds, will be determinative of the proceedings with substantial costs of the proceedings to date following the event."

35. This application was an example, in Ms Mansoori's submission, of the increasing threat of limitation being brought by the defendant. The claim of Sir Simon Hughes together with those of Sienna Miller and Paul Gascoigne were different from the other cases in that they were second proceedings brought in respect of "Sun Only" articles. There were other claimants whose claims were based solely on articles in the Sun newspaper and, indeed, by the time of T4, roughly two thirds of the articles were from The Sun rather than The News of the World. However, the combination of a second claim being brought as well as it only being in relation to the Sun put the Hughes, Miller and Gascoigne claims in their own category.

36. The application made against Sir Simon Hughes did not reach a hearing because the case settled before the hearing could take place. Ms Reffin relied upon this fact to support her argument that the defendant's intention has been to manage the claims to a conclusion without the need for any trial to take place. Therefore, it did not matter if a robust defence was put forward, including interim applications, since the defendant's ultimate aim was to settle the claims.

37. Ms Mansoori's argument in respect of this application and the defendant's approach generally was that it demonstrated the defendant was not pursuing its stated aim of looking to resolve claims. Whilst claims were only made against the News of the World, then they were resolved relatively easily. However, once allegations were made involving The Sun, the defendant's approach hardened so that virtually no admissions are made any longer and the claimants are put to proof of every aspect of their claim.

38. By the time of the CMC in July 2021, there were 11 claims remaining which were eligible for the trial listed in November 2021. Directions were given including the service of witness statements and the management of documentation required for the

hearing. A pre-trial review was listed for 6 October 2021 and by which time there were only four claims remaining, one of which was agreed by all concerned not to be ready for trial. The three remaining claims all settled prior to commencement of the trial on 1 November 2021.

39. On 26 November 2021 an Order agreed by the parties was approved by the managing judge. Paragraph 4 of that Order concerned an immediate detailed assessment on the standard basis of the T4 common costs of the 82 claims included in Schedule B to the Order incurred between 26 September 2020 and 7 September 2021 inclusive. That is the order in which these proceedings are based in respect of Common Costs Bill 2 ("CCB2").

Preliminary Issues

40. During the period from 2000 to 2013 when success fees and After The Event ("ATE") premiums were recoverable as "additional liabilities" by claimants from defendants in almost all civil litigation, the test for proportionality was based on the approach set out in Lownds v Home Office [2002] EWCA Civ 365. The "Lownds Test" required the court to consider at the outset whether or not the costs claimed appeared to be disproportionate on a global basis. Depending upon that conclusion, the court would allow costs that had been reasonably incurred and were reasonable in amount, or would apply a stricter test of necessity in respect of those costs.

41. As a matter of practice, a paying party who said that the costs were disproportionate, would seek the application of the Lownds test as the first point of dispute. One practical effect of this was that the parties' advocates had the opportunity at the outset of a detailed assessment to explain to the judge the nature and weight of the case from the client's point of view. Inevitably, the paying party would seek to make light of such matters and the receiving party would dwell on the difficulties. Having done so, the judge would give a decision about proportionality and the assessment would move on to matters such as hourly rates and success fees.

42. With the move of the test of proportionality to the end of proceedings as confirmed by the case of West v Stockport NHS Foundation Trust [2019] EWCA Civ 1220, the advocates' opportunity to roam over the terrain of the substantive case has to some extent been stymied. However, the factors in CPR 44.4 which related to the Lownds test, also apply to the question of the appropriate level of hourly rates. Consequently, submissions on hourly rates now tend to take considerably longer than they did in order for each advocate to describe the nature of the case in addition to any specific points regarding the hourly rates claimed.

43. In these proceedings, there was something of a halfway house in that Ms Reffin began squarely with submissions regarding proportionality. I have already set out a quotation from one of the managing judges who referred to the defendant's regular refrain regarding the disproportionate amount of costs being claimed from the defendant's point of view. That quotation described the viewpoint as being "not without some justification" and clearly Ms Reffin wished to lay down a marker early on about the significant sums that have been spent by the defendant in both damages and costs in respect of these cases.

44. Nevertheless, I am not going to deal with proportionality at this point and so have dealt with the submissions made regarding the factors in CPR 44.4 under the heading of hourly rates. As Mr Browne said, there is a good deal of overlap in respect of the various preliminary issues. It is for this reason that I have already set out many of the points raised in my description of the MTVIL before addressing directly the preliminary issues.

Hourly rates of fee earners

45. Ms Reffin for the defendant and both Ms Mansoori and Mr Browne for the claimants addressed me on the various factors to be taken into account in CPR 44.4(3), the so-called seven pillars of Wisdom (and ignoring the relatively recently arrived eighth pillar regarding budgets).

46. In respect of conduct, the claimants' advocates laid great store by the original acts of Dan Evans, Clive Goodman, Ian Edmondson and others in accessing the voicemails of well-known personalities and their associates for the purposes of obtaining news stories. Similarly, the instruction of private investigators to gain information by unlawful means was noteworthy conduct. Ms Mansoori also took the defendant to task in its approach of making non-admissions in its defences and making applications to strike out claims. Similarly, the difficulty experienced by the claimants in extracting relevant disclosure from the defendant was highlighted by Ms Mansoori.

47. Ms Reffin accepted that the defendant had misused information in numerous cases but suggested that this point had been factored into the hourly rates offered by the defendant. In terms of the proceedings themselves, the defendant pleaded defences and made applications where it properly could. There was nothing wrong with making applications such as the one against Sir Simon Hughes. Moreover, there was nothing in the conduct of the defendant in defending the claims in parallel with a general approach of settling the cases as and when they could be settled. The defendant's approach had succeeded in settling every case (save where the claimant had discontinued).

48. In terms of the amount of money involved, Mr Browne referred to the value of the bill which was just over £3 million. Ms Reffin referred to the damages, the costs in CCB1 and the individual costs claims under this heading when making points regarding the proportionality of the costs involved overall. As such, the submissions were not entirely aligned but it is not controversial, in my view, that the sums involved are significant whether they include the damages and individual costs claims or simply the bill that is currently before the court.

49. As far as non-monetary relief is concerned, Ms Reffin acknowledged the importance of the private apologies and statements in open court as well as the damages received by the claimants. However, she submitted that those matters had become routine along with the giving of undertakings not to repeat the misuse of information.

50. Mr Browne described the importance of the proceedings to the claimants in terms of its effect upon others as well as the claimants themselves. Personal assistants had been dismissed and family members had been distrusted as a result of seemingly private information having become public. Mr Browne also relied upon the findings of the Senior Costs Judge and Arden LJ in the MGN litigation.

51. Both claimants' advocates referred to the disputes regarding the wording of the statements in open court of Sienna Miller and Paul Gascoigne. The suggestion was that the defendant ought not to have been battling against the wording that the claimants wished to use. Ms Reffin pointed to the fact that until those statements in December 2021, there had been no issue with the wording of such statements and as such it was a case specific matter involving the particular claimants rather than any approach of the defendant to belittle the importance of such statements.

52. The parties' submissions on the particular complexity of the matter and the difficulty or novelty of the questions raised reflected the fundamental differences in viewpoint which they hold. Ms Reffin summarised the nature of this litigation after 10 years as being "mature" and which by T4 was now industrialised but without any apparent economy of scale in the repetitive processes involved. The generic points of dispute had been paid for by previous tranches and considerable amounts of disclosure had been obtained and paid for in the same way. Nevertheless, the costs of the claimants pursuing claims in T4 was no less and, probably, rather more than in previous tranches. The costs of the T4 claimants including their individual costs were roughly the same as their damages.

53. The claimants' advocates describe the litigation as being extremely complex and bespoke. Applications continued to have to be made in respect of an evolving picture of the defendant's culpability. By way of example, the involvement of the private investigators continued to be unearthed and the involvement of claims against The Sun were a significant part of T4 in a way that had not occurred in the early tranches. The destruction and concealment of evidence as set out in the generic particulars of claim was a significant factor in T4. The law on the misuse of information as a tort was also evolving and had to be applied to this complicated, factual situation. The work carried out benefited not only the existing claimants but also future claimants.

54. The parties' advocates were agreed that the group of solicitors bringing these cases on behalf of the claimants were specialists and used that knowledge and skill on behalf of their clients. There was also agreement that the position of lead solicitor attracted greater responsibility. Ms Reffin noted that Vos J also took this view when setting hourly rates in 2012.

55. As is usually the case, neither side had much to say in respect of the "time spent on the case" in the context of hourly rates. Ms Reffin did point to the fact that, although the parties were not far apart on what were reasonable hourly rates, the number of hours involved still made the difference of view material. That was not a view shared by Mr Browne in his submissions.

56. The work was done in Central London by West End and Fleet Street firms which Mr Browne described as being small to medium in size. He sought to make something of a David and Goliath comparison with the defendant's choice of Clifford Chance as solicitor. But in the absence of any indication of the rates paid by the defendant to their solicitor in this case, it was rather a speculative submission, and it is not one that in my view assists. I am well aware that even "Magic Circle" firms vary their hourly rates considerably depending upon their interest in acting for particular clients in particular matters.

Fee earners

57. According to Appendix 4 to the amended points of dispute, there are 39 different fee earners from the various law firms whose time is claimed in this bill. Additionally, there are two fee earners from the Legal Research Team whose time is claimed as agents of Hamlins and a further five fee earners from the costs lawyers, Masters. Of those 46 people, four claim two different statuses during the currency of this bill, albeit that only two of them claim different rates as a result of that change in status.

Law firm fee earners

58. I have set out below the summary table in the Defendant's skeleton argument and to it I have added a number in parentheses in the Grade column to indicate the number of fee earners claimed at each grade based on the Guideline Hourly Rate ("GHR") criteria. The table also sets out the rates allowed by Vos J as the managing judge in Tranche 2 and the current GHR for London 2 work which applies to work by firms based in Central London which is not "very heavy commercial" work.

Grade	**Tranche 2 (Vos J)**	**2021 GHR (London 2)**	**Offered**	**Claimed**
A (10)	400	373	450	460-490
B (4)	280	289	315	375
C (6)	230	244	260	275
D (24)	140	139	160	160

59. It can be seen from the table that the Grade D rate is agreed. The number of middle grade (B and C) fee earners is limited and the time claimed for them is approximately 11% of the overall time claimed. By comparison the ten Grade A fee earners have recorded at least 30% of the time claimed. As such, as is often the case, the submissions centred on the Grade A fee earners.

60. Ms Reffin characterised the defendant's offers as giving ample recognition of the CPR 44.4 factors. She said that they also reflected the views of Vos J in the figures he set in 2012. She pointed out that all of the offers exceeded the 2021 GHR figures with the Grade A offer described as being especially generous. If the Claimants were to recover any rates above the defendant's offer, they would have to justify those rates and, in Ms Reffin's submission, they could not do so.

61. In terms of the need for that justification, Ms Reffin relied upon the words of Males LJ in the case of Samsung Electronics Co Ltd & Ors v LG Display Co Ltd & Anor [2022] EWCA Civ 466 and again (together with Birss LJ) in Athena Capital Fund SICAV-FIS SCA & Ors v Secretariat of State for the Holy See [2022] EWCA Civ 1061. In the latter case Males LJ said the following at paragraph 6:

> "This court has recently held that, in the case of solicitors' fees, if a rate in excess of the guideline rate is to be charged to the paying party, a clear and compelling justification must be provided: *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466. No such justification has been advanced in this case."

62. The larger difference between the rates offered and claimed in respect of the Grade B fee earners was explained by Ms Reffin on the basis that the rate claimed exceeded the

Grade A rate for the GHR (let alone the Grade B rate) and that could not be justified either.

63. In response, Mr Browne relied on his and Ms Mansoori's submissions regarding the CPR 44.4 factors. He suggested that the defendant had not considered those factors in either the points of dispute or the skeleton argument for the hearing. It was only in Ms Reffin's oral submissions that the defendant's position was set out.

64. Mr Browne also relied upon the figures allowed by Vos J in 2012. He told me that the £400 allowed in 2012 would now be £599 based on RPI increases. In this context the dispute between £450 and £460 (for most of the partners) was not a point that ought to have been taken.

65. Mr Browne's submissions in support of the Grade A fee earners claiming £490 concentrated on Christopher Hutchings, Mark Thomson and James Heath. Mr Hutchings was the senior partner at Hamlins and who oversaw Callum Galbraith, the partner with the greatest level of conduct of the case in Hamlins' role as Lead Solicitor. Mark Thomson was probably the first person to have a phone hacking client and had been involved in this litigation from the beginning. James Heath was the Lead Solicitor in the MGN litigation. The three solicitors formed the core expertise and leadership of this litigation.

66. The other Grade A fee earner claiming £490 was Edward Canty of Centrefield LLP. On the understandable ground that Mr Canty had only recorded two hours of time out of the 7,686 hours recorded overall, Mr Browne did not spend time seeking to distinguish Mr Canty from others, such as Mr Galbraith, who had charged £460 per hour.

67. Mr Browne referred to the London 1 GHR in passing. Ms Reffin responded on the basis that this was clearly a London 2 case and as such the London 1 submissions were inappropriate. My understanding of Mr Browne's submissions in this respect is that they were no more than a positioning of the various rates claimed in the bill were between the London 1 and 2 rates for each Grade which suggested consistency in them and, to some extent, the unusual nature of this litigation.

68. In fact, as can be seen from the following table, the Grades A and D figures fit that pattern, but the Grades B and C are in fact higher than the London 1 figures as well as the London 2 figures. The change from a purely geographic banding in London to one which is based on whether the work is very heavy corporate or commercial work does not assist the Claimants' argument. The firms instructed by the Claimants are in the old London 2 locations in any event and as such cannot take the benefit of the £409 etc figures from the 2010 London 1 GHR which were referable to any work done by firms described as being in the City of London.

Grade	**London 1**	**Claimed**	**London 2**
A	512	460-490	373
B	348	375	289
C 1	270	275	244
D (24)	186	160	139

Decision on Law firm hourly rates

69. I accept Ms Reffin's point that the challenges to the rates are potentially worthwhile, even if there is only a modest amount between the parties in terms of pounds per hour. Not only is this a significant bill but there will be other bills to come. The fact that rates allowed in 2012 are still being referred to suggests that it is time for the parties to be clear on an updated allowance.

70. I also accept the argument that the GHR may be a useful starting point in a detailed assessment as well as in a summary assessment. I do not, however, consider that the guidance given by Males LJ regarding the need for a "clear and compelling justification" for exceeding the GHR extends with any great force to this particular situation.

71. The GHR are provided predominantly to assist judges who do not specialise in costs cases to deal with a summary assessment of costs when faced with the successful party's summary assessment schedule and competing arguments from the advocates.

72. The relevance to the GHR being a starting point in detailed assessments is no more than a reflection of the scarcity of any other starting point. Expense of time calculations or other potential starting points, as is demonstrated here, are invariably absent. But a starting point by its very name does not suggest it is the finishing point and that is particularly so where the court has the opportunity for the parties to address it in detail in respect of the CPR 44.4 factors.

73. In this judgment I have set out the submissions on those specific factors. I have also set out the nature of the proceedings as seen from both sides in terms of applications, disclosure etc. They all blend together when considering the weight of the case and the specialism of the lawyers whose hourly rates are in dispute.

74. This litigation has been run by the same participants for the last decade. Vos J expressed a wish for the cases to be run by a small cohort of experts in the area and on the claimants' side this has led to specified firms, counsel and costs lawyers being utilised. The defendant has not had its representation mandated in the same way but has followed suit in terms of keeping continuity of representation. Consequently, any previous decision I was taken to involved the same dramatis personae as is present here.

75. This familiarity may not breed contempt but it does lead to entrenched positions and, having previously used the phrase "trench warfare", I was reminded of it on several occasions during the submissions. Relatively small amounts of ground may be gained from skirmishes in one part of the case, but which can then be used to advantage elsewhere or at a later date. From the claimants' perspective this led to disclosure applications benefitting not just those claimants whose cases fall into this tranche but also future claimants whose claims are yet to be brought. Conversely, from the defendant's perspective, the extensive disclosure already provided ought to be sufficient to bring the same sort of claims against the same defendant. The extra disclosure sought is a disproportionately expensive method of making marginal gains to the claims being brought.

76. The defendant's approach to the litigation was similarly seen from widely different viewpoints. The claimants' advocates portrayed it as being unnecessarily dogmatic in refusing to admit matters on which it advanced no positive case and thereby put the

claimants to prove each and every element. Contrasts were drawn with the MGN litigation where substantial admissions had been made.

77. The defendant's approach, as Ms Reffin began and ended her submissions, is to settle these cases and the absence of any trials in the first four tranches demonstrates that approach being followed through. She said that these cases were being managed to settlement rather than managed to trial which is an echo of comments made by Mann J in 2020 in the following terms:

> "It would be naïve to suppose that I am propelling cases to trial with a very good chance that at least one of them will try. I do not believe that to be the case. I believe it is more likely that I am propelling cases towards trial so they are propelled ultimately to settlement before a trial."

78. Ms Reffin relied on a number of historical admissions to suggest that the defendant was doing its best to streamline this litigation. There have in fact been three different sets of generic pleadings and the admissions related to the first of those. All of the proceedings have been amended and re-amended. The latest amendments (according to the defendant's primer) in the first ("Weeting") pleadings occurred in 2012 and in the second ("Pinetree") pleadings in 2018. Judging by the lack of any further amendment, proving the matters set out in those pleadings are not central to the parties' activities. The third ("Concealment and Destruction") pleadings were last amended in June 2020.

79. The defendant's primer straightforwardly points out that limitation is taken as a defence in each individual case where the cause of action appears to be more than six years ago and that would appear to apply, subject to any issue as to knowledge, in every case. Limitation was said to be a significant issue by the claimants' advocates and placed that alongside the allegations that phone hacking and other unlawful information gathering occurred at The Sun and not just at the News of the World.

80. The hardening and softening of the defendant's position over time was common ground. It appeared that the hardening of the position occurred when The Sun started to be used as the foundation for claims which did not involve the News of the World at all and so some claimants found themselves apparently able to make a second claim. In the absence of any trials, the strength of the defendant's arguments regarding limitation, Henderson v Henderson estoppel and ultimately any culpability of The Sun cannot be stated with any certainty.

81. The strength of the defences has not prevented the defendant seeking to settle the claims made. I am told that there has never been any issue regarding the provision of private apologies and the entitlement to a statement being given in open court if the claimant wished to have one. Consequently, the dispute very largely boils down to a question of money. Just as insurance companies have routinely settled personal injury cases without medical evidence if they wished to do so by offering sufficient money, there is no bar to the defendant here being able to settle all of the claims if it wishes to do so. There is more than sufficient expertise on both sides for offers to be made which put a claimant at risk if not accepted, and to be advised of that risk. The CFA and ATE insurance funding arrangement does not generally provide a robust model for opposing a well-placed offer. The unusual feature of the claimants' without prejudice valuation being required after disclosure must add to the prospects of offers being well judged.

82. As such, it is in the gift of the defendant to resolve claims if it wishes to do so. I have referred to Mr Sherborne's criticism to the managing judge of the defendant settling cases late in the day by significantly increasing the offers made. Given the number of claims that have been brought, I have little doubt that there will also be examples of claimants reducing their expectations significantly to settle and all of the possibilities between the two. But what is certain, is that if the defendant decided that it wished to test, for example, the limitation point, it could certainly take a case to trial simply by making no offer or only a parsimonious one which was unlikely to be accepted.

83. This would fit in with the press release I was taken to from 8 April 2011 regarding the phone hacking story. The release indicated that a compensation scheme was being set up to deal with "justifiable claims" fairly and efficiently. That would bring a "fair resolution with damages appropriate to the extent of the intrusion." However, claims would be contested where they were believed to be "without merit or where we are not responsible." That approach appears to be being followed through and it is a tried and tested method used by those facing multiple claims. The erecting of barricades of potential defences to make the prospect of litigation less appetising at the same time as making an offer to conclude is as old as the hills. It seemed to me that the claimants' advocates sought to make rather too much of the overly adversarial approach as they viewed it.

84. Similarly, the comparison with the MGN litigation does not take matters very far in my view. Whatever admissions were made there, the claimants still had to prove some matters and did not always succeed in doing so as was made clear in the Gulati decision. It is a matter of fact and degree. No defendant is going to make blanket admissions to deal with any claim made regardless of its apparent merit. The defendant here has made it clear, it seems to me, what needs to be proved and those are the hurdles through which the claimants have to jump. The costs of doing so may well be higher than if further admissions were made, but that is the defendant's choice.

85. I have dwelt at some length on this point for two reasons. It is, as I have described below, relevant to the question of the level of success fees. But it is also relevant to the question of hourly rates. Whilst the claimants' advisors can no doubt say that a claim with some merit is likely to succeed based on the track record, those advisors need to have the skill and expertise to pursue the case to a hearing in case it is the one where the defendant wishes to put the claimant's case fully to the test.

86. The solicitors involved are clearly experts in their field. Added to that is the inherent complexity that comes from running individual claims in very long running litigation. The fact that some claimants have come round for a second claim plainly demonstrates that this litigation is not mature or senile with little remaining to be proved. It is in the nature of such litigation that the seam of claims to be mined will be widened over time with new potential claims and further potential heads of claim over different periods. As such, I consider that the claimants' characterisation of this litigation is the more appropriate.

87. There is very little between the parties in terms of the hourly rates. Given the expertise of the solicitors and the weight of the case in terms of its value, complexity and importance, I take the view that the claimants have justified the hourly rates that have been claimed. They do not seem to me at first blush to be surprising rates and, given the amounts allowed in 2012, they have increased only modestly over a decade. This

litigation seems clearly to be run by the Grade A fee earners with assistance mostly from very junior colleagues.

88. In respect of the Grade A fee earners, I am persuaded that Messrs Hutchings, Thomson and Heath should be entitled to the rate of £490 per hour. I do not see that a peripheral fee earner as Mr Canty is here can justify more than the general hourly rate of £460 which I allow for him along with the other Grade A fee earners. I record Ms Reffin's reservation of her right to challenge the increased rate in respect of Mr Heath. In any event no rates that I have allowed here will necessarily survive future challenges.

89. In respect of the Grades B and C fee earners, I consider that rates similar to the London 1 GHR are appropriate in providing an increase on the starting point of the London 2 GHR bearing in mind the CPR 44.4 factors that I have described. That means, in my judgment, allowing the Grade C rate of £275 as claimed but reducing the Grade B rate to £350 per hour.

Masters' fee earners

90. The rate for the one Grade C fee earner claimed, Philip Daval-Bowden is agreed and so too are the rates claimed at £160 per hour for Grade D work. The two challenges to the time claimed by Masters concern (i) the rate of £175 claimed for some of James Foster's work and all of Suzanne Holmes' and (ii) some of the work claimed for by Rachel Mole, a partner at Masters, which is said not to justify the otherwise agreed rate for her of £195.

91. In respect of the £175 per hour rate, the reply is laconic in simply asserting that the rates of the Associates are reasonable given their expertise and experience and the size and complexity of the costs involved. None of that explains why the same work appears to have been done both before and after Mr Foster's elevation, nor why it is a higher rate than charged for the costs consultant. Given the short period of this bill, an increase in rates would not be expected and needs some justification which has not been forthcoming. Accordingly, I allow £160 per hour for the Associates' work.

92. The challenge to Ms Mole's work comes from the defendant drawing a distinction between drafting work and other work. Having looked at the bill detail tab, it was not obvious to me that Ms Mole had done any drafting work comparable with the other Masters' fee earners. To the extent this is said to be encompassed by line 6526, I consider that work to be the sort of supervisory or technical work which would justify the rate claimed of £195 as with the other entries. But if there is anything which is purely bill drafting, then that can be picked up on the line by line assessment and I will look at it then.

Legal Research Team

93. The challenge to the work of Dr Harris and Mr Waddell was aired in the context of seeking to put the claimants to their election regarding the agency agreement between Hamlins as the Lead Solicitor and the Legal Research Team. I declined the defendant's application and expressed the view that the defendant's challenges were essentially ones of quantum as to the quality and quantity of the work done. Such challenges were a matter for the line by line assessment. To the extent that the work was reasonably

incurred and reasonable in amount then it would be allowed at the Grade D rate conceded of £150 per hour.

A brief comment on terminology

94. Before moving on to the challenges to counsels' success fees, I think it would be helpful to head off any contemplation by the parties of a potential distinction drawn by me in respect of the terminology of the agreements beginning with various numbers of the letter "C". The fee arrangements in this judgment concern both individual CFAs and collective CFAs, usually described as CCFAs. The collective agreements between counsel and the Lead Solicitor have been described as "Common Costs Conditional Fee Agreements" which acronymically is CCCFA(s). These CCCFAs can also be described as CCFAs and, in terms of the legislation, simply CFAs. In this judgment I have used the number of the letter C which seemed to me best reflects the context when describing or discussing counsels' agreements. There is no intention otherwise to distinguish between, for example a CCFA generally and the CCCFAs here.

Recoverability of counsel's success fees

95. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") brought into play the recommendations of Sir Rupert Jackson in terms of ending the recoverability of success fees and ATE premiums as part of his interlocking reforms in respect of the costs of litigation.

96. Section 44(4) of LASPO amended the provisions of section 58A of the Courts and Legal Services Act 1990 so that Section 58A(6) would read from 1 April 2013 as follows:

> "A costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement."

97. Section 44(6) of LASPO dealt with transitional arrangements so that subsequent costs orders which concerned a CFA taken out before 1 April 2013 would continue to enable the recoverability of the success fee but CFAs entered into on or after 1 April 2013 would not. This provision was the subject of many submissions before me and I set it out as follows:

> "(6) The amendment made by subsection (4) does not prevent a costs order including provision in relation to a success fee payable by a person ("P") under a conditional fee agreement entered into before the day on which that subsection comes into force "(the commencement date") if –
>
> (a) the agreement was entered into specifically for the purposes of the provision to P of advocacy or litigation services in connection with the matter that is the subject of the proceedings in which the costs order is made, or
>
> (b) advocacy or litigation services were provided to P under the agreement in connection with that matter before the commencement day."

98. Limited exceptions to that general provision included publication and privacy proceedings of the sort involved in these proceedings. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 13) Order 2018 removed this exception as from 6 April 2019 which is the "commencement date" for the purposes of Section 44(6) above.

99. In the run up to 1 April 2013, a considerable number of CFAs were signed by putative claimants and their solicitors in order to receive the benefit of recoverable success fees. There were challenges to the dating of some of the CFAs which had been taken out much more rapidly than had previously been the case, but the transition into a non-recoverable CFA world, at least from the court's perspective, was reasonably smooth.

100. The wording of Section 44(6)(b) was seen as being an attempt to deal with Collective CFAs ("CCFA"s) which dealt with claims in bulk. Such agreements were signed by solicitors with either clients who had numerous, similar cases or with those who stood behind the parties to proceedings such as trades unions and insurance companies.

101. Such agreements, having been signed before the commencement date, were capable of continuing far into the future. In order to create a "cliff edge" between recoverable and non-recoverable success fees comparable with individual CFAs, Section 44(6)(b) ensured that some work had been done under the terms of the CCFA before the commencement date in respect of a particular case. If it had, then the success fee would be recoverable, even if the pre-commencement work was very modest.

102. The same cliff edge occurred in publication and privacy proceedings in April 2019. In the MTVIL, the use of CCFAs by the regularly instructed counsel from 2018 (2016 in Mr Browne's case) must inevitably have caused conversations as to how to deal with cases post April 2019.

103. On the face of it, success fees would be irrecoverable. In respect of the individual CFAs signed by the various claimants with their solicitors, there is a clear dividing line between the 25 claimants who signed up before 6 April 2019 and the 57 who signed up afterwards. The solicitors claim success fees on the 25 cases and I have dealt with the challenge to the sums claimed below. There is no dispute in principle that they are recoverable and equally there is no suggestion that any success fees in the CFAs of the other 57 are only payable by the claimants themselves.

104. Submissions were made by both counsel for the defendant about the concern of the defendant to be clear about which cases claimed recoverable success fees and which did not. I was taken to a number of letters seemingly reminding the claimants of the approaching commencement date and asking for clarification of the cases which would be affected.

105. I am sure that the defendant was keen to know this information, but I was far from convinced that it made any difference to the behaviour of the defendant. There was, it appeared to me, more than a hint in the correspondence of, if not triumphalism exactly, a rather unsavoury wish to press on the bruises already sustained by the claimants' side regarding the change in the legislation and therefore the ending of the recoverability of success fees.

106. Whether that correspondence encouraged the claimants to pursue success fees for their counsel via the CCCFAs is purely a matter of speculation and I am not going to indulge in it. I have mentioned it simply because the defendant's characterisation of the claimants concealing their claim for success fees by, for example, not raising it in correspondence, nor before the managing judge when the general effect of the 2018 Commencement Order was being discussed, was entirely infused with speculation about the motives behind the non-disclosure. This reached its nadir, in my view, when I was taken to a Notice of Funding which set out all the information required regarding the date of the CFA and that a success fee was sought. Nevertheless, it was said that the absence of a covering letter to say that a success fee was indeed being claimed under counsel's CCCFA, amounted to a lack of notice.

107. What effect would the alleged lack of notification have? A non-notified opponent merely has to show that it was prevented from considering alternative options, not that it would definitely have taken some other course of action. That is a relatively low bar but it does suggest that some potential alternatives need to be in play, otherwise there would always be a prejudice to the non-notified party. In this case, there was nothing suggested by the defendant that it might have done differently if it had known that the success fees were going to be claimed when it had taken the view that such fees could no longer be recovered. The parties' approach to this litigation is set out at some length at the beginning of this judgment and has been cast in that manner for some time. The suggestion that, if the defendant had known about some additional success fees, it might have considered a different approach is difficult to accept. Some success fees were always going to be recoverable and I was told on numerous occasions that the defendant's approach is to settle these cases promptly when it is in a position to do so anyway.

108. If the matter had been raised in correspondence during the proceedings, I have little doubt that it would have generated considerable time, effort and further correspondence on both sides before concluding that it was a matter for a judge if the other side did not ultimately concede the argument. Consequently, I am not going to consider any of the submissions made as to why the defendant says it was "kept in the dark". There is no "penumbral spirit" in the legislation as Lord Hoffman memorably described it in Norglen Ltd (in liq.) v Reeds Rains Prudential Limited & Ors ([1999] 2 A.C. 1) in the context of tax avoidance schemes:

> "They either work… or they do not… If they do not work, the reason, as Lord Steyn pointed out… is simply that upon the true construction of the statute, the transaction which was designed to avoid the charge to tax actually comes within it. It is not that the statute has a penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes. There is no need for such spooky jurisprudence."

Or, as Mr Browne put it in this case, the question is simply, do the arrangements dovetail together to comply with the legislation so as to enable the success fees in the CCCFAs to be claimed for all of the claimants?

109. On a number of occasions counsel for the claimants both referred to the unique nature of this litigation. In this context, it is the Costs Arrangements Order ("CAO") which is

the unique element. The use of individual and collective CFAs and costs sharing agreements are not in my view unusual in multi-party litigation.

110. The CAO was made by Mann J on 3 April 2019. It provides for claimants with existing cases, and who were already listed on the schedule to the order, to be described as "Eligible" claimants. They would be joined by any other claimants who commenced proceedings before the cut off date for bringing claims in T4.

111. The Eligible claimants needed to provide information to the Lead Solicitor so that it could maintain the T4 Group Register. This information was to be provided as soon as practicable. The public section of the register contained information concerning the parties and the information on the claim form. The private section contained information regarding funding and settlement.

112. Although it would be possible for claims to be brought outside the group arrangements, the CAO obviously envisages that claimants will wish to take advantage of the group structure. In order to do so, in addition to providing information for the Register, the claimant also needed to enter into the CSA i.e. the Costs Sharing Agreement. Having completed the requirements of the CAO, an Eligible claimant became a fully-fledged T4 Claimant.

113. The costs of claimants incurred in respect of their individual cases would be recovered, if successful, via the individual CFA signed with the claimant's solicitor. Similarly, where a claimant instructed a barrister in relation to their specific case, such fees would be charged under an individual CFA entered into by counsel and the instructing solicitor.

114. The common costs of the litigation were to be covered by a combination of the CAO and the CSA. The CAO deals with the between the parties' aspects of the structure and the CSA deals with the claimants' rights and responsibilities between themselves.

115. The CAO states that the liability and entitlement of each claimant is several rather than joint. It then records how the common costs arrangements would work, unless the court ordered otherwise, at paragraph 16 as follows:

> "a. For the purpose of the recovery of any T4 Common Costs between the T4 Claimants and the Defendant:
>
> i. By a Claimant, the recoverable costs of the Claimant shall be such share of the T4 Common Costs of the T4 Claimants together as determined below;
>
> ii. By the Defendant, the recoverable costs of the Defendant against a Claimant shall be such share of the T4 Common Costs of the Defendant as determined below; and
>
> iii. No assessment of any T4 Common Costs or of any share of such T4 Common Costs shall take place until after the T4 Trial, with permission to apply if such a trial does not take place. The provisions of CPR

> 44.2(8) shall apply to enable appropriate payments on account of T4 Common Costs to be made from time to time as the Court shall direct.

b. The share of T4 Common Costs referred to above will be calculated (whether for a Claimant or the Defendant) on the basis of the aggregate across all Periods for which the relevant Claimant is deemed to have been on the T4 Group Register for each Period divided by the total number of Claimants deemed to have been on the T4 Group Register for that Period.

c. For the purpose of the share of T4 Common Costs:

   i. Any T4 Claimant on the T4 Group Register shall be deemed to have been on the said Group Register from the beginning of the First Period; save that any Claimant who by the T4 Cut-Off Date has not entered into a CSA as required by this Order shall be deemed never to have been on the T4 Group Register;

   ii. Any T4 Claimant who is removed from the T4 Group Register by the Lead Solicitor or by order of the Court shall be deemed to have been removed from it on the end-date of the Period which included the date of removal."

116. Subsection (b) above deals with the time during which each individual claim is to be counted as being on the Group Register. This is always important in multi-party litigation so that a reasonable share of the common costs can be established between claimants whose cases inevitably take different amounts of time. The concept of being liable for an opponent's costs either before entering the group arrangements or after leaving them is always difficult. As appears to be the common approach in such cases, the duration of the claim is split into periods of time – here generally two months – during which any claimant whose case was running at the time would be potentially liable for a several share of the costs incurred by either side during that period.

117. The word Period is capitalised because it is a defined term in the CAO. The definition generally used is the two month period I have just described. There are two further periods which are defined at the beginning and end of the proceedings. The definition of the "First Period" is important to the Claimants' argument and is as follows:

> "(a) the First Period shall be from 26 March 2019, namely the date of the Tranche 3 Consequentials Order…"

118. The importance of the definition is that it pre-dates the commencement date of 6 April 2019. Paragraph 16(c)(i) set out above refers to the T4 Claimants being deemed to have been on the Group Register from the beginning of the First Period, (save for those who were to be treated as never having been on it at all – which does not apply here).

119. The essence of the Claimants' argument is that whenever each claimant signed up to an individual CFA with their solicitor, they then had to sign up to the CSA in order to deal

with the common costs of the MTVIL. By signing the CSA, these Eligible claimants became T4 Claimants who were bound by an agreement executed on 3 April 2019 and by a court order which deemed them to have been on the Group Register from 26 March 2019.

120. Clause 3 of the CSA expected the claimants to use the counsel nominated in the agreement. Those counsel had all decided to use CCCFAs with the Lead Solicitor in respect of the common costs work. The CCCFAs of Simon Browne KC, Sara Mansoori KC, David Sherborne and Julian Santos were signed well before the T4 Claims even began and so were pre-commencement CFAs. They concerned work done on behalf of claimants who were deemed to be liable for common costs from 26 March 2019. Accordingly, that liability for costs under the pre-commencement CFA enables all of the claimants to claim recoverable success fees for the common costs.

121. Mr Browne pointed to the preamble paragraphs of the CSA to show how it tied in with the CAO. Paragraphs 7 to 9 record the conclusion of the T3 Claims in January 2019; the wish for consequential orders; and the effects of the previous CAO in 2016 continuing save for any variations set out in the CAO with which we are concerned in April 2019.

122. Paragraph 10 of the preamble records the existence of claims since March 2017 having been identified as potential claims for T4 and "numerous further claims being intimated as being about to be issued" which together would make up the T4 Claimants. Paragraph 11 confirms that the existing legal team of Hamlins, Masters and counsel were all willing and able to continue working on T4.

123. Paragraphs 16 and 17 describe the intention of the parties to the CSA in the following terms:

> "(16) This agreement deals with the New Cost Sharing Claimants' liability for their own Individual Costs and the New Cost Sharing Claimants' Common Costs of MTVIL and binds all of the New Costs Sharing Claimants and their Solicitors and each of them with each other;
>
> (17) The intention of the parties to this New Costs Sharing Agreement is to share the liabilities for costs equitably in that each New Costs Sharing Claimant will bear his/her own costs of pursuing his/her own claim and an equal share of the New Costs Sharing Claims Common Costs of pursuing MTVIL on behalf of and for the benefit of all New Costs Sharing Claimants;"

124. Counsel are defined as David Sherborne, Julian Santos and William Bennett of 5RB, together with Sara Mansoori KC and Simon Browne KC. In fact, Mr Bennett appears to have played no part in these proceedings and instead subsequent arrangements were made with Ben Hamer and Kate Wilson who signed CCCFAs after 6 April 2019 date and for whom no success fees are claimed.

125. Clause 3 of the CSA deals with the appointment of counsel. The parties to the agreement were jointly to instruct counsel to advise and represent the claimant group as required

with joint instructions on behalf of the group being given to counsel by the Lead Solicitor and the fees of counsel for such work being common costs incurred by the Lead Solicitor as agent for all of the solicitors representing the claimants. The central clause for the purposes of this dispute is 3.2 which says:

> "Counsel will each enter into Conditional Fee Agreements (which will provide for a success fee) with Hamlins for all work carried out by Counsel pursuant to this Agreement. The Parties give the Lead Solicitor and Hamlins authority to enter those Conditional Fee Agreements on their behalf."

126. The CCCFA of Mr Browne is dated 4 January 2016 and the CCCFAs of Ms Mansoori, Mr Sherborne and Mr Santos are all dated 16 October 2018. Mr McDonald suggested that the agreement envisaged new CFAs being entered into by the word "will" but it does not seem to me that that takes the Defendant very far. Any new agreement would simply replicate the wording of the existing CCCFAs and they were clearly drafted with future claimants in mind. The 2018 agreements contain the wording:

> ""the client" means each and every Claimant who is, has been, or is to be, listed from time to time on the register of Claimants held by the Lead Solicitor in the MTVIL from 16 October 2018"

Similarly, Mr Browne's agreement refers to work being undertaken on behalf of:

> "…each and every client…who is, or is to be, listed on the said Register…"

127. Given these wordings, the obligation on counsel to enter into an agreement with the Lead Solicitor to carry out work for T4 Claimants had plainly already been satisfied.

128. Do these provisions dovetail so as to enable the success fees claimed in the CCCFAs to be recovered from the Defendant? Mr McDonald disputed that the provision in the CAO was sufficient to bring this about. The order itself was simply a continuation of previous arrangements and was agreed by the parties as a consent order. The court's approval of the order should be seen in that light rather than that it had sanctioned the arrangements now contended for by the Claimants. Mr McDonald said the interpretation now placed on the wording in the order by the Claimants had not been aired before the court at the time.

129. In Mr McDonald's submission, each claimant only became a party to the CSA on the date that they subscribed to it. This was in accordance with the definition of an "Intended Claimant" and reflected their status as an Eligible claimant before they appeared on the Group Register and became bound by the terms of the CSA.

130. Mr McDonald also pointed to the absence of any reference cited in the individual CFAs or the CSA itself to any liability being accepted for any retrospective liability via extant CCCFAs. There was, he said, a gap between the arrangements for the signing up of the CSA and the liability for counsels' fees insofar as it related to the claim for a success fee on counsel's base fees.

<u>Decision on the recoverability of Counsel's success fees</u>

131. I have incorporated the essence of Mr Browne's submissions on this subject in setting out the wording of the various documents said to dovetail together. It was noticeable that these arrangements were not described to any great extent in the replies to the points of dispute and almost entirely ignored in the Claimants' skeleton argument for this hearing. Indeed, rather more time seemed to be taken up with the application for relief from sanction regarding non-notification of the CFA arrangements than demonstrating that the success fees could be claimed at all.

132. The claimants' argument is a relatively simple one which does not take very long to set out. Nevertheless, the limitation on the submissions in support of the arrangement is, I think, almost a tacit acceptance that it does not stand much scrutiny. I have described at the outset of this section how the cliff edge established for individual CFAs was brought about for collective CFAs as well. The two prongs of Section 44(6) capture agreements specifically dealing with the claimant (s44(6)(a)) and collective agreements (s44(6)(b)). The individual agreements here are divided 25/57 as to the recoverability of success fees for both solicitors and counsel. The change in the recoverability expected by s44(6)(a) has occurred as it was intended in respect of those agreements.

133. S44(6) as a whole refers to "P" who is "a person" liable to pay the success fee. In my view that person is plainly the individual claimant, not potential future claimants or any other existing claimants in the managed litigation.

134. The CCCFAs were all made between counsel and the Lead Solicitor before the commencement day as s44(6) requires but the need for there to be a specific agreement for the purposes of providing P with services in s44(6)(a) is an impossibility for a collective agreement unless all of the relevant Ps could be named at the time of creating the agreement.

135. The work done in these proceedings is either generic or "Claimant-specific" and it is that latter work which is covered by an agreement specifically entered into for the individual proceedings. The fact that those proceedings would then be tied together with other individual proceedings for the purposes of managed litigation does not make the collective agreements relevant to that managed litigation into Claimant-specific agreements so that they provide services specifically for P within the terms of s44(6)(a).

136. In respect of collective agreements, s44(6)(b) requires some services to have been provided to P prior to the commencement day. Any work done between 26 March 2019 and 5 April 2019 would, at the commencement date, have been shared between those T4 Claimants who had already subscribed to the CSA since they would satisfy the definition in s44(6)(b). But, for claimants who began the process by entering into an individual CFA after 6 April 2019, they could only become liable for any share of those common costs retrospectively via the later subscription to the CSA.

137. It does not seem to me that such a description brings those 57 claimants within s44(6)(b) in services being provided to P before the commencement day. If any individual P had decided not to become a T4 Claimant, but instead had pursued their own claim, they could never have been invoiced for such work, as would be expected if it had actually been done for them (and the case had been successful).

138. At most, the 57 claimants have voluntarily and retrospectively accepted a liability for those costs as part of the arrangement to come within the managed litigation. It is trite

to say that not every cost for which a party is liable to their lawyers is automatically recoverable from their opponent. In my judgment that retrospective acceptance of a liability for costs already incurred cannot amount to services being provided to P before the commencement day. As such, I do not consider that the arrangements put forward by the claimants bring their success fees within s44(6)(b).

139. I have described the CAO as being the unique feature in these proceedings. Absent its terms, there is nothing on which the claimants can hang their argument. It is notable therefore that the only reference to success fees in the CAO is in paragraph 6 relating to the information to be kept on the Group Register. Similarly, although the CSA is fundamental to the argument that the claimants have a recoverable success fee having subscribed to it, the only reference to success fees are (i) in clause 3.2 referring in parentheses to counsel's CFAs having success fees and (ii) some later provisions regarding Masters' quantification of any success fees and how to deal with disputes between claimants.

140. The thrust of both the CAO and the CSA is the recoverability of "costs" in general with a recognition that this might include some success fees. They are clearly not intended to be an explicit vehicle to enable success fees to be claimed after 6 April 2019 notwithstanding that date was within a few days of these two agreements being created. It might have been surprising for the CAO to have any overtly helpful provision given it would need to be agreed by the defendant, but that did not apply to the CSA. In that document there are no fewer than 20 recitals setting out the parties' understanding of the circumstances in which the agreement came about. Yet there is no mention of any attempt to continue to seek success fees from the defendant or that in some way the CSA would facilitate that situation occurring. Since it is an agreement specifically about costs, that absence is striking.

141. As described later, Mr Browne's description of storm clouds gathering at the start of T4 related to the risks to the claimants of limitation arguments and other potential barriers to successful claims. But it might equally have referred to the funding landscape with the ending of recoverable success fees in this type of litigation. If the claimants had wished to pursue success fees in the manner contended for here, then some express wording in the contractual documentation would have assisted their cause. In its absence, the claimants are left with no more than, it seems to me, the happenstance of the CAO and CSA pre-dating the commencement day, and a court confirmed liability for common costs which enables their recovery. That is still some way short in my judgment of compliance with the legislative requirements of the Courts and Legal Services Act, as amended, to enable success fees to be claimed for the 57 claimants who entered into CFAs and subscribed to the CSA after 6 April 2019.

Application for relief from sanction

142. Shortly prior to the preliminary issues hearing, the claimants made a precautionary application for relief from sanctions. The sanction was said to be the non-recoverability of the success fees of counsel for a failure to give notice of the existence of a CFA with a success fee which was to be claimed from the opponent (contrary to Section 44.3B of the old Costs Practice Direction).

143. The claimants' primary position was that there had been no such failure to notify the defendant. But if there was such a requirement, then they applied for relief from the sanction based on the matters set out in the application notice.

144. Since I have already determined that the success fees are irrecoverable for the later 57 claimants having failed to come within the terms of the legislation, this application has been rendered nugatory in respect of them. Whether notification was required, or relief should be granted, neither will save the recoverability of the success fee in my judgment.

145. The 25 claimants who had entered into their CFAs prior to 6 April 2019 had, as I understand it, given the requisite notice when entering into the CFA with their solicitors. I note at paragraph 78 of the defendant's skeleton that it expected those claimants to claim success fees. If there had been an argument that those claimants were unable to do so for lack of notification, then that comment would not have been made. The defendant's challenge is simply that part of the expected success fees are claimed via counsels' CCCFAs of which the defendant had no notice. This is described as the claimants having seemingly "taken care to conceal" this fact. I have already expressed my view about the desirability of ascribing such motivations to the claimants' funding arrangements.

146. The claimants' application is precautionary. It depends upon there being any need for notification of a CFA with counsel in the first place. If there is no such need, there is obviously no breach of the CPR requiring relief from the sanction of such breach.

The need for notification

147. The CPR in force prior to its recasting on 1 April 2013 required by CPR 44.15(1) that:

> "A party who seeks to recover an additional liability must provide information about the funding arrangement to the court and to other parties as required by a rule, practice direction or court order."

148. The Costs Practice Direction covered Parts 43 to 48 of the CPR. Section 19 dealt with providing information about funding arrangements. It specified the form to be used (N251), the time period in which notification needed to be given and the need to update information where it had changed, amongst other things. However, at paragraph 19.3(2) it was said that "further notification" was not required where a party had already given notice:

> "(a) that he has entered into a conditional fee agreement with a legal representative and during the currency of that agreement either of them enters into another such agreement with an additional legal representative:"

149. The phrase "additional legal representative" was not defined but could obviously include counsel, a solicitor agent or costs lawyer. Why there was no need for notification in such circumstances was not spelled out in the regulations or elsewhere. The need to use such additional legal representatives might have occurred rapidly and the prospect of subsequent challenges for lack of notification when things were done in

a rush might have provided an explanation. The fact that, as here, the opponent was already aware it was facing a potential additional liability and so there was no real benefit to require further notification is another possibility. Whatever is the case, the requirement, or rather non-requirement, is entirely plain on the face of the practice direction. There was no need to inform the opponent of the instruction of an additional legal representative where notification of the (main) legal representative's use of a CFA had already been notified.

150. Mr McDonald essayed the argument that the wording of the practice direction envisages the CFA with counsel postdating the CFA with the instructing solicitor. In this litigation the CCCFAs relied upon by counsel were all executed long before the individual CFAs with the solicitor. I did not find that to be an attractive argument. The instruction of counsel only occurs at the point that the claimant subscribes to the CSA. That date is inevitably after the individual CFA with the solicitor has been made. As such, in my view, the claimant "enters into another such agreement" in the order expected by the practice direction.

151. Accordingly, I do not consider that any application for relief was required on the basis that all of the 25 claimants had given notice of their CFAs with their solicitors.

152. If I had been required to deal with the application, I found the arguments on both sides to have some force at the third stage of the Denton test. The first two stages were uncontroversial. In the factual circumstance that notification needed to be given and it had not, the failure to do so was significant. There was no good reason for that failure and so the question of relief came down to a consideration of all the circumstances.

153. For the claimants, Mr Browne was able to point to the longevity of the litigation; the narrative in previous common costs bills and the defendant's primer to demonstrate the knowledge of the defendant that the claimants invariably used CFAs to pursue their cases. The extent of any delay in notification was brought to an end by the service of CCB1 in July 2021 which explicitly claimed a success fee for counsels' fees for all of the T4 Claimants. At most therefore, the relief was for a period rather than a complete non-notification.

154. Mr McDonald relied upon the dicta of cases such as Springer v University Hospitals of Leicester NHS Trust [2018] EWCA Civ 436 which hold a high line in the requirement of notification to be given. Absent any good reason for the non-notification, a claimant who failed to provide notice faced a steep hill in persuading a court that non-notification should be absolved. The prejudice to the opponent was in the prevention of the opponent considering its options to take a different course. There was no need for the opponent to produce evidence that it actually would have taken any different option.

155. Ultimately, I have to say that I preferred the claimants' argument on this point. The extent of knowledge of each side's situation by the opponent is significant and the defendant knew of the general approach of the claimants to funding their cases. I have said earlier that there was correspondence between the parties around the commencement day regarding confirmation of which cases had CFAs already set up. I have also commented upon the extent and nature of the correspondence that would have occurred if the claimants had served notices claiming a success fee and confirming that this included the 57 later claimants. I do not accept that the defendant's approach would have altered as a result of notification of sums which, significant in themselves, are not

significant in the overall scheme of this litigation. As such, to the extent that the application for relief from sanctions was required, I would have granted it.

Quantum of success fees

156. Both sides addressed me in a broad fashion as to the method by which the success fees should be calculated, by which I mean that the recoverable success fees would broadly compare between the claimants subject to any specific adjustments. Neither side contended for the sort of individual assessment of each claimant's claim as might have occurred in relation to the individual CFAs with the solicitors.

157. Nevertheless, there was a vast difference between the approaches of the parties, even allowing for the generally and significantly different views of this litigation which the parties put forward.

158. The themes which I have already set out in this judgment regarding the litigation either being fast-moving, complex and continually evolving or repetitive, industrialised and essentially the management of cases to settlement is relevant to all of the success fees claimed.

159. As is set out in the Costs Practice Direction and the relevant case law, my task is to put myself in the shoes of the legal representative entering into the CFA at the time the CFA was made in order to consider the risks involved. Hindsight is to be avoided in seeing how matters did in fact turn out.

160. The need to assess success fees has waned considerably in the last few years. Ms Reffin's helpful submissions on the law relating to success fees provide a starting point for assessing the quantum of both the solicitors and counsels' success fees.

161. Ms Reffin's submissions began with the reiteration of the point that, as the phrase usually has it, the purpose of success fees is for "winners to pay for losers" so that over a basket of cases, the additional fees paid in respect of successful cases pays for the fees lost in those cases which have been unsuccessful.

162. Regard must be had to the definition of a win in the CFA in order to establish what risks are involved. Since the definition of a win invariably includes any amount of damages, as a general principle the value of the claim does not in itself increase the risk, even though it might increase the amount of work required to achieve a win. This is not to overlook the small number of cases here in which a minimum damages clause meant that to achieve a win was, at least in theory, more challenging.

163. I have not cited the cases relied upon by Ms Reffin for the propositions set out above since in my view they are not controversial. Nor is the guidance that courts need to be aware of the temptation for a legal representative to put in all the risks that could be foreseen such that a rather pessimistic view of the prospects occurred overall. The more pessimistic the prospects, the greater the chance of justifying the level of success fee. For example, in the context of group litigation the Court of Appeal, in Motto v Trafigura Ltd [2011] EWCA Civ 1150 said, at paragraph 122:

> "This contemporaneous and detailed assessment is obviously an important piece of evidence when considering the prospects of a

> successful outcome of these proceedings. However, while I am not suggesting that this assessment of the risks was not honest, it does seem to me that it is at least potentially self-serving, prepared as it was by a person employed by the claimants' solicitors, who obviously have an interest that the success fee is as high as possible, while their clients, the claimants, have no interest in keeping the success fee low, as they will never have to pay it. Indeed, given the financial interest in winning the case which the success fee gives to the claimant's lawyers, the claimant, if anything has an interest in his solicitors charging a high success fee. My concern about the reliability of the 50% overall assessment is reinforced by the somewhat dubious precision of the figures, especially the 82.5% attributed to "forum"."

164. Ms Reffin relied upon the judgments of both the then Senior Costs Judge and the Court of Appeal in Motto, in support of the proposition that in group litigation, or managed litigation, the prospects of success are likely to change over time as circumstances develop. Furthermore, on this point, Ms Reffin took me to the current Senior Costs Judge's pronouncements in the MGN litigation where he gave judgments in November 2016 and December 2017.

165. In those judgments, the Senior Costs Judge traced the developments in the litigation. He considered the risks to have reduced over time and therefore the prospects of success to have increased. As that progression occurred, the reasonable success fee to be allowed reduced to reflect the reduction in risk. By the end of his second judgment, the Senior Costs Judge considered a reasonable success fee to be 25% as a starting point.

166. The defendant's position is that, at approximately the same time as the second MGN judgment, the defendant here demonstrated that cases were all being managed to a settlement. Offers were made on virtually all of the outstanding T3 Claims in the second half of 2017 when those claimants were all required to get their cases ready for the trial set in 2018. None of those cases reached trial and it was Ms Reffin's submission that the prospects of success in this litigation were even better than the ones in the MGN litigation. Consequently, the starting point for considering the relevant success fees should be based on a 90% prospect of success which, using the ready reckoner, would mean an 11% success fee.

167. The stark result of this submission was the modest amount of room for manoeuvre left to the defendant in making any adjustments either up or down from that starting figure to reflect matters such as Part 36 risk or a claim that only involved The Sun and not the News of the World. Deductions of 3%, for example, in my experience would have been a rather larger figure in submissions in the past if the starting point had allowed such leeway. I appreciate that 3% is a figure allowed in the MGN judgments, but. in my view, percentages as small as this risk being a manifestation of the "somewhat dubious precision" referred to by the Court of Appeal in Motto.

168. Ms Reffin also relied upon the decision of Mackay J in McCarthy v Essex Rivers Healthcare NHS Trust [2010] 1 Costs LR 59. In that case, the costs judge had reduced the level of the success fee, which had been claimed at 100%, to 80%, notwithstanding that he accepted that it was a 50-50 case. The reasoning of the costs judge was that a

clause in the CFA entitled the solicitors to end the agreement if they thought the client was unlikely to win. Based upon that clause, the costs judge considered the solicitors had the opportunity to reduce their risk by exiting agreements where the prospects looked poor.

169. Mackay J considered that clause to be a factor of high relevance. He described it as being "a sensible indeed essential provision" given the nature of CFA's which enabled the solicitors to discard claims from the overall basket where, as time went by, the prospects appeared to be less than 50-50. At paragraph 14 he said:

> "They will obviously want to do this as at early a stage in the proceedings as possible, since they recover no profit costs if they exercise this right. That will leave them with an enriched, or improved, basket which will again, as a matter of high probability in my judgment, include claims which will fall into a range of something like 50 to 80%, all of which will still have the 100% uplift."

170. Ultimately, Mackay J upheld the costs judge because he considered that the reasoning was entirely justifiable and so was entitled to reach that decision allowing the margin of respect due to a specialist decision-maker in his field.

171. I have set this out in more detail than some of the other propositions because, as I indicated to counsel in argument, it is not one which I consider to be uncontroversial. It makes the assumption that all losing cases can be established at an early point so that the lost costs are limited and are more than made up for by the increased costs of the longer running winners. That is not something which, as far as I am aware was ever established to be the case. I certainly heard submissions in various fora from those representing claimants that losers were often those taken most if not all the way to trial. I accept entirely that in cases such as clinical negligence actions, many cases taken on initially would be jettisoned in the absence of supportive evidence. But that was in the nature of an acquisition cost in my view as much as enriching the basket of cases to the point where 50-50 cases were reduced.

172. More fundamentally, as Mackay J's judgment makes clear, the clause enabling the solicitors to discontinue in the absence of reasonable prospects, has been present since CFA's were first used. Accordingly, the same terms applied in all of the cases before the Court of Appeal and the Supreme Court from Callery v Gray onwards. There is not, to my knowledge, any suggestion in any other case that this clause distorts the prospects of success in the solicitors favour to the extent allowed by the costs judge in McCarthy. In my view, the idiosyncratic method of risk assessment by the solicitors concerned in McCarthy (where success fees of 100% in clinical negligence cases were agreed before there was any evidence other than the claimant's history) is such an outlier, that it is not one on which any great foundation can be built in terms of risk assessment and therefore success fee calculation.

173. The only relevance related to Ms Reffin's submission that the common costs incurred by Hamlins as the Lead Solicitor required, as a prerequisite, for the Eligible claimant to provide information on their case. Consequently, Hamlins were able to carry out something of a second vetting of the prospects before entering the case on the register.

Whilst I considered this to be superficially attractive, there is in fact nothing as far as I can see which suggested that any such second vetting took place.

174. The addition of a further claimant would add to the resources of the claimants if an adverse costs order was made. If the particular claimant's case was successful, then the common costs to be claimed would be divided between more people. Either circumstance would benefit the other claimants and so would militate against any attraction in carrying out further vetting. As such, I am not convinced that there is in fact any weight to this particular argument.

175. The final proposition put forward by Ms Reffin concerned the staging of success fees. In the case of Bright v The Motor Insurers Bureau [2014] EWHC 1557 (QB), Slade J said this at paragraph 50:

> "The trigger point of the second stage of a success fee is not the principal basis for determining its reasonableness. What is material is whether the success fee is set at such a level which is reasonable in light of the risk of non-recovery of costs anticipated at the date of entry into the CFA."

176. Ms Reffin referred in particular to the final words of that paragraph to emphasise the need for even a staged success fee to be at a level which is reasonable in light of the risk of non-recovery of costs. It was Ms Reffin's position that no staging was appropriate in this case and that a single stage success fee should be allowed as occurred in both Motto and MGN. But if a staged arrangement was to be contemplated, the seemingly inevitable prospect of settlement without a trial needed to be borne firmly in mind when contemplating the risk of non-recovery of costs. In the defendant's skeleton argument, it is said that all of the staged CFAs started at too high a level with the range being between 25% and 67% and all culminating in a 100% success fee.

177. In respect of the defendant's submissions on the level of the recoverable success fees, Ms Reffin began by taking issue with the claimants' analysis of the risks involved. She suggested that the claimants were using a considerable amount of hindsight in relying on applications made after the CFAs were made in order to justify the risks that were said to exist. At the same time, the claimants had not taken any account of the invariable settlement of the claimants' cases, thereby ending in a successful result.

178. Ms Reffin then took me through her detailed chronology of events in support of her client's position that I should build on the approach taken in the MGN cases. She also raised the apparent contradiction between the risks set out in the CFAs and the risks (or at least the prospects of success) warranted to the ATE insurer when taking out a policy for each claimant. By the time these claimants became involved in the litigation, there were three bands of premium depending upon the prospects of success, namely 50 to 60%; 60 to 80%; and over 80%. These prospects suggested the claimants' cases were much more likely to succeed than the success fees claimed of 100% if the case reached trial which could only be based on a 50-50 prospect of success.

179. I have recorded earlier in this decision many of the points that Ms Reffin reiterated in respect of this element of the preliminary issues. In particular, the existence of challenges in the defence to the strength of some of the claimants' cases; the potential existence of Limitation Act defences; and the dispute about any involvement of The

Sun newspaper had not prevented all of the cases being resolved. Ms Reffin pointed to the existence of a concession regarding limitation for a period which did not seem to galvanise certain claimants to issue during that concessionary window so as to avoid any issue regarding limitation. I was told of several claims which were in existence before that concession was made but whose cases were not commenced until after the concession had ended. This strongly suggested that there was a lack of concern regarding limitation on the claimants' part.

180. When referring to the second MGN decision of the Senior Costs Judge, Ms Reffin accepted that the defendant's expressed intention to settle had not been a factor which the judge was prepared to take into account at that time. However, she submitted that there had been a further three years since that decision which demonstrated the settlement approach of the defendant for fully eight years of litigation. This approach had resulted in the settling of hundreds of cases with all the trials being vacated.

181. These submissions led to the conclusion that there was generally a 90% prospect of success from the end of T3. Indeed, although the defendant did not go further than the 90% prospect of success, Ms Reffin trailed the possibility that the court might be tempted to do so given that further settlements had occurred thereafter in T4. Conversely, for the limited number of claimants who had already signed up to CFAs prior to the defendant's settlement approach, the defendant was prepared to offer 18% as being an appropriate starting success fee (based on an 85% prospect of success).

182. Ms Reffin then went through the adjustments suggested in the points of dispute and the defendant's skeleton argument to that starting point of 11% (or 18%) success fee. Most of these adjustments related to an improved prospect of success. The existence of associates at the other end of phone calls which had been intercepted increased the prospect of a successful claim being made. So too did any claim which did not only involve The Sun and therefore had the benefit of admissions made in respect of the News of the World. Claimants who had received the Metropolitan Police Service disclosure prior to entering into the CFA also reduced their risk and so improved their prospects of success.

183. The only adjustment to reflect an increased risk that the defendant offered was the taking of a risk in relation to advising the rejection of Part 36 offers and for which a standard 2% was offered. Even this concession was watered down to some extent by the statement in the defendant's skeleton argument that this might be "too generous as 2% is high in relation to overall risk, and in view of the pattern of settlements including close to trial."

184. The minimum damages clauses in the CFAs of the Taylor Hampton claimants was not an additional risk in the defendant's view. The hurdle that needed to be cleared in that clause was irrelevant in cases where the damages were all bound to be considerably higher if the claimant was successful at all.

185. The claimants' response to Ms Reffin's submissions were split between Ms Mansoori and Mr Browne. The submissions of Ms Mansoori concentrated on the risks in the litigation and, as with the defendant's submissions on this issue, I have already set out some of the claimants' arguments, such as the increasing risk of limitation and the application to strike out some of the claimants' claims.

186. Ms Mansoori pointed to the several liability of the claimants to highlight the additional risk that if some claimants did not succeed, the shortfall would not be picked up by the others. Furthermore, other than David Sherborne, the counsel dealing with work under the common costs arrangements were at one stage removed from the individual claimants and so had less insight into their cases than would usually be the case.

187. Mr Browne poetically described storm clouds gathering in front of the claimants when entering into their CFAs as T4 claimants. The largest clouds were represented by arguments on limitation, disclosure and Part 36 offers. The question, as posed by Mr Browne, was whether that risk assessment was correct?

188. I certainly heard a good deal from both counsel for the claimants in respect of the limitation challenges brought by the defendant and the hard fought applications for disclosure. The unusual direction for the claimant to set out a without prejudice valuation of the claim once disclosure has been provided must, it seems to me, have heightened the prospect of a well judged Part 36 offer being made.

189. It is true to say that the issue of Part 36 offers can be seen in the risk assessments supporting the CFAs but it is much more difficult, in my view, to see similar risks described in relation to disclosure and limitation. The tenor of the risks associated with disclosure relate to the apparent gaps in the documents previously provided and related to matters such as those gaps either preventing corroborative evidence to be available or that potentially unhelpful documentation was still to be produced. None of this is set out in any explicit way. Mr Browne's reference to disclosure being "sporadic" and subject to further applications is the only real mention and that is in very generalised terms.

190. The only CFAs where limitation is expressly described are the individual CFAs involving claimants who had previously brought a claim or who had intimated a claim but then had not pursued it for more than six years. It is the case say that the CCCFA risk assessments seek to bring in risks identified in the risk assessments of the individual claims. But that is no more than a make weight when such assessments were almost entirely made months if not years after the CCCFAs themselves were made.

191. The following eight factors are set out in the risk assessments of the CCCFAs dated 16 October 2018 in addition to the basic risks of counsel not receiving anything if the client lost their claim and that the client would not pay counsel until the end of the case if successful:

> "a. The generic case carries great risks, particularly in the hotly disputed areas such as illegal information-gathering activities in the Sun and in the News of the World outside the activities of Dan Evans and the date range of January 2005 to August 2006. The Defendant has made clear on several occasions its intention to contest these areas of the generic case vigorously.
>
> b. The nature of the Defendant's pleaded case on the disputed issues and the minimal information given makes it very difficult to assess the strength of the Defendant's case.

c. The passage of time since the events which are the subject of the pleadings means that it is difficult to adduce evidence proving the allegations being made by the Claimants against the Defendant.

d. The generic case gives rise to a very wide range of issues, all of which are the subject of either non-admissions or denials by the Defendant, each giving rise to a risk of an adverse finding and costs consequences.

e. The Defendant's concealment of its wrongdoing and destruction of potentially relevance (sic) has made the task of proving illegal activities considerably more difficult.

f. The Defendant has made Part 36 offers in respect of a large number of the individual claims, which has raised the risk involved in proceeding to a later stage.

g. This Common Costs CFA covers a large number of cases, many of which are at a very early stage, each with its own unique combination of factors and issues, and with its own risks. This risk assessment encompasses the factors that are identified as applying in the risk assessments of each individual claim.

h. The factors that apply in the risk assessments of each individual claim."

192. To emphasise factor h (which in itself is a repetition of the last phrase in factor g), the paragraph in the CCCFA following those risks factors seeks to include the factors set out by the solicitors in their risk assessments attached to the individual CFAs between the claimant and their solicitor.

193. I have already provided my view about the weight of such a provision. But in any event, save for those CFAs where limitation has been explicitly raised as an issue, it does not seem to me that the factors raised in the individual CFAs adds anything to the factors identified by counsel. There are references to the fact that the claims are brought on inferences from various factors and that given the age of the incidents involved, there may be little contemporaneous evidence to hand, not least because of the alleged destruction of material. As can be seen in the factors set out in most Counsels' CCCFAs above, these are the same matters as raised by counsel. Mr Browne's risk assessment is also similar and does reference to this being "an inferential case."

194. In contrast to the defendant's approach, Mr Browne endorsed a broad approach in the manner adopted by the Senior Costs Judge in the MGN decisions. Mr Brown divided the 25 cases in relation to the solicitors' success fees into three categories. Given my decision regarding the recoverability of counsel's success fees, those 25 claimants are the same in respect of both solicitors' and counsels' success fees.

195. In the first category, Mr Browne placed the cases of Sienna Miller, Paul Gascoigne and Sir Simon Hughes, which all involved claims made only in respect of articles in The

Sun and represented second claims against the defendant. Mr Browne placed these at the top of the first category in terms of their difficulty and risk. The Miller and Gascoigne cases had only settled near to the trial dates. The Hughes case had faced a formal application to strike it out. In relation to Miller and Gascoigne, Mr Browne referred to the case of U v Liverpool [2005] EWCA Civ 475 as support for the proposition that success fees at 100% can be justified more easily where they are settled at or near trial.

196. Added to those 3 claims in category 1 were the claims of Gregory Harkin, Peter Keeley and the three Andersons. In those cases the claim had been intimated more than six years before proceedings were actually brought and there was an obvious risk of a successful limitation defence being brought. Unlike the other cases which had settled early, the claims of Harkin, Keeley and the Andersons used CFAs with a single stage 100% success fee.

197. The second category consisted of 8 claimants whose cases share the same feature in that they were settled after disclosure had been provided. As such, a defence had been filed and, in each case, it had raised the question of limitation which had required a Reply to be filed.

198. The remaining 11 claimants comprised the third category and involved cases which had settled prior to a defence being filed. Only some of those 11 claimants had been notified by the Metropolitan Police that they were a victim of phone hacking. Mr Browne submitted that simply because someone's name came up on a Palm Pilot, it did not necessarily mean that the named person was a victim of phone hacking. It might be suspicious, but it was not evidence as the Senior Costs Judge found in the MGN litigation.

199. Mr Browne specifically challenged the defendant's approach to the risk encapsulated in Part 36 offers. The 2% offered by the defendant bore no relationship to the Court of Appeal decision in C v W [2008] EWCA Civ 1459. There, Moore-Bick LJ took the view that the 20% success fee allowed for by the first instance judge represented a 17% risk of losing altogether and was a reasonable assessment, having taken all factors into account. In quantum only cases this decision has been taken as authority for allowing 20% in respect of a Part 36 risk for many years, according to Mr Browne.

200. In these cases there were clearly other matters in play in addition. Mr Browne reiterated the earlier submissions regarding the issue of several rather than joint liability, the potential for any claimants to drop out and that the common costs counsel were at one stage removed from the claimants themselves. He submitted that the staging approach adopted by the claimants' solicitors, and indeed counsel, was a more appropriate method than the 5% increases in prospects allowed for in the MGN cases.

201. Finally, Mr Browne disputed the relevance of the proposal forms for ATE insurance. He said that it could be years between the signing up of the CFA and the taking out of the ATE insurance. The former had to be done when solicitors were first instructed. The latter only when on the cusp of litigation. As such, any risk assessment in relation to ATE insurance was no guide to the factors which the solicitors had to consider when entering into their CFAs. The delay in taking out ATE insurance was something that the managing judge encouraged, even though the ATE underwriter who gave evidence in the MGN litigation was not so keen on it.

Decision re success fees - staging

202. There are 25 claimants who are entitled in my judgment to claim success fees on the base costs of their solicitors and counsel in this bill. Those claimants instructed seven different firms and each firm had its own CFA with the risks assessed at percentages and stages chosen by that firm. The claimants instructed the team of counsel in respect of the generic matters and they used two different CCCFAs which again had different wording and staging. As a result, there are a considerable number of different success fees claimed. Helpfully, the parties provided me with a spreadsheet showing the various sums claimed and offered.

203. During the course of submissions, it became clear to me that I did not consider the approach of the Defendant in building upon the approach taken by the Senior Costs Judge's decisions in the MGN litigation to be the right way to proceed in this litigation, at least for the period covered by the CCB2 bill. I preferred the submission of Mr Browne that a staged approach was appropriate.

204. The idea of a staged approach was originally canvassed as long ago as the first Callery v Gray ([2001] EWCA Civ 1117) hearing before the Court of Appeal. Although the Court dealt with a single stage success fee in that case, the Court expressed the following preliminary view at an early stage in the recoverability of success fees:

> "[106] In concluding this portion of our judgment, we wish to draw attention to an alternative type of success fee, which we consider that it is open to the solicitor and the client to agree at the outset of proceedings. We can describe this as a 'two-stage' success fee.
>
> [107] A success fee can be agreed which assumes the case will not settle, at least until after the end of the protocol period, if at all, but which is subject to a rebate if it does in fact settle before the end of that period. Thus, by way of example, the uplift might be agreed at 100%, subject to a reduction to 5% should the claim settle before the end of the protocol period.
>
> [108] The logic behind a two-stage success fee is that, in calculating the success fee, it can properly be assumed that if, notwithstanding the compliance with the protocol, the other party is not prepared to settle, or not prepared to settle upon reasonable terms, there is a serious defence. By the end of the protocol period, both parties should have decided upon their positions. If they are prepared to settle, they should make an offer setting out their position clearly and providing the level of costs protection which they determine is appropriate.
>
> [109] A further advantage of a two-stage success fee would be the knowledge that if a claim was not settled, the full success fee would be payable. This knowledge would encourage rigorous consideration of the merits of the claim during the protocol period and therefore accord with the intent of the CPR."

205. Whilst the Court of Appeal left the definition of "the end of the protocol period" open, the idea of settling at an early stage at a discounted figure from the otherwise agreed percentage was clear. In simple personal injury cases at least, the assumption was that the discounted period equated, more or less, to settlement pre-proceedings. Once the defendant had set out its defence, the claimant was entitled to assume that it was a defence to be reckoned with.

206. The idea of a staged success fee was reiterated by Brooke LJ in the Claims Direct Test Cases ([2003] EWCA Civ 136) at the very end of the judgment. At paragraph 101 he said:

> "The two-step fee advocated by the court in *Callery v Gray (No 1)* is apt to allow a solicitor in such a case to cater for the wholly unexpected risk lurking below the limpid waters of the simplest of claims."

207. As Mr Browne alluded to, the Court of Appeal in U v Liverpool City Council made further reference to the guidance in Callery v Gray at paragraph 50 in the following terms:

> "We must add that the district judge fell into error not only because he believed that the claimant's solicitor had the power and the duty to renegotiate the level of the success fee once the risks inherent in the proceedings had diminished, but also because he misunderstood what this court said about a two-stage success fee in Callery v Gray. In that case Lord Woolf CJ encouraged lawyers to take seriously the possibility of agreeing an initial success fee of, say 100%, on the basis that if the claim settled within the protocol period (or some other period identified by the parties to the CFA) a lower success fee would be recoverable under the CFA. At the assessment of costs attention would then be paid to the reasonableness of the success fee which was recoverable as things turned out, and as we have observed (see para 21 above), this type of arrangement would lead to a greater chance of establishing the reasonableness of a higher success fee given that the claim did not settle within the agreed period."

208. The cases referred to all relate to personal injury. The only well known case in this area in respect of defamation and similar claims is the decision of the very experienced costs judge, Master Campbell in Peacock v MGN Limited [2010] EWHC 90174 (Costs). In that case the success was set at 100% but was discounted to 50% if the case settled within 28 days of service of the defence (and 25% if it had settled pre-proceedings).

209. The case did not settle until it had entered the 100% success fee period and Master Campbell concluded that the staging arrangements were reasonable. In particular, in his conclusions at paragraph 25 he said the following:

> "ii) It is open to the Claimant to choose the date of staging. Since in [U] the Court of Appeal contemplated a low success fee, "perhaps until the service of the defence" and to have the benefit

> of a high success fee in the cases that did not settle early, I consider there was nothing unreasonable in the Claimant choosing 28 days following service of the Defence as the date on which the 100% success fee would come into effect; a fortiori where, as here, this gave MGN an extra four weeks above and beyond the period mentioned by Brooke LJ in [U] before it would assume any potential liability for a 100% success fee.
>
> …
>
> iv) [Claimant's counsel] is right in my view to invite the Court to draw the inference that a Defendant who denies liability and serves a defence containing multiple paragraphs justifying the offending words, must believe that it has a realistic chance of the defence succeeding at trial, as happened here. In my judgment, having not settled the matter in the protocol period and having thereafter served a Defence giving the particulars of justification in the manner that it did (see paragraph 12 ante), it is reasonable to suppose that MGN believed it had a "serious defence" in the nature contemplated by Lord Woolf in *Callery v Gray*."

210. It was this passage that Slade J had in mind when considering the suitability of the staged success fee arrangement in Bright to which Ms Reffin referred. At paragraph 49, Slade J said:

> "A two-stage success fee may be used by a solicitor "to protect himself against the risk that the claim might go the full distance" (U v Liverpool para 21). As Master Campbell held in *Matthew Peacock v MGN Ltd* [2010] EWHC 90174 para 25(ii), it is open to the claimant to choose the date of staging. The claimant must be in a position to justify the percentage uplift for success fees. If, therefore, he elects an early trigger for a higher second stage success fee, he must be in a position to justify the higher risk of non-recovery of his fees at an earlier stage than if the second stage were only reached at or shortly before trial."

211. By the time the claimants' solicitors in these proceedings had entered into their CFAs, the fixed recoverable success fee matrix had been part of the CPR for some time. Consequently, the idea of three or four levels of success fees increasing to 100% if the case got to trial was commonplace. The fixed figures for personal injury claims had come about as a result of negotiations between industry stakeholders and they were likely to reflect the views of many of those using or opposing CFAs to conduct litigation.

212. Given this context, and the fact that Callery itself referred to a 100% success fee reducing to a much lower figure if the case settled early, I do not accept that staged arrangements whose end stage is 100% can properly be interpreted as the solicitor considering the case to have no better prospects than 50:50. In fact the use of a staged arrangement, in my view, simply guarded against unexpected danger.

213. Turning to this litigation, there is something to be said for both sides' views of the risks. The claimant is put through hoops to prove the claim put forward, but then it settles. It must be overblown to describe this litigation as being fraught with difficulty where, despite only inferential evidence available (apparently), any solicitor advising a new client on their potential claim would have to be aware that almost every single case has succeeded and not a single one has been to a trial. Explaining to such a client that the case has no more than a 50:50 chance in order to justify a single 100% success fee would require the most persuasive of advocates.

214. On the other hand, the claimants' representatives can point to the fact that none of the evidence has ever been tested. It may be that the disclosure that has occurred is more than sufficient to get the claimants home on the first and second particulars of claim. The disclosure battles appear to relate solely to the scope of further claims and matters of concealment and destruction as pleaded in the third particulars of claim. But the claimants' lawyers cannot be certain this is the case any more than they can be sure that the evidence they have in respect of specific articles will necessarily prove to be sufficient if they have to be proved in court. The decisions of Mann J in Gulati must have proved a salutary warning to the claimants' lawyers as to the potential difficulties. As time moves on, the limitation arguments presumably strengthen even if some of the defendant's historic actions may have provided the claimants with a riposte so far. As such, there is a considerable degree of uncertainty which would indicate that a 100% success would be required should any of these cases reach a trial.

215. I note in passing that in the Atkins Thomson cases of Hughes, Collins and Sawalha (both) and all cases run by Taylor Hampton, Shoosmiths, Russells and Charles Russell Speechlys, a success fee of 100% is also payable where the hearing of an interim application or preliminary issue might have been dispositive. That is an unusual provision in my experience but appears to be a perfectly sensible reaction to the risk that all fees would be lost if the decision went against a particular claimant.

216. In my judgment, the quantum of the claimants' success fees should reflect the fact that these cases were always likely to settle based upon previous tranches but there could be no guarantee that this would continue to be the case. The Callery model of an agreement allowing for a 100% success in case all matters have to be proved but which is discounted to reflect the very real likelihood of settlement occurring plainly fits the circumstances of these cases. To my mind, the question is simply whether there should be more than two stages, and if so, the points at which they apply. The following table attempts to demonstrate the various CFA arrangements.

Law Firm	Pre Proceedings	Close of pleadings	Following disclosure	Following W/S	Last Stage
Hamlins					
Sarah Doukas	25	50	100		
Neil Fewings	25	50	100		
Melinda Messenger	25	50	100		
Jaine Brent	25	50	100		
Danny Murphy	25	50	100		
Clintons					

Lisa Jeynes	25	50	100		
George Sampson	25	50	100		
Steel & Shamash					
Paul Gascoigne	25	50	100		
Russells					
Cheryl Tweedy	25	50	75		100
Charles Russell Speechlys					
Caroline Quentin	25	50	75		100
Shoosmiths					
John Terry	67				100
Struan Marshall	33	50	75		100
Myleene Klass	33	50	75		100
Jermain Defoe	33	50	75		100
Taylor Hampton					
Jake Robinson	25	35	50	75	100
Suzi Aplin	35	45	75	100	100
Elaine Lordan	35	45	75	100	100
Atkins Thomson					
Sienna Miller	30	50	70	80	100
Simon Hughes	30	50	70		100
Michelle Collins	30	50	70	80	100
Julia Sawalha	35	55	70	85	100
Nadia Sawalha	35	55	70	85	100
Kathryn Anderson	100				
Janet Anderson	100				
Christopher Anderson	100				
Gregory Harkin	100				
Peter Keeley	100				

217. The categorisation is a little rough and ready since the definitions are not exactly the same in the different CFAs. But the table does show essentially where the stages are placed. The only CFA where more than one percentage applies in one of the separate boxes is Jake Robinson where the 50% rate begins before the close of pleadings.

218. It is noticeable that in some of the very early CFAs, such as Robinson's, a different approach is taken to those which come later. For example, Taylor Hampton, who are the solicitors for Robinson, altered both the percentages and the stages at which the discounted rate would change. Robinson's CFA is signed roughly 18 months before the Aplin and Lordan CFAs. Something similar applies to the Atkins Thomson CFAs. These CFAs suggest an approach which is more tailored to the individual claimants.

The single stage success fees for those whose claims might be struck out early contrast with the 5 stages generally used.

219. Other firms, such as Hamlins, have taken the approach of seeking the same success fees at the same stages for all their cases. The same 25/50/100 approach has been adopted by some of the other firms. It may of course be that the cases of the relevant claimants had more homogeneity than the clients of the other firms. But it appears to be a broader approach which is similar to that taken by the common costs counsel who by dint of a CCFA without individual risk assessments were more or less obliged to standardise the risk assessment and therefore the level and staging of the success fees.

220. I do not criticise the claimants' solicitors for using a number of stages, particularly given the approach taken by the CPR at the time. But in the circumstances of this litigation, I think it is, to paraphrase Lord Neuberger's description in Motto, an attempt to bring in a doubtful element of precision. Other than a bland statement in a few of the CFAs that the risks increase over time and therefore the success fee should increase, there is no particular justification that I can detect from the claimants as to why three, four or five stages have been chosen. The effect of multiple stages is to increase the percentage towards the stages at which settlement is more likely. Whether that is (a) the intention (b) an attempt to spread out the figures to demonstrate that there is a continuing incentive for the defendant to settle or (c) something else entirely is open to question.

221. All I can conclude is that there is no explicit and cogent justification given by the claimants as to why any particular staging is used and, as can be seen from the table, there are many variations employed by the solicitors involved. Ms Reffin referred me to a holding I made in the case of Bright which was referred to by Slade J in her judgment on appeal regarding the risk said to occur as the case progresses:

> "If the case goes all the way to a hearing there is a prospect of a judge finding against the claimant. On the eve of the hearing, such a risk is present, but in my view it is no more real than it would be when the case was originally being risk assessed. The possibility of a judge being unimpressed with the claimant as a witness, for example, is one about which all litigators are aware and so it can be factored in from the outset. I do not see that the case is in fact any more risky if it only settles a week before trial than if it settled a month or a year earlier. The process of quantification of a personal injury claim takes some time to crystallise and settlements regularly occur close to hearings. If the claimant has prepared for a forthcoming trial and the defendant then settles the case, the defendant will have to pay for those extra costs. It does not mean, in my view, that the case necessarily becomes riskier during that trial preparation period."

222. My decision in Bright comes in for a good deal of criticism from the appellate court and I would not seek to rely on the paragraph I have just set out as if it were approved by Slade J. I have included it, partly because it was specifically referred to by Ms Reffin, and partly because it is an example of the Callery approach which I consider particularly fits these proceedings.

223. The Callery approach was to allow for a high success fee to protect the claimant in case the proceedings fought but with a discount to encourage and reward early settlement. The approach of the defendant here to set up its defence in respect of each case is an entirely reasonable one in itself, but it must come at the cost of accepting that the claimant could lose the case if it were fought to trial. The only reason that prospect has not happened is that the defendant has decided to make offers to settle. But the risks do not evaporate simply because of an approach the defendant has taken to previous claims. The cautionary phrase "past performance does not guarantee future results" applies to the financial investment of the claimants' lawyers in these proceedings just as it does in the financial markets. It is for this reason that I have concluded that a 100% success fee is appropriate as part of a staged arrangement.

224. Equally, the claimants would have to recognise the statistics of this litigation suggest that the case will ultimately be settled. Some of those settlements will be pre-litigation and as such will not involve them in the CSA and common costs at all. Many others will settle during the pleadings phase and the disclosure and without prejudice valuation phases. A modest number have reached the end stages where witness statements are required and in the run up to a hearing. But, as was made clear to me, some of the settlements in those last stages were without formal witness statements being produced.

225. The unusual nature of the disclosure and without prejudice valuation was mentioned on numerous occasions and I have already referred to Ms Reffin's submissions in this respect. In its primer, the Defendant says, at paragraph 25b:

> "Insofar as it is not possible to settle claims before the provision of C-specific disclosure, the subsequent phase in which Cs provide a valuation of their claim is critical in achieving settlement of any outstanding claims. It is therefore important for the procedural timetable to build in a sufficient interval between the provision of valuations and exchange of witness statements to allow enough time for the parties to engage in settlement discussions after valuations are sent and before the highly time-consuming and costly exercise of preparing witness statements has to begin."

226. In this respect, the defendant's concern was as much to the costs of the wide-ranging witness statements it would have to produce as for the costs of the claimants providing their witness evidence.

227. I am sure that the claimants' valuations would assist settlement in demonstrating the claimant's aspirations. It must also expose the claimant to the prospect of a well-judged Part 36 offer by the defendant in a manner which is not the case usually in litigation. The claimant's proposals, I have little doubt, are of more assistance to the defendant when seeking to settle a case than the witness statement that would eventually be produced.

228. In my judgment in Bright, immediately after the quoted paragraph, I drew a distinction between personal injury cases (such as Bright) and defamation cases such as Peacock. In respect of the latter, I suggested that the service of a defence indicating that there was a "serious defence" to the claim might be the end of the discounted period. As I have said previously, the Court of Appeal in Callery suggested that in simple personal

injury cases, the discounted period was the end of the protocol period (however that was defined).

229. Having read a number of decisions of the managing judges in this litigation, they are clear that the proceedings are complex and the management has required innovative solutions. In this context, I consider that the appropriate discounted period in these proceedings is to be measured by reference simply to these proceedings and not to other litigation. I take the view that the two-stage approach as proposed by Callery reflects the circumstances here. The cases are steered through the limpid waters described by Brooke LJ but the claimants are entitled to guard against anything under the surface. This only requires a two stage approach and there is nothing in the replies to the points of dispute, the claimants' skeleton argument or the oral submissions, in my view, to support an approach involving more than two stages.

230. The claimants bring proceedings in a managed fashion which requires them to subscribe to agreements regarding their costs and to proceed at the pace set by the litigants in the particular tranche. The usual procedural hoops have to be stepped through such as the pleading of the case, albeit with the benefit of reference to generic pleadings on some aspects. The defendant will raise arguments which challenge the claims in general e.g. limitation, as well as dispute the detail of, for example, the articles said to have been produced from unlawful information gathering of one sort or another.

231. There may have been disclosure prior to the commencement of proceedings but the defendant, in particular, will produce standard disclosure during the proceedings before the claimant puts forward a without prejudice valuation. In my judgment it is at this point that the parties have reached the end of the discounted period. In most litigation, the pre-action protocols are meant to exchange information so that parties can consider their positions and "stocktake" before commencing proceedings. In this litigation, I take the view that this period extends into the litigation itself. It goes past the ritual dance of the parties setting out the claims and defences that would be put before the court if the case reached a hearing. It also goes past the provision of the disclosure by the defendant – and to some extent the claimant – before the claimant sets out the extent of the claim. From this point the defendant has, in my view a short period in which to settle the claim if that has not already been done.

232. If it does not, the claimant is entitled to consider the defendant is serious about its defence (or at least may be) and can prepare for trial on the basis that the risk of an unsuccessful claim is balanced by the prospect of a 100% success fee if successful. Whilst the Bright line, if it may be described as such, takes the discounted period more or less to the trial before reaching the 100% stage, I do not think that is appropriate here. Given the judicial opprobrium levelled at the parties for judicial and court time taken up with cases which settle at a later stage, there must be a clear encouragement for the parties to have settled reflected in the staging for the subsequent cases. I have taken the view that it is later than in other reported cases, but I do not think it stretches beyond a short period after the without prejudice valuations have been provided. In my view that period should be 4 weeks from the service of the valuation to allow for some time for negotiation.

233. The one circumstance which does not fit within this approach is where, as in the Hughes case, the defendant has chosen to bring an application to strike out the case. Some of the cases (including Hughes) were run on CFAs which contemplated an interim

application and brought the 100% success fee into play if one was made. I think that was a reasonable approach and allow such a fee to be claimed where the application was made, always assuming the relevant individual CFA allows for such a claim to be made.

Decision re success fees - quantum of solicitors' success fees

234. The approach of a 100% success fee discounted where settlement occurs within 4 weeks of the without prejudice valuation applies to all of the cases brought. In my judgment, it was unreasonable for the claimants who entered into single stage 100% success fees with Atkins Thomson to do so. Staged agreements ought to have been used, just as they were by other claimants who instructed the firm. I accept there was a risk that an application would be made straightaway regarding limitation in the circumstances of those cases. But if it had been, the 100% provision for an interim application would have come into play in any event. The only effect of the single stage agreement was to prevent the defendant having any chance to settle the cases at a discounted figure.

235. One of the criticisms of the CFA regime by defendants was that if they had a good, but ultimately unsuccessful defence, they would suffer a large success fee if they took the case to trial. If there was a single stage success fee, then they could never take a commercial decision of settling early to obtain a discount. By comparison a defendant with an unarguable defence, could challenge the level of the claimant's success fee when the defence inevitably failed. The use of a two-stage success fee reduced that problem, just as it would have done in these cases.

236. The remaining question is the appropriate level of success fee where cases settled within the discounted period. The Court of Appeal described the 5% figure it used as an example as being a "rebate" although perhaps that should be the 95% not being claimed rather than the 5% itself. No particular explanation was given as to why 5% rather than any other figure was proposed. The rationale appears to be that the case could not seriously be defended.

237. In the case of Bright, Slade J confirmed that the claimant must be in a position to justify the percentage uplift for success fees. But my reading of paragraphs 49 and 50 of her judgment is that she was concentrating on the second stage fee in terms of whether it could be justified given that it was at that second stage the case had reached.

238. It seems to me that in order to determine the discounted success fee rate, an attempt must be made to look at the sort of case which Brooke LJ was referring to with his description of "the limpid waters of the simplest of claims", rather than the "wholly unexpected risk lurking below". Brooke LJ was discussing simple road traffic accident cases when describing them as the simplest of claims and it could not be said that these cases are of any similar simplicity. Nevertheless, the approach is to assume that the cases are straightforward to bring and settle as would be expected from the settlement statistics.

239. This leads to the description of a rather generalised claim. It seems to me that the absence of any admissions to the contentious parts of the claims means that it has to be assumed that liability is disputed. For the purposes of this discounted claim, the assumption has to be that the dispute could not be pursued in any vigorous fashion which would prevent settlement. At most, the risk would generally be in terms of the

quantum of the claim, for example, a challenge to some of the articles inferred to have been produced as a result of unlawful information gathering rather than from some other source. The risks would therefore be largely in respect of Part 36 offers.

240. Mr Browne described the 20% figure allowed in C v W as having been the accepted figure for the last 15 years or so. That is certainly my experience and was also accepted by both the court (Martin Spencer J) and the advocates in NJL v PTE [2018] EWHC 3570 (QB). Both C v W and NJL were cases where liability was admitted so that the principal risk to the claimant had been removed. The only risk which could prevent a claimant from recovering costs was a Part 36 offer and so the timing of such offers and the likelihood that it would be rejected and not beaten were prime considerations.

241. The circumstances of these authorities are no more than broadly comparable with the circumstances of the cases here. The only real conclusion to draw is that, if liability is taken to be in dispute to some degree, then a figure above 20% should be allowed because that figure only caters for quantum risks (which are essentially Part 36 risks). I should note that, having looked at the description of the minimum damages clause in the 3 Taylor Hampton cases, I accept the defendant's argument that it does not materially affect the risk to the claimant.

242. I have compared the discounted period here with the pre-action or protocol period in other proceedings. Looking at the table of success fees set out above, and discarding the outliers, the range of success fees claimed in the first stage is 25% to 35%. It seems to me that figures in this range both reflect the conclusion in the preceding paragraph of 20%+ being required and are also a significant discount on the 100% success fee that is otherwise recoverable. That discount, according to the decision in U, assists the claim for a 100% success fee for cases which settle later or go to trial. Success fees of 25% and 35% would indicate prospects of success of 74% and 80% (inversely).

243. I consider that such figures are in line with the generalised claim I have outlined. On the one hand, it could be said that the figures are too pessimistic given that the cases all settle but that would be to bring an element of hindsight into this exercise. On the other hand, it might be said that the discounted period is extended to a point which makes the recoverable success fees insufficient to pay for losers should they occur. But such an argument suffers from the fact that, at the time these CFAs were entered into, there were no losers to pay for and the end of the recoverability regime was in sight so the number of future losers would be limited, if they occurred at all.

244. I had thought of imposing a single figure for the discounted period on the basis that none of the pre-proceedings figures, by definition, apply here. But instead, I have decided to allow the pre-proceedings figures as claimed in the CFAs where such figures are between 25% and 35%. To impose a single figure would require a reason to prefer one of the four figures claimed (25 / 30 / 33 / 35) to the others in circumstances where I have taken a broad approach generally. No such reason presents itself and I prefer to allow the sums individually negotiated on the basis they fall within a reasonable range.

245. Where the claimants have a higher pre-proceedings figure I allow the percentage generally claimed by the relevant claimant's solicitors. That will mean 33% for John Terry and 30% for Harkin, Seeley and the Andersons.

Decision re success fees - quantum of counsels' success fees

246. I have treated the factors appropriate to set the structure of the success fees as being the same for counsel as for the solicitors. Consequently, I intend to apply the same two-stage structure to the success fees claimed by counsel with 100% being discounted for earlier settlement. In respect of the discounted rate, I need to look at the staging claimed by counsel as well as the percentages and other factors raised in submissions such as the relevance of being one step removed from the claimants themselves.

247. Both Mr Browne's CCCFA in 2016 and Ms Mansoori, Mr Sherborne and Mr Santos' CCCFAs in 2018 follow similar stages. The first stage in the 2018 agreement drew some criticism from the defendant but since it is 0% for settlement pre-proceedings (and therefore before there could be any liability for common costs) it was not a criticism of any great weight. If anything, it appeared to be the drafter's sense of logical completeness that included that stage. Mr Browne's agreement did not condescend to deal with such settlements.

248. Thereafter the success fees in all of the CCCFAs follow the chronological pattern of 15% / 25% / 50% and 100% albeit that the wording carefully follows the Callery approach of 100% being the success fee which might be discounted for earlier settlement.

249. Both the 2016 and 2018 CCCFAs define the period when 15% would be payable as being *"after proceedings are issued but before service of the Defence."* The 25% period runs from the service of the defence to *"no later than 21 days after standard disclosure"* in the 2016 agreement and is essentially in the same terms in the 2018 agreements.

250. There is some divergence in the 50% period. In the 2018 CCCFAs, counsel have agreed:

> "to 50% if the relevant claim concludes at least 21 days after the date by which standard disclosure was ordered to be given but no later than 35 days before the beginning of the trial window [or trial date itself] of the main trial of the [MTVIL]…"

251. By his 2016 CCCFA, Mr Browne agreed to:

> "50% if the client's claim concludes [after 21 days after standard disclosure] but no later than 21 days after the first exchange of witness statements of fact;"

252. Once these periods had passed then no discount on the 100% success fee applied. Neither agreement appears to have an equivalent provision to some of the solicitors' individual CFAs regarding the 100% applying at an earlier point if an interim application had been made. Nor are there any single stage success fees. The consequence of this is that the success fees claimed by counsel only include 100% success fees in respect of two claimants (and Mr Browne does not claim 100% for one of those) compared with the 10 claimants where the solicitors have claimed a success fee without discount.

253. The 50% stage definitions in both versions of the CCCFA cover the period I have decided should be the end of the discounted period in respect of the solicitors' success fees. There is no more explanation in my view in these CCCFAs than the solicitors'

CFAs as to the reasons for setting the stages and percentages at the particular points and figures chosen. The most obvious explanation is a spreading of the increases over the life of the case, as the solicitors appear to have done. But in the absence of any particular explanation, I do not consider myself bound to follow that staging where I have concluded that the key transition from cases being managed to settlement to ones that, at least potentially, have to be managed to trial is the without prejudice valuation procedure.

254. By my calculation 14 of the 25 claimants' cases settled by the 25% stage in any event so they are not affected by my decision. Of the remaining 11, the Gascoigne and Miller cases settled after the valuation period ended (albeit that Mr Browne's success fee in Gascoigne had not reached the final stage according to his CCCFA). So, this decision only applies to the remaining 9 claimants.

255. I have not come across any factor which suggests that a different point for the discounted period should apply to counsel rather than the solicitors. Indeed, if anything, the likelihood that some counsel involvement in the settlement offers would have taken place (if only Mr Sherborne) is a factor that points towards using the same cut off point. I have therefore concluded that the same discounted period should apply and that counsels' success fees should be allowed at 100% save where settlement occurred no later than 28 days from the claimants' without prejudice valuations.

256. In terms of the discounted percentage, I have recorded the submissions concerning the several, not joint, liability and that counsel were "one step removed" from the claimants which were not risks faced by the solicitors with their individual CFAs. I accept that these are different factors but I am not convinced that they make the proceedings more risky in a manner which ought to be reflected in a higher success fee. The effect of several liability only occurs where cases reach a final hearing. If, as has happened to date, the cases settle with an agreement to pay costs, there is no issue with recovering the full amount of the reasonable and proportionate fees charged. For there to be a shortfall, a court would have to conclude that one or more claimants had failed to prove their claims, or perhaps simply failed to beat Part 36 offers. In those circumstances, counsel would already be entitled to a 100% success fee and that could not be increased.

257. The discounted figure which I am considering is predicated on the basis that the claims which have been brought into the managed litigation have been vetted by the solicitors via their signing up of the client to an individual CFA. Absent something untoward lurking beneath the surface of such a claim, it will be reaching a settlement and so entitling a share of the common costs. To the extent this is a risk, therefore I do not think it weighs heavily enough in the balance to alter the success fee.

258. Similarly, the generic issues take their context from the individual cases, but I do not see any great risk from limited contact with the claimants themselves affecting the generic issues being pursued in these common costs. The risk of pursuing disclosure which breaks new ground seems to me to be more of a risk factor, but such risk is managed by counsel and the Lead Solicitor when deciding on whether to pursue any particular application.

259. Accordingly, I have concluded that the discounted figure for counsel ought to be, more or less, the same as for the solicitors. There is no equivalent to the pre-proceedings stage in the solicitors CFAs, notwithstanding the 0% previously mentioned, because the

CCCFAs only involve litigated cases. I appreciate that 15% is claimed by counsel for cases which settle almost immediately, but I do not consider that to be a true comparator either. The appropriate figure in my judgment is the 25% claimed where proceedings have passed the close of pleadings and have been managed up to a point following disclosure. Whilst it ought not to need saying, I will simply note that a dozen of the cases only contractually entitle counsel to 15% and that figure does not increase by reason of this decision.

Premature issue of proceedings leading to reduced success fee?

260. Literally the final matter put forward by Ms Reffin in respect of the quantum of success fees concerned the claims brought by Julia and Nadia Sawalha. There is in fact no mention of this point in the skeleton argument itself, but merely in the claimant specific appendices. Similarly, there does not appear to be any reference to this argument in the generic points of dispute. Certainly, the appendices refer to the points of dispute regarding the individual costs' bills for the detail of the point raised.

261. Those bills of costs have been settled and so the detail of those claims is not going to be considered by me. It is true that the success fees were reserved to the hearing of the generic costs, but that does not help me with any detail on what is obviously a fact specific challenge. In a nutshell the defendant says that these claimants issued proceedings prematurely and that success fees were unreasonably incurred as a result.

262. The drafter of those points of dispute in the Nadia Sawalha case clearly appreciated the difficulty in making any headway in this argument. At 2.7 in the points of dispute, the defendant "notes" that if the claim had settled pre-proceedings, as the defendant contended, the same success fee would have been payable anyway. The point of dispute is reduced to a suggestion that the lack of a pre-proceedings (lower) staged figure was unreasonable. Wisely, I would say, neither of the defendant's counsel chose to pursue that line of argument. There would still be the possibility that counsel's success fees regarding the common costs would not have been incurred if there had been no proceedings. But given that all of the other success fees referable to Ms Sawalha were always going to be recoverable; there is nothing in the common costs points of dispute; and I have been provided with no evidence regarding the facts of this case, I reject the challenge to counsels' common costs success fee.

263. The same argument is run by the defendant in respect of Julia Sawalha, and since her success fee is claimed at 85% rather than 35%, there might, at first blush, appear to be more mileage in it. There is the obvious difficulty that the case cannot have been settled quickly and so the prematurity point is inevitably weakened. But, given the decision I have made on success fees generally, I believe that Julia Sawalha's success fee is reduced to 35% in any event and so this challenge is rendered nugatory in respect of the solicitor's success fee. In respect of counsel's fees, I take the same view as I have with the Nadia Sawalha case and reject the defendant's challenge.

Summary

264. In respect of the preliminary issues:

i) Hourly Rates – I have allowed these as claimed in the bill save for Mr Canty whose rate is reduced to £460 per hour and the Grade B fee earners whose rate is reduced to £350 per hour.

ii) Recoverability of Counsels' success fees – I have disallowed the success fees of those claimants whose individual CFAs were entered into after 6 April 2019 on the basis that they do not comply with the regulations. For those whose CFAs were dated before 6 April 2019, I have allowed the recoverability of the success fees in principle because no notification was required (and would have given relief from sanctions in any event).

iii) Level of solicitors' success fees – I have allowed a 100% success fee where settlement occurred more than 28 days after the relevant claimant's without prejudice valuation: otherwise, the success fee is discounted to 25% - 35% depending upon the individual CFA.

iv) Level of counsels' success fees – I have allowed the same two stage structure as for the solicitors. Counsel is entitled to either 100% or a discounted figure of 25% (unless limited to 15% in any event.)

Postscript

265. I circulated the draft of this judgment to the parties with the expectation of handing it down at the beginning of the detailed assessment hearing on 20 March 2023. However, in addition to the typographical errors which the parties addressed, Ms Reffin wrote a letter to me raising what she described as a factual error and addressed the consequences of that error in terms of the non-recoverability of the counsels' success fees for any of the claimants.

266. I asked the claimants to provide any response they wished to make and I received a note in response. Regrettably, I did not have the opportunity to consider the parties' submissions prior to the hearing on 20 March 2023 and so I delayed the handing down of this judgment in order to reflect on the points that had been raised.

267. The claimants' note suggested that I should not countenance dealing with the matter raised by the defendant on the basis that it was not a typographical error etc. The Court of Appeal in Egan v Motor Services (Bath) Limited [2007] EWCA Civ 1002 deprecated the practice of counsel writing to the judge to ask him to reconsider his conclusions (see paragraph 49).

268. It is also the case that it is not apparent to me that I have made the factual error suggested as being the springboard to the point made in Ms Reffin's letter. As the claimants' note points out, I have not actually said that the 25 claimants with a pre-commencement date CFA have also signed the CSA by 6 April 2019. It seems to me that the defendant's argument is in fact an attempt to build a different final conclusion from interim points that I have made.

269. Nevertheless, I can see that a point of substance has been raised and I have not dealt with it expressly. I have decided that the best way to resolve this point is to deal with it by way of this postscript. I have not changed the overall result of this decision and I am reluctant to disturb the flow of paragraphs 136 and its neighbours in case,

unwittingly, I create the sort of apparent inconsistency highlighted by the Court of Appeal in Egan.

270. I think it is clear from my decision that I have treated the claimants whose CFAs with their solicitors were entered into prior to 6 April 2019 differently from those who had entered into them subsequently. For the later claimants, I have concluded that the vehicle of the CSA and the CAO was not sufficient to create a pre-commencement date arrangement which would satisfy the requirements of s44(6) in order to claim a success fee on counsels' fees.

271. I did not dwell on those claimants whose individual CFAs were dated prior to 6 April 2019 and the wording in paragraph 136, relied upon by the defendant, deals squarely with the 57 later claimants and not the 25 earlier claimants.

272. The defendant's assumption, it seems to me, is that the entire issue of recoverability is bound up with the date of subscription to the CSA. Consequently, my decision regarding those whose CFAs were made after the commencement date and who signed the CSA thereafter must also apply to those who signed CFAs prior to the commencement date but did not sign the CSA until later. I do not accept that this is a conclusion I have reached in this decision, nor is it one that I think is correct.

273. Each claimant's network of arrangements for legal representation spreads from the starting point of the individual CFA signed between the claimant and their solicitor. The existence of that agreement, expressly or impliedly, entitles the solicitor to enter into a separate CFA with counsel in respect of the claimant specific claim. Equally, it enables the solicitor to instruct Hamlins as its solicitor agent in respect of generic matters. (If Hamlins is the claimant's own solicitor then the entitlement is even clearer). In the context of these proceedings, that solicitor agency would plainly include instructing counsel to deal with common costs issues.

274. This network of authorisation must exist, in my view, whether or not the client ultimately instructs their solicitor to subscribe to the CSA. In the unlikely event that the client decided not to join the managed litigation, it seems to me that Hamlins would be perfectly entitled to bring a claim for its fees as solicitor agent against the solicitors instructed by the client.

275. In my judgment, the crucial difference between the earlier claimants and the later claimants is the existence of the individual CFAs entered into before 6 April 2019 for the former category. With that agreement in place, a claimant's entitlement to claim success fees would only be limited by the date of the CFAs of any additional legal representative. In these proceedings the agreements with the various counsel who had pre-existing CCCFAs would attract success fees, but those with later agreements (Mr Hamer and Ms Wilson) would not.

276. The earlier claimants, at the commencement date, came within s44(6)(a) having the benefit of a CFA in existence which specifically provided services to them. Consequently, a subsequent costs order could include provision for the payment of a success fee by the opponent in accordance with s44(6). The earlier claimants' arrangements are in fact the obverse side of the entitlement coin to the later claimants where the post commencement date of the original CFA precludes the retrospective

recovery of counsels' success fees even though most of those counsels' agreements pre-date the cliff edge.

277. The Court of Appeal in Catalano v Espley-Tyas Development Group Limited [2017] EWCA Civ 1132 recognised the stark difference between pre and post commencement arrangements when saying that the framers of the rules could not have intended that a claimant could "blow hot and cold" in deciding whether to utilise a pre-commencement agreement when QOCS meant a post commencement arrangement might be preferable. In my view, the effect of the cliff edge on the arrangements of the earlier and later claimants here is similarly stark and the die was cast by the dates on which they entered into CFAs with their own solicitors.

278. Finally, I have said that I do not accept that a post commencement subscription to the CSA prevents recovery of a success fee where there is a pre-commencement CFA. I have concluded that the instruction of counsel in the CCCFAs can be direct via the chain of authorisation beginning with the original CFA. Such arrangement does not require the use of the CSA at all. That is a complete answer to this point.

279. But if, in some way, the CSA was required as a link in the chain, rather than as a written rationalisation of the rights and responsibilities between the claimants, I do not think the post-commencement date of the CSA vitiates that chain. It is, at most, a variation in the arrangements and is not one which discharges the original CFA. As such, in my judgment, that variation would not prevent the continued provision of litigation services to the underlying dispute found to be acceptable by the Supreme Court in Plevin v Paragon Personal Finance Limited [2017] UKSC 23.

280. In conclusion, I appreciate that I have referred to two cases in the preceding paragraphs which had not been referred to by either party in written or oral submissions. I have left reference to them to the very end of the postscript in order to demonstrate that I did not rely on them as such to produce my decision. They are meant to be no more than an illustration of what appeared to me to be similar views expressed by higher courts. If either side wish to take this decision on appeal, then no doubt submissions can be made on the relevance, or otherwise of those cases, if they deem it appropriate.