Neutral Citation Number: [2019] EWHC 34 (QB)

Case No: HQ14X02923

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2019

Before:

MR JUSTICE FOSKETT

- -

Between:

VARIOUS CLAIMANTS

Claimants

- and –

GIAMBRONE & LAW (A FIRM) & OTHERS

Defendants

AIG (EUROPE) LIMITED

Section 51
Respondent

- -

Shantanu Majumdar (instructed by **Penningtons Manches LLP and Edwin Coe LLP**) for the **Claimants**
The Defendants were not present or represented
Leigh-Ann Mulcahy QC and Carl Troman (instructed by **Kennedys Law LLP**) for the **Section 51 Respondent**

Hearing dates: 20-22 November and 12 December 2018

- -

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.

MR JUSTICE FOSKETT:

Introduction

1. This is an application under section 51 of the Senior Courts Act 1981 for a non-party costs order against AIG (Europe) Limited ('AIG'), as from 1 October 2008 the insurers of the Defendants in the litigation that underlies this application.

2. At that date, the manifestation of Avvocato Giambrone's legal practice was the LLP (see paragraph 34 below) and consequently the "insured" under the policy was the LLP. However, AIG was also responsible for indemnifying the previous partnership (see also paragraph 34 below) for claims against the partnership which were made and notified during the currency of the policy.

3. In the underlying litigation, the trial at first instance took place before me in March 2015 resulting in substantive judgments reported at [2015] EWHC 1946 (QB) ('the main judgment') and [2015] EWHC 3315 (QB) ('the supplemental judgment'). In essence, the Claimants succeeded on all points. The appeal by the Defendants failed: [2017] EWCA Civ 1193. The application of the Defendants for permission to appeal to the Supreme Court was rejected on 18 December 2017 because "the application [did] not raise an arguable point of law."

4. I do not intend to rehearse the background to that litigation in any detail other than to the extent necessary to deal with the arguments advanced on this application, but a full appreciation of the issues will require consideration of the judgments to which I have referred. The first instance litigation was fiercely contested: the trial lasted 18 days and there were several interim hearings before that. There was then a contested summary judgment application in October 2015 which led to the second of the judgments referred to above. I cannot now recall the precise volume of documentation to be considered at the trial, but it was extensive, as my first judgment records.

5. The procedure involved in the present application is a "summary procedure": see *Symphony Group plc v Hodgson* [1994] QB 179, 193. Notwithstanding that, the documentation placed before me occupied 10 lever arch files, there were 2 bundles of authorities, extensive Skeleton Arguments and a hearing lasting over 4 separate days. Some of the documentation, particularly the correspondence, is labyrinthine and some aspects of the narrative weave a tangled web with Avvocato Giambrone at the centre.

6. I have been much assisted by the detailed submissions of Mr Shantanu Majumdar, who on this occasion represented all the Claimants, and Ms Leigh-Ann Mulcahy QC and Mr Carl Troman, who represented AIG, but I have indicated to them that I propose to focus only on those issues that seem to me to be of material significance to this application and to try as best I can to deal with the application in a way that reflects the true character of a "summary procedure". That is not easy given the scale of the material with which I have been presented (not all of which it is possible to have digested fully), but I believe that, at the end of the day, the issues can be distilled into some relatively short propositions and I consider that the application falls to be dealt with by reference to a fairly narrow compass.

7. Both Mr Majumdar and Ms Mulcahy focused at the outset of their respective submissions on the legal framework for the decision and I too will begin by referring to the parameters within which it is to be made.

The legal framework

8. Section 51 of the Senior Courts Act 1981 provides that "[the] court shall have full power to determine by whom and to what extent the costs are to be paid."

9. In *Aiden Shipping Co Ltd v Interbulk, The Vimeira (No 2)* [1986] AC 965, the House of Lords confirmed that the words "by whom" include parties who are not parties as such to the relevant piece of litigation. The procedure when such an application is made is now governed by CPR rule 46.2(1).

10. The jurisdiction has been much discussed in the authorities, but there are authoritative words of caution that excessive reliance should not be placed upon them as precedent: see, e.g., *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2006] EWCA Civ 1038, *per* Longmore and Laws LJJ at [11] and [19] respectively, and *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23, *per* Moore-Bick LJ at [62]. That said, when exercising the jurisdiction at first instance, it is impossible not to have regard to the circumstances in which the Court of Appeal and beyond have regarded the use of the jurisdiction as either appropriate or not appropriate, as the case may be, as affording at least some guidance on how to approach the task of exercising the discretion conferred by the statute.

11. In *Symphony Group plc v Hodgson* [1994] QB 179, the Court of Appeal drew together some principles applicable to the exercise of this jurisdiction, the first (drawn from the *Aiden Shipping* case) is that such an order is "exceptional" and that a "judge should treat any application for such an order with considerable caution". However, in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807, the Judicial Committee of the Privy Council said this about the word "exceptional":

> "Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against."

12. The Privy Council went on to say this:

> "Generally speaking the discretion will not be exercised against "pure funders" [namely] "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access

> to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.
>
> Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence …."

13. The court also cited the decision of the High Court of New Zealand in *Arklow Investments Ltd v MacLean* (unreported) 19 May 2000, where Fisher J said:

> "19. The guiding principle here is that costs orders against third parties are exceptional but that they are warranted in cases where there would otherwise be a situation in which a person could fund litigation in order to pursue his or her own interests and without risk to himself or herself should the proceedings fail or be discontinued.
>
> 20. … where a person is a major shareholder and dominant director in a company which brings proceedings, that alone will not justify a third party costs order. Something additional is normally warranted as a matter of discretion. The critical element will often be a fresh injection of capital for the known purpose of funding litigation.
>
> 21. … the overall rationale [is] that it is wrong to allow someone to fund litigation in the hope of gaining a benefit without a corresponding risk that that person will share in the costs of the proceedings if they ultimately fail."

14. In *Grizzly Business Ltd v Stena Drilling Ltd* [2017] EWCA Civ 94, the Court of Appeal emphasised (i) that it is not the case that both control and funding of the litigation must be present before an order could be made and (ii) the "single question is whether in the circumstances it is just to make a discretionary order requiring the non-party to pay costs because of the nature of its involvement in the litigation" (as stated by Tomlinson LJ at [51] in *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144).

15. None of the foregoing cases dealt specifically with the position of a liability insurer as a possible target of a section 51 application. In *Travelers Insurance Co Ltd v XYZ* [2018] EWCA Civ 1099, the argument was advanced that a "liability insurer who funds an unsuccessful defence by its insured will only be liable under section 51 if the evidence establishes that the insurer controlled the litigation in its own interest, and without paying appropriate regard to any inconsistent or contrary interest of its insured." It was contended that in such a case "it is appropriate to regard the insurer

as the real party such that an order under section 51 can properly be made [and that if] this criterion is not established, then no order under section 51 should be made."

16. The application in that case arose from group litigation concerning the supply by Transform Medical Group (CS) Ltd ('Transform'), one of a number of defendants, of defective breast implants to a large number of claimants. About 1,000 claimants joined the litigation of which 623 of those claims were brought against Transform. Transform had insurance cover placed with Travelers Insurance Co Ltd ('Travelers') in relation to 197 claims but was uninsured in respect of 426 claims made against it. In 2013 an order for the trial of preliminary issues was made, all relating to the quality of the implants, in four sample cases. Transform was the defendant in all four sample cases. Two of the four sample cases were uninsured claims, although, as appears below, that was not known to the claimants and all claimants proceeded on the basis that all claims were insured.

17. Under the terms of the insurance policy Travelers was bound to pay the costs of defending the insured claims, including the costs of defending the common issues affecting the insured and uninsured claims. Travelers and the insured had jointly retained the same solicitors. The solicitors had advised Transform not to disclose the fact that some of the claims were not insured. Transform entered insolvent administration in June 2015. The insured claims were settled by an agreement made in August 2015. The uninsured claimants obtained judgment in default against Transform and applied for a non-party costs order against Travelers. Thirlwall J, as she then was, held that the case was exceptional and ordered Travelers to pay the costs of the uninsured claimants. She held that but for Travelers' interest, Transform would have disclosed the lack of insurance, and if it had done so the uninsured claims would not have been pursued and costs would not have been incurred.

18. The Court of Appeal (Lewison and Patten LJJ) rejected the submissions summarised in paragraph 15 above. The proposition that the authorities relied upon in support of the submissions laid down "a series of conditions which must be fulfilled before a costs order can be made against insurers, such that if they are not fulfilled an exercise of discretion against insurers must be wrong" was itself said to be wrong: see [30].

19. The court observed as follows at [11]:

> "There is … an obvious asymmetry in Travelers' position. If Transform had succeeded on the preliminary issues then all claimants (whether insured or uninsured) would have been liable equally to contribute towards Transform's costs which, ultimately, would have been to Travelers' advantage. But failure on those very same issues has the result, if Travelers are correct, that it is ultimately liable for only approximately 32 per cent of the claimants' costs. In addition … there is a large element of happenstance in Travelers' position. The costs of defending the preliminary issues, for both claimants and defendants, were the same whether there had been 197 claims or 623. Had there only been 197 claims (all insured) Travelers would have been liable to indemnify Transform against all the claimants' costs of the preliminary issues. But because 426 uninsured claimants joined the register, if Travelers are right

> they have fortuitously escaped liability for approximately 68 per cent of those costs, even though the addition of those uninsured claimants had no effect on the costs at all."

20. At [32] Lewison LJ said this:

> "In [this] case Travelers funded the costs of the preliminary issues and stood to benefit from a successful outcome. They fall squarely within that category of case. In addition, the features I have mentioned at [11] bring this case within the realms of "exceptional". Neither counsel was able to point to a previous case which had these features. I agree with Colinvaux and Merkin that the principle of reciprocity is important. It is that principle which underlies Lord Brown's statement that if a person funds and stands to benefit from proceedings, justice requires that if they fail he should pay the successful party's costs …. This is no more than a reflection (or perhaps a modest extension) of the long-standing principle that he who takes a benefit must also accept the burden."

21. As will appear below, there are some similarities (but equally, some differences) between the position in that case and the position in this case. Mr Majumdar places some reliance upon it, particularly upon the concept of reciprocity. Ms Mulcahy submits that the judgment fails to acknowledge the distinction between the position of litigation funders and 'after-the-event' insurers, on the one hand, and indemnity insurers, on the other. The former, she says, are "consciously on the look-out for opportunities to provide funding for litigation with a view to profiting from that litigation by sharing in its proceeds in the event of success" whereas the latter "provide cover for the risk that their insured may in the future be faced by a claim [and, as such,] can never profit from litigation". The ideal position for them, she says, is that no claim will be made against their insured and if such a claim is made the best result for them is that the claim does not succeed and they suffer only irrecoverable costs. She asserts that the distinction between the two types of funder has found a reflection in previous cases such as *Gloucestershire Health Authority v M A Torpy & Partners Ltd* [1999] Lloyd's Rep 203, the well-known case of *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055 and the *Dymocks Franchise Systems* case (see paragraph 11 above).

22. Ms Mulcahy tells me that she understands that the Supreme Court has granted permission to appeal in the *Travelers* case.

23. I will return to this debate at the point when it becomes relevant to the outcome of this application if it does.

The perception of the insurance position at the trial

24. As I observed in the main judgment, the insurance position was of no relevance to the outcome of the case: see [71] – [78] of that judgment. I venture to repeat one observation I made at [76] because of the perception I gained during the trial:

> "The position about the Defendants' funding of this litigation is thus unclear and in a number of respects plainly unsatisfactory. It is a most unattractive position that every point can be taken by the defendants against the claims brought by the claimants, with the risk to the claimants of having to pay the insurer's costs if the defendants succeed, but the insurers cannot be made to pay the claimants' damages or costs if the claimants succeed, the claimants having to rely in that situation upon recourse to the person of Avvocato Giambrone and/or his fellow partners (all of whom claim to be in no position to meet any such liabilities). However, as I have said, any issues arising out of this will fall to be considered only if the claimants establish liability or, of course, if the defendants challenge successfully the position taken by their insurers."

25. I returned to this matter at [86] in the supplemental judgment as follows:

> "I would make two observations; first, I would merely emphasise the unsatisfactory insurance position referred to in paragraphs 71 – 77 of the main judgment such that the litigation seems to be capable of being conducted on the Defendants' side with complete immunity as to costs (the individual Defendants claiming impecuniosity, whether such claims are justified or not, when faced with orders for costs incurred when any aspect of the insurance-funded litigation goes against them). Second, I sense that the tactics in this case (going back over many years) have been to delay any potential adverse finding so far as Avvocato Giambrone is concerned whilst the number of firms bearing his name has continued to expand on a worldwide basis. From an outsider's perspective, this approach appears to have dictated the settlement pattern prior to the cases chosen as exemplar cases coming before me. Indeed there was a settlement of an exemplar case concerning another development in Calabria (the El Caribe development) that I was due to consider as part of the generic issues trial shortly before the trial commenced (see paragraph 9 of the main judgment). Since the judgment was handed down I have sensed that efforts to delay any further adverse consequences for as long as possible have been taking place."

26. As will appear below, I now know more about how the unsatisfactory position, as I perceived it, came about, but I would have thought that any reasonably well-informed layman would have regarded the way the litigation was conducted on the Defendants' side from the point of view of the costs position as unbalanced and, at first blush, unfair.

27. I might add that, despite the Claimants succeeding on all substantive points, the Defendants (presumably on AIG's instructions) made an application for payment of their costs. The application did not succeed. Although the Defendants initially took the position that I should not make any decision on the question of costs until the whole case had been concluded and said that I should not be placed in the position of

seeing certain "without prejudice" material at that stage, I ruled against those contentions in a 'Provisional Ruling on Costs' dated 12 February 2016 (which, since it is not already in the public domain, is attached as Appendix 1 to this judgement). Following further written representations (in the context of which certain "without prejudice save as to costs" offers were referred to), I made a 'Final Ruling on Costs' dated 19 May 2016 (which is also attached as Appendix 2 to this judgment). In that final ruling, I made the following observations:

> "As I observed in paragraph 10 of the main judgment, almost every issue raised by the Claimants was "hotly contested". A few matters were conceded during the trial, but all major issues were fiercely fought by the Defendants. The revelation of some of the "without prejudice" material indicates that the Defendants had little confidence in success on many of the major issues, but nonetheless the proceedings were fought and no admissions or concessions were made on the principal issues that formed the subject matter of the trial. That position was maintained throughout the trial even though many individual claims had been settled prior to the hearing."

> "All this is only relevant to the proposition that a very great deal of the time at the trial was spent in litigating issues about which there appears no longer to be a dispute and about which there was little confidence of success prior to the trial. Notwithstanding that situation, I am being asked to award the Defendants the costs of the trial."

28. I will return to the assessment of the prospects of success for the Defendants below.

The background to the insurance position as it now appears

29. Reference to [71] – [78] of the main judgment indicates the position taken by AIG, namely, that they were entitled to aggregate all the VFI claims so that they amounted to one claim for the purposes of the Defendants' insurance policy and that since all Jewel of the Sea claims were VFI claims, cover for those claims was thus limited to £3 million payable in respect of damages and/or costs to the Claimants. The Note from Mr Flenley QC referred to in [74] suggested that further pursuit of the claims "may not be economic".

30. Essentially, the policy provided for a "Limit of Liability" (excluding defence costs) in respect of "any one claim" of £3 million (see further at paragraph 33 below). The annual premium was £25,000 and there was a retention[1] of £7,500 for "each and every claim". There were other provisions of the policy that it is necessary to recite in order to understand the background to the issues that arise in this application.

31. The first is a paragraph headed "Related Claims" which was, in effect, the aggregated claims clause. It reads as follows:

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1 Effectively, an "excess".

> "If notice of a claim against any Insured is given to the Insurer pursuant to the terms and conditions of this policy, then: (i) any subsequent claim alleging, arising out of, based upon or attributable to the facts alleged in that previously notified claim; and (ii) any subsequent claim alleging any wrongful act which is the same as or related to any wrongful act alleged in that previously notified claim, shall be considered made against the Insured at the same time as the previously notified claim was made, and reported to the Insurer at the same time as the previously notified claim was first reported. Any claim or claims arising out of, based upon or attributable to (i) the same cause or wrongful act, or (ii) a single wrongful act, or (iii) one matter or transaction, or (iv) a series of continuous, repeated or related wrongful acts, or (iv)[2] the same or similar wrongful acts in a series of related matters or transactions, shall be considered a single claim for the purposes of this policy."

32. The next provision is headed "Defence/Settlement". It reads as follows:

> "The Insurer does not assume any duty to defend.
>
> In the event that the Insurer decides that representation by a solicitor is necessary (such decision to be at the sole discretion of the Insurer) then the Insured shall select one of the Legal Panel to provide such legal representation. The Insured shall not admit or assume any liability, enter into any settlement agreement, consent to any judgment, or incur any defence costs without the prior written consent of the Insurer. Only those settlements, judgments and defence costs consented to by the Insurer, and judgments resulting from claims defended in accordance with this policy, shall be recoverable as loss under this policy. The Insurer's consent shall not be unreasonably withheld or delayed.
>
> The Insurer shall be entitled, at its own expense, to take over and conduct, in the name of any Insured, the defence, investigation or settlement of any claim it deems expedient with respect to any Insured.
>
> If any Insured wishes a claim to be settled, but the Insurer does not, the Insurer will brief senior counsel (to be mutually selected or, in default of agreement, to be selected by the Law Society of England and Wales) to advise on whether or not the claim against the Insured is likely to succeed. If counsel's advice is that the claim is likely to succeed, the Insurer shall take such steps as are mutually agreed to settle the claim on terms to be mutually agreed or, in default of agreement, such steps and such terms as counsel advises having due regard to

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[2] This is presumably a mistake and should read (v).

> the interests of both the Insured and Insurer. Counsel's fee will in each case be payable by the party against whose contention counsel advised.
>
> The Insurer will not settle any claim without the prior consent of the Insured. If the Insurer recommends a claim to be settled, but the Insured does not accept such recommendation, the Insured will indemnify the Insurer against any amount, including defence costs, over and above the Insurer's recommended settlement from the date on which that recommendation was made."

33. The final clause of relevance is headed "Limit of Liability". It reads as follows:

> "The total amount payable by the Insurer under this policy for any one claim during the policy shall not exceed the Limit of Liability. Defence costs are payable in addition to the Limit of Liability. In the event that the amount paid by or on behalf of any Insured to dispose of a claim exceeds this policy's Limit of Liability for any one claim, then this policy shall only cover the same proportion of defence costs as this policy's Limit of Liability for any one claim bears to the total amount paid to dispose of the claim (exclusive defence costs). The inclusion of more than one Insured under this policy does not operate to increase the total amount payable by the Insurer under this policy.
>
> The Limit of Liability is the total sum payable by the Insurer. Any sum paid by the Insurer under this policy shall erode the Limit of Liability. In no circumstances shall the liability of the Insurer exceed the Limit of Liability."

34. The right of AIG to aggregate the various claims made against Avvocato Giambrone in his various manifestations in relation to the purchases of properties in Calabria has been challenged from the time it was first made known to them by those representing the Claimants. I will turn to the way that issue has been deployed in this application below, but for present purposes it is to be noted that Avvocato Giambrone and those with whom he has been associated professionally also challenged this right. I have been shown correspondence going back to September 2010 when AIG (then known as Chartis) was asserting this right and Avvocato Giambrone was challenging it. Kennedys took the matter up again in January 2012 on the insurers' behalf and the issue remained under discussion throughout 2012. The differences of view led to an agreement entitled "Binding Heads of Terms of Agreement" ('HOTS') dated 6 February 2013 between AIG and the four partners in the Giambrone partnership. It was <u>not</u> entered into with Giambrone Law LLP and so the LLP was not bound by it and the partners could not prevent settlement of claims against the LLP. (The LLP was formed on or about 6 April 2008 and the business of the previous partnership was transferred to it: see [46] – [50] of the main judgment. As recorded in that judgment, "it ceased to practise in April 2009 and at some stage subsequently went into liquidation.")

35. AIG place considerable reliance on this agreement to explain and justify its conduct in the litigation against the partners because, Ms Mulcahy submits, AIG was not in control of "its choice whether to defend the partners once the [HOTS] was in place". She says that AIG "did stop defending the LLP when it could, but it did not have a similar freedom of movement with the partners". This, as I have said, represents a substantial plank of AIG's response to the present application (along with the issue of causation) and I will return to it below.

36. The HOTS recited the dispute between AIG and the partners and recorded that they had agreed a compromise of the disputes as to AIG's liability under the policy "on commercial terms" and had agreed the HOTS as "reflecting the principal terms of agreement pending formalisation of detailed settlement terms." It recorded that the partners had been advised to seek independent legal advice as to the terms of the agreement. (Correspondence between Avvocato Giambrone and Kennedys shortly before the commencement of the trial and thereafter after the main judgment had been handed down reveals that at that stage he sought to challenge the validity and efficacy of the HOTS: see further at paragraphs 60-66 and 69 below.)

37. I have not been shown any further agreement and it would seem that the HOTS remained (and was treated as) the binding agreement it was said they constituted. The important terms for present purposes were these:

> "2.1 In respect of the Aggregated Claims AIG's liability shall be limited to £3 million per promoter of the development such that there shall be a £3m limit of indemnity for all Aggregated Claims in respect of each of the following:
>
> (a) Claims where Italian Connection was the promoter of the development;
>
> (b) Claims where VFI was the promoter of the development;
>
> (c) Claims where PGI was the promoter of the development; and
>
> (d) Claims where IPL was the promoter of the development."

38. Aggregation was, therefore, agreed to be applicable to those claims arising in respect of sales promoted by a particular promoter – in other words, on a "per promoter" basis.

39. The other term of significance is paragraph 2.4 which reads as follows:

> "AIG shall advance defence costs in respect of the Aggregated Claims provided always that AIG shall be entitled to withdraw funding for Defence Costs in respect of the Aggregated Claims in the event that it reasonably considers that there is no realistic prospect of defending the claim and on the basis that such Defence Costs are not or would not … reasonably be incurred.

> In the event of a dispute between AIG and the insured as to the prospects of success, AIG shall brief senior counsel (to be mutually selected, or in default of agreement, to be selected by the Law Society of England and Wales) to advise on whether or not the Claim against the insured is likely to succeed. If counsel shall advise that the defence is unlikely to succeed AIG shall be entitled at its discretion to withdraw Defence Costs funding." (Emphasis added.)

40. There was a comprehensive confidentiality clause, although revelation of the agreement was permitted to "third party claimants" for the purpose of "responding to and/or negotiating settlement of third party claims".

41. As will appear (see paragraph 46 below), the HOTS were deployed in an offer of settlement made to the El Caribe claimants being represented by Penningtons Manches ('PM) on the day following the date of the agreement. However, before I turn to that, it is to be noted that AIG accepts that any professional indemnity insurance provided to a solicitor must comply with the Minimum Terms and Conditions of Indemnity for Professional Indemnity Insurance for Solicitors and Registered European Lawyers (the 'MTC') and if they do not, the MTC prevail and will take precedence over any terms, conditions, exclusions or limitations in the policy. The MTC applicable at the time, both at the time of the original policy and the HOTS, contained the following provisions:

> **"1.1 Civil liability**
>
> The insurance must indemnify each insured against civil liability to the extent that it arises from private legal practice in connection with the insured firm's practice, provided that a claim in respect of such liability:
>
> (a) is first made against an insured during the period of insurance; or
>
> (b) is made against an insured during or after the period of insurance and arising from circumstances first notified to the insurer during the period of insurance.
>
> **1.2 Defence costs**
>
> The insurance must also indemnify the insured against defence costs in relation to:
>
> (a) any claim referred to in clause 1.1 … ; or
>
> (b) any circumstances first notified to the insurer during the period of insurance; or
>
> (c) any investigation or inquiry or disciplinary proceeding during or after the period of insurance arising from any claim

referred to in clause 1.1 … or from circumstances first notified to the insurer during the period of insurance.

…

2.1 Any one claim

The sum insured for any one claim (exclusive of defence costs) must be, where the firm is a relevant recognised body or a relevant licensed body (in respect of its regulated activities), at least £3 million, and in all other cases, at least £2 million.

2.2 No limit on defence costs

There must be no monetary limit on the cover for defence costs.

2.3 Proportionate limit on defence costs

Notwithstanding clauses 2.1 and 2.2, the insurance may provide that liability for defence costs in relation to a claim which exceeds the sum insured is limited to the proportion that the sum insured bears to the total amount paid or payable to dispose of the claim.

…

2.5 One claim

The insurance may provide that, when considering what may be regarded as one claim for the purposes of the limits contemplated by clauses 2.1 and 2.3:

(a) all claims against any one or more insured arising from:

(i) one act or omission;

(ii) one series of related acts or omissions;

(iii) the same act or omission in a series of related matters or transactions;

(iv) similar acts or omissions in a series of related matters or transactions

and

(b) all claims against one or more insured arising from one matter or transaction

> will be regarded as one claim.
>
> …
>
> **4.8 Advancement of defence costs**
>
> The insurance must provide that the insurer will meet defence costs as and when they are incurred, including defence costs incurred on behalf of an insured who is alleged to have committed or condoned dishonesty or a fraudulent act or omission, provided that the insurer is not liable for defence costs incurred on behalf of that insured after the earlier of:
>
> (a) that insured admitting to the insurer the commission or condoning of such dishonesty, act or omission; or
>
> (b) a court or other judicial body finding that that insured was in fact guilty of such dishonesty, act or omission.
>
> …
>
> **4.10 Conduct of a claim pending dispute resolution**
>
> The insurance must provide that, pending resolution of any coverage dispute and without prejudice to any issue in dispute, the insurer will, if so directed by the Law Society of England and Wales, conduct any claim, advance defence costs and, if appropriate, compromise and pay the claim. If the Society is satisfied that:
>
> (a) the party requesting the direction has taken all reasonable steps to resolve the dispute with the other party/ies; and
>
> (b) there is a reasonable prospect that the coverage dispute will be resolved or determined in the insured's favour; and
>
> (c) it is fair and equitable in all the circumstances for such direction to be given;
>
> it may in its absolute discretion make such a direction."

42. The terms of the original policy had to comply with those provisions. If they did not, the MTC prevailed. AIG's position, as I understand it, is that the HOTS did not have to comply with the MTC because (a) they did not constitute an insurance policy and (b) they represented the settlement of a coverage dispute arising from the terms of the policy.

43. I was not invited to determine whether the HOTS were required to comply with the MTC (although, as appears below, it was a point taken in early correspondence: see paragraph 47 below). As I understood the argument before me, however, the Claimants put their case on the basis that, as between AIG and the partners, the

agreement was proper and *bona fide*. Their argument is about the alleged impact that the HOTS had on the conduct of the litigation.

44. Nor is it for me to decide on the merits of the aggregation dispute. It remains a possibility that the Claimants will challenge the position taken by AIG in relation to aggregation. They are entitled to do so at least under the terms of an assignment agreement dated 8 March 2018 – thus entered into after the main judgment was given – and possibly independently of that. I say no more about it other than to record that AIG contends that the decision of the Supreme Court in the case of *AIG Europe Ltd v Woodman* [2017] 1 WLR 1168 (given on 22 March 2017) has lent support to its position and indeed makes the Claimants' contention in relation to aggregation "untenable". The Claimants disagree. It is, however, right to record that Ms Mulcahy accepts that until the decision of the Supreme Court, "the basis of aggregation was not, as a matter of general law, certain". As I have said, the Claimants do not accept that even after the decision in *Woodman* the effect of the law is "certain" in the present case and they themselves rely to some extent on the fact that prior thereto there were differing judicial views about the way the aggregation provisions were to be interpreted.

45. As I have said, the Claimants submit that the alleged impact of the HOTS on the conduct of the defence does not have the significance on the issue in this application that AIG suggests they have. I will return to that shortly.

46. As I have indicated, the HOTS were deployed in negotiations at an early stage after they were concluded. RPC (which was jointly retained by the Giambrone Partners, the LLP and AIG to defend the claims brought by the Claimants) wrote to PM on 7 February 2013, enclosing a copy of the HOTS, and reminding them that the El Caribe claims and a number of other developments were promoted by 'Italian Connection' and that the overall limit of liability (including the claimants' costs) for claims where 'Italian Connection' was the promoter was £3 million. Attention was drawn to the fact that just short of £1.89 million had already been paid out by AIG in respect of such claims with the result that there was approximately £1.1 million left. An offer was made to the 9 El Caribe claimants for whom PM acted. The terms are irrelevant for present purposes save to observe that they were dictated by the amount of the indemnity said to be left and that it was acknowledged by RPC that there was insufficient left to satisfy all the claims (of the 9 claimants and all the others) in full.

47. The response included the following paragraph:

> "On proper construction, the prescribed minimum terms (designed to protect clients such as ours) prevent your clients' aggregation clause from being capable of the effect which the agreement enclosed with your letter purports to give it. If, upon conclusion of the present claims, it becomes necessary for our clients to take action directly against insurers, such action will include a claim for a declaration that that agreement is void, and we fully expect such a claim to succeed."

48. The "minimum terms" referred to were presumably the MTC.

49. Whilst the precise articulation of the Claimants' stance in relation to the efficacy and relevance of the HOTS has varied somewhat subsequently, the general response on behalf of both sets of Claimants has been the contention that the HOTS should not have the significance on the issue with which I am concerned that AIG claims for them.

50. Having introduced the HOTS, it is necessary now to consider the competing contentions about their relevance.

The alleged relevance of the HOTS

51. The main thrust of what AIG says as to the relevance of the HOTS is foreshadowed in paragraph 46 above. Focusing on the issue of who substantially controlled the defence to the claims, the contention is advanced that, following the conclusion of the HOTS, AIG "were aware at a high level of the way the Giambrone Partners' defences were run" (according to Ms Shuttleworth's witness statement of 2 October 2018), but "did not exercise sole or even predominant control over the defences". She went on to say that "the Giambrone partners engaged proactively with the Claimants' claims, their defences to those claims and with giving instructions to RPC." RPC's retainer was a joint retainer and she indicates that "AIG as insurer also engaged with and provided instructions to RPC, in particular in relation to attempts to effect settlement …." I should add that Mr William Sefton, the partner at RPC with overall supervision of the case, has confirmed the accuracy of those assertions. Avvocato Giambrone, at the somewhat surprising invitation of the Claimants, has challenged what Ms Shuttleworth has said. Since it suits his present purpose to say this (see paragraph 99 below), I attach little, if any, weight to it.

52. As phrased, Ms Shuttleworth's evidence does <u>not</u> suggest that AIG had <u>no control at all</u> over the conduct of the claim and there is, as it seems to me, an inevitable overlap between giving instructions on settlement offers, evaluating the merits of the defences being advanced and deciding on the tactics to be deployed in the litigation. I will return to that shortly, but it is necessary to record that I have not seen any documents that would evidence who had substantial control of the defences of the partners because such documents are subject to a joint legal professional privilege that the partners have been unprepared to waive despite requests on behalf of AIG that they should do so. Nonetheless, for reasons given later I have little doubt that Avvocato Giambrone played a central (if not "the" central) role in dictating the way the defences were conducted.

53. The proviso in the HOTS as to the continued provision of unlimited defence costs was as highlighted in paragraph 39 above. I was told little about how the formulation of the proviso was achieved, but I have noted that the first draft of the proposed HOTS, sent by Ms Shuttleworth to Avvocato Giambrone by email on 10 January 2013, had, at the then proposed paragraph 2.3, the following:

> "Upon erosion of the available indemnity AIG shall have no further liability to the insured to indemnify in respect of any Aggregated Claim and the Claimant's costs and/or <u>Defence costs in respect of such claim</u>." (Emphasis added.)

54. Mr Buchan (see paragraph 245 of the main judgment) indicated in an email to Ms Shuttleworth the following day that one of the points for further discussion and clarification was "AIG's position in respect of Defence costs for ongoing matters".

55. There was a discussion between her, Avvocato Giambrone and Mr Buchan on 11 January 2013 and an email from Ms Shuttleworth to them both on 16 January 2013 said, in relation to Clause 2, that the issue was:

> "… addition of wording to provide for payment of defence costs on claims which aggregate albeit you agreed that there should be a provision for AIG to act reasonably in advancing costs so that it is not funding claims which have no reasonable defence when it will not ultimately be liable to pay any damages."

56. The revised draft sent by Ms Shuttleworth on 21 January 2013 and the following proposed clauses are to be noted:

> "2.3 Upon erosion of the available indemnity AIG shall have no further liability to the insured to indemnify in respect of any Aggregated Claim and the Claimant's costs in respect of such claim."

57. The proposed Clause 2.4 was in the terms of that appearing in paragraph 39 above, certain typographical errors in the draft having been altered so that the final version was as set out above.

58. What is said by Ms Shuttleworth about the post-HOTS period is as follows:

> "… whilst AIG funded the defence costs of the Giambrone Partners, AIG was not at any time advised that there was no realistic prospect of defending the claims against the Giambrone Partners or that those defence costs would not be reasonably incurred such that the proviso in Clause 2.4 entitling AIG to withdraw funding for defence costs took effect. In the absence of such advice AIG was not able to cease advancing defence costs pursuant to the HOTS."

59. Mr Majumdar made what, in my view, was a legitimate observation when he said in his Skeleton Argument that these were "very carefully chosen words". As he said, since legal professional privilege has not been waived, it has not been possible to scrutinise what advice about the merits was in fact given (including whether it did or did not use the words "no realistic prospect of defending"). However, he suggests that this would be to miss the point because Clause 2.4 permits AIG to withdraw funding if "it reasonably considers that there is no realistic prospect of defending the claim" and he contends that AIG could not have thought (reasonably or otherwise) that there was a realistic prospect of successfully defending the claims advanced by the PM claimants and the Edwin Coe ('EC') claimants "given that they (and their merits) were materially the same as all the previous cases which AIG had settled."

60. I will return to the issue of the previous settlements shortly, but Mr Majumdar might have added that the non-waiver of legal professional privilege may have prevented knowledge for the purposes of this application on whether any advice about the merits was ever sought by AIG. However, in a letter from Kennedys to Avvocato Giambrone dated 6 August 2015 (which formed part of a series of communications about whether AIG should fund the proposed appeal against my decision reflected in the main judgment) it was said that "as you know, Kennedys has never advised you or AIG in relation to liability for the numerous claims advanced against you", thus indicating that AIG had not sought any advice of its own through that source on the merits of the claims.

61. For reasons that hardly need spelling out, I approach anything said by Avvocato Giambrone in the context of this case with considerable caution. In my view, he will only say things that are in his own interests and are self-serving at the time he says them and he will put matters in a way that is capable of misleading. I am reinforced in that view by an admission in a recent witness statement that he gave misleading statements in affidavits put before me in 2014 and 2015 (see paragraph 104-106 below).

62. That said, the series of communications of which the letter from Kennedys forms a part does contain some assertions by him that have a ring of authenticity about them because they seem to be consistent with other material in the case. He wrote an open letter to Kennedys which was sent by email to them at 2:25 am on 5 August 2015. It comprised 12 pages. It was copied to a number of people, including Mr Sefton, and Avvocato Giambrone said that it would be sent to Mr Flenley QC for his comments.

63. He asserted in the letter that AIG had never sought written advice from Leading Counsel as to the merits "since the very early stages". It is not clear to me whether that was intended to mean that AIG did seek advice on the merits in the early stages, but had not done so since, or whether he was saying, in effect, that they had never sought that advice from the outset. It probably matters little for present purposes, but Avvocato Giambrone's letter also purported to quote from an email from Mr Sefton dated 23 July (presumably 2015) where, according to Avvocato Giambrone, "[Mr Sefton] confirmed that AIG did not receive written advice from Leading Counsel about the prospects because he was not instructed to request that Leading Counsel prepare a written advice on the prospects."

64. In the same letter, Avvocato Giambrone refers to the view reached by Mr Sefton (then at CMS Cameron McKenna) in relation to the Jewel of the Sea claims when he apparently said "having now reviewed this claim in detail and concluded that it will be extremely difficult to defend, we have approached claims reserving on all of the Jewel of the Sea civil claims we have received in the same way." This was, of course, long before PM and EC became involved, but it gives credence to the view that the settlement pattern was dictated to a large extent by the perception that certainly the Jewel of the Sea claims could not be defended successfully. Since the trial before me, and any proposed appeal from my decision, related only to Jewel of the Sea claims, this correspondence only dealt with such claims. However, given the overall picture, it would be surprising if any materially different view was formed of, for example, the El Caribe claims.

65. The letter did not refer to any percentage chance of a successful defence, but the expression "extremely difficult" does suggest that the then assessment was that the chances of success were very slim albeit, one supposes, not completely impossible.

66. I have no direct evidence of any other assessment by Counsel or solicitors of the merits of the defence to the Jewel of the Sea (or indeed any of the other) claims prior to the HOTS being concluded. That occurred some 2½ years later. It is, of course, unclear whether the legal professional privilege that has not been waived has prevented its revelation, but what is clear is that all offers of settlement from the conclusion of the HOTS onwards were at the high end of nominal value ("just over 80% of the amounts paid … by way of deposits" in an offer made on 2 July 2013 on Jewel of the Sea acquisitions and 90-100% at later stages: see, e.g., 'Final Ruling on Costs'). The barriers to acceptance on the Claimants' side were some of the conditions attached. But the starting point of each offer suggests clearly a lack of faith in defeating the claims on the part of those on the side of the Defendants in the litigation. (Avvocato Giambrone's letter to Kennedys also refers to further advice given by RPC to AIG on 11 September 2014 to the effect that the prospect of defeating the Jewel of the Sea claims was assessed at 35%, Mr Flenley apparently having said at or about that time that it was "verging on a case with a 40% chance of success".) Whether further advice was sought before concluding the HOTS is one issue, but it may be thought that the more important issue for present purposes is the test to be applied in deciding whether to continue funding the defence costs, namely, whether at any time AIG reasonably considered that there was "no realistic prospect of defending the claim" and "on the basis that such Defence Costs are not or would not … reasonably be incurred". On one view, this afforded a very narrow basis for withdrawing funding (see paragraph 68 below). Whatever advice was received about the prospects of success, it does not appear that the resolution mechanism set out in Clause 2.4 (see paragraph 39 above) was ever invoked.

67. By the time the HOTS were concluded, of course, AIG will have had a full (or substantially full) appreciation of the number of claims being advanced, whether in relation to Jewel of the Sea or otherwise. The existence of the aggregation argument was known at least as early as 2010 (see paragraph 34 above), but doubtless the appreciation of the number of claims will have brought that argument very clearly into focus and, since there were plainly some doubts about the validity of that argument at that stage, there was an incentive to AIG to resolve the dispute with its insured.

68. Reaching an accommodation with the insured was a perfectly legitimate objective. However, the troubling feature of the agreement reached is that it made an open-ended commitment to the partners to fund the defence of the claims against them even though the indemnity limit had been exhausted with the opportunity to withdraw the funding only on the basis that there was "no realistic prospect of defending the claim". This is a somewhat elastic concept with little precision. Equally, it is not wholly clear whether the "and" that appeared after that expression was supposed to be "or": if so, there would have been a further proviso enabling withdrawal of funding if the defence costs "would not reasonably be incurred". That latter proviso would enable consideration to be given to the question of whether the likely expenditure on costs would be justified by reference to the likely outcome. In her reply to Avvocato Giambrone's letter to Kennedys, Ms Shuttleworth said this:

> "However, it is abundantly clear to us, and will be to any third party reviewing this matter in hindsight, that everything that AIG has done to date, including the advancement of in excess of £3.5 million in defence costs in respect of claims arising from the property purchases in Calabria, has been with the aim of resolving the many exposures against you, which, of course, arise from the extensive breaches of duty/negligence on your part (including the payment away of client monies without authority) and the conduct of the conveyancing transactions on behalf of the numerous claimants."

69. Before commenting on that paragraph in her letter, I should refer to one other paragraph in a further letter in this sequence of correspondence to which Mr Majumdar drew my attention. Avvocato Giambrone had been arguing in this correspondence that AIG was being inconsistent in not being prepared to fund the appeal against my decision when it had funded the defence when the prospects of success had been as I have recorded above. Ms Shuttleworth made this observation:

> "Finally, we note that much has been made of the apparent contrasting position AIG has taken to advancing defence costs in the past. It may well be that on a proper analysis AIG could have taken the position at an earlier stage to withdraw defence costs. However, it elected not to do so thereby giving you the maximum opportunity to defend the claims being made against you and the reputational damage of the claims. It is galling to find that AIG is now being criticised for that decision."

70. On one interpretation, that suggests that a conscious decision was made at some stage not to withdraw defence funding when AIG was of the view that there was no reasonable prospect of successfully defending the claims and/or that further expenditure on defending them would not be reasonable.

71. Returning to the passage in the letter quoted at paragraph 68 above, I was told by Ms Mulcahy on instructions that the costs of the present proceedings on the Defendants' side were "approximately £1.5 million" and I have been further told that the reference in the letter to a figure "in excess of £3.5 million" having been spent on defence costs related to the defence of all claims made against the Defendants, including claims made other than in the present proceedings, as indeed the letter suggests. This does mean that a very sizeable proportion of that sum must be attributable to defending those claims after the HOTS were concluded and, of course, for the purposes of the trial in the present proceedings. This expenditure was incurred at a time and during a period when the professional advice from the solicitors conducting the litigation for the Defendants was that the claims would be "extremely difficult to defend", the prospects of success never subsequently being put definitively higher than 35%: the defence was much more likely to fail than to succeed.

72. The other side of that coin is that the Claimants, whose prospects of success were, on the analysis of those advising the Defendants, good (perhaps, "extremely" good if the Defendants' likelihood of successfully defending was "extremely difficult"), were obliged to pursue an 18-day trial (with all the other hearings involved) to obtain that which, on all realistic predictions, was the likely outcome.

73. What also has to be taken into account is that AIG accepts that the position it had in relation to the withdrawal of defence funding was markedly less advantageous after the HOTS than it had been prior thereto. It is accepted on AIG's behalf that it controlled the litigation against the LLP. The way the distinction between the control of the litigation against the LLP and that relating to the partnership was put in Ms Shuttleworth's witness statement was as follows. It followed the assertions recorded in paragraph 51 above. What she said was this:

> "The situation in relation to the LLP was different. AIG acknowledges that, whilst it was the decision of the Giambrone Partners to defend the Claimants' claims against them, it was AIG's decision to defend the Claimants claims against the LLP up to the point when it withdrew funding of the LLP's defence on 2 December 2014. The official receiver did not direct the defence of the LLP although the official receiver did give authority for AIG to file a defence on behalf of the LLP, which authority AIG had in any event pursuant to the terms of its policy.
>
> The court may wonder why, if AIG controlled the defences of the claims against the LLP and was not desirous of defending those claims at trial, AIG did not simply admit liability on the part of the LLP. The answer is twofold in accordance with the wishes of the Giambrone Partners. First, it would have been contrary to the Giambrone Partners' best interests for AIG to admit liability in the claims against the LLP in circumstances where the Giambrone Partners would not agree to settle the claims against themselves. That is because such admissions would have had the potential to set a precedent for claims against the Giambrone Partners. Secondly, and more significantly, settling the claims against the LLP would have had the effect of eroding the indemnity limit available to the Giambrone Partners."

74. I think, with respect, that the court is much more interested in why AIG put forward the formulation of the proviso to which I have referred, which at least arguably tied its hands so far as withdrawal of defence funding is concerned in a much more significant way than prior thereto. Much of what Ms Mulcahy advanced was that AIG's hands were tied because the Giambrone Partners would not agree to any settlement that exposed them to personal liability. That may indeed have impeded settlement, but failing to achieve a settlement is one thing, continuing to provide significant defence funding on a case that is more likely than not to be lost is another (see further at paragraphs 76-79 below).

75. My impression is that in the period prior to the conclusion of the HOTS, AIG (i) was seriously concerned that its aggregation argument would not prevail and (ii) was the victim of Avvocato Giambrone's persistence. Ms Shuttleworth speaks of the disagreements between him and AIG "from the outset" and that the relationship of the partners and "AIG and [Kennedys] was frequently very difficult and sometimes hostile, with heated correspondence being exchanged." I have no doubt she is correct about that. Indeed I have seen correspondence that confirms it. She speaks of a

"lengthy and fractious indemnity conference" in March 2012 and the institution by the partners of a formal mediated process against AIG in 2012 and again in 2015. Interestingly, she records that on 12 December 2012 Avvocato Giambrone told her that the partners did not want to settle the Jewel of the Sea claims because the defences to those claims "were getting stronger and stronger and … they had supportive expert evidence." (I assume this was the proposed evidence of Notary Carderelli whose evidence, as it happened, I did not find convincing.) It seems that it was against that background that AIG agreed the HOTS and the terms of the proviso. Perhaps AIG was persuaded by Avvocato Giambrone that the strength of the defences to the Jewel of the Sea claims were greater than previously suggested, but, as it seems to me, alarm bells ought to have been ringing given Mr Sefton's previous advice. (I should, perhaps, say that I am conscious that Jackson LJ gave permission to appeal against my decision on five grounds because, in his view, "they raised serious issues which merited argument on a full appeal". It has not been suggested before me that that makes any difference to the assessment of the prospects of success being made on the Defendants' side at the earlier stages in the litigation and indeed I respectfully think that is so. As it happens, the Court of Appeal rejected each of the grounds advanced.)

76. However it came about, the net effect of the HOTS was to give to the partners the power to control the defences to the Jewel of the Sea claims with minimal influence from AIG (or influence that, for whatever reason, AIG was not prepared to exercise) despite AIG being committed to bankroll the pursuit of those defences when there must have been entirely reasonable concerns from time to time, if not throughout, that the game was not worth the candle. Ms Shuttleworth more or less accepts that (see paragraph 69 above).

77. The question that arises in the particular circumstances of this case is whether I should be persuaded that since, as a matter of fact, the Giambrone Partners effectively controlled the defence to the litigation, AIG is thus protected from a successful section 51 application. I do not think so: it would involve shutting one's eyes to the circumstances in which the ceding of this power came about. As I have said, the power was conceded on a basis that left AIG either with virtually no effective control or with control that AIG decided, for whatever reason, not to exercise. As it happens, large sums of money were expended on the litigation which, given what AIG must have known by the time of the HOTS about Avvocato Giambrone and the tenacity with which he would seek to protect his interests, was foreseeable (a tenacity that is further evidenced by a great deal of material that has been revealed in the context of this application). Whilst the "deal" reflected in the HOTS may have been commercially sensible as between AIG and Avvocato Giambrone, it cannot operate to exclude the protection from adverse costs consequences afforded to the Claimants by section 51. The fact that the Claimants commenced and maintained their claims knowing the terms of the HOTS does not, in my view, alter that position. The obverse position is that AIG took its chances that the HOTS would not have the impact on any section 51 application made in due course that it contended it would, the threat to make such an application having been made on behalf of the Claimants at an early stage.

78. In my view, where an indemnity insurer substantially relinquishes control of the conduct of the litigation to the insured (or fails to take steps to control it when there

are grounds for intervening), and does so in the expectation that it will be immune from a costs liability towards the opposing party if the opposing party is successful, that expectation is open to be falsified by the court in a section 51 application, particularly if the prospects of success for the insured are assessed as poor.

79. I would see that as the essential basis for making an order in this case and as a stand-alone factor that opens up the broad discretion conferred by section 51. To the extent that any broad support is required from previous authorities, then the reciprocity/asymmetry issue referred to in the *Travelers Insurance* case (see paragraphs 15-20 above) offers some support, albeit that the facts were rather different in that case, as does *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12.

80. I would add that, in my judgment, Mr Majumdar was right to say that the arrangement reflected in the HOTS was one which benefited AIG because, certainly vis-á-vis the Giambrone partners, the aggregation issue became settled at a time when there were doubts about whether AIG's interpretation of the policy provisions and the MTC was correct. As he says, the "consequence of a successful defence would have been that AIG's alleged right to aggregate would not need to be tested." This means that permitting the defence costs to be underwritten in the way for which the HOTS provided did benefit AIG. I accept, of course, that the arrangement (and thus the payment of the defence costs) was not for AIG's sole benefit, but that it obtained some material benefit from the arrangement is a cumulative factor that adds weight to the making of an order under section 51. Whether the case of *Woodman* (see paragraph 44 above) now makes any difference to the position on aggregation is not relevant for that purpose.

81. In the context of the HOTS, I should record that Ms Mulcahy asserts that the Claimants will be bound by the HOTS because they stand in the shoes of the insured for the purposes of the Third Party (Rights Against Insurers) Act 1930. I should make it clear that I have not heard argument on that issue and to the extent that it is an issue, it is for another day.

82. In responding to the section 51 application, Ms Mulcahy has also placed very considerable reliance upon the efforts made by AIG (through instructions given to RPC) to settle the underlying litigation. Whilst she tells me (and I accept without attributing responsibility for it) that I may not have seen everything because of legal professional privilege issues, I have seen enough to accept that AIG did make repeated efforts to bring the litigation to an end through settlement. She criticizes the Claimants for their attitude to the negotiations, suggesting, for example, that "they set their faces against engaging properly in settlement discussions with AIG", "ignored the reality that there was not enough insurance money to compensate all who suffered losses as a result of the defaults of the Giambrone entities" and "inexplicably" declined to agree to arbitrate the aggregation dispute following a proposal to that effect in July 2013.

83. I am afraid submissions of this nature can hardly ever take matters further in this context. The exercise invited by them is very different from the familiar exercise of determining whether a particular offer has been bettered or not bettered by the result of a contested trial. The offers will have been made from AIG's viewpoint at the time they were made. It is quite clear that the responses on the part of the Claimants will have been conditioned by their viewpoint at the time of the responses. The "without

prejudice" and "without prejudice save as to costs" material simply reveals what was said on both sides. The ability of the court now to assess the validity or reasonableness of the competing positions taken then and to say that one was right and the other wrong is extremely difficult, if not impossible. I accept that AIG would wish to have settled all the claims rather than to meet the costs of seeking to defend them. Doubtless the Claimants would have been of an analogous mind in relation to the pursuit of the claims, but there were obstacles on both sides and I consider it quite impossible to attribute responsibility for the failure of the negotiations in a way that has any impact on the outcome of this application.

84. It follows that, for the reasons I have given, in principle the Claimants have established their entitlement to some award under section 51. I say "in principle" and use the expression "some award" to reflect the proposition that there is one other factor to be considered, namely causation and, following from that if established, quantification.

Causation

85. AIG submits that the Giambrone Partners would still have caused the Claimants to incur materially the same costs even without its own funding of the partners' defence costs.

86. I proceed on the basis that an argument as to causation is a legitimate argument in this context: see, e.g., in *Dymocks* (see paragraph 11 above), where the following was said:

> "Although the position may well be different when a number of non-parties act in concert, their Lordships are content to assume for the purposes of this application that a non-party could not ordinarily be made liable for costs if those costs would in any event have been incurred even without such non-party's involvement in the proceedings." (Emphasis added.)

87. This approach is borne out by the approach of the Court of Appeal in *Cormack v Washbourne* [2000] CLC 1039, 1049, *per* Auld LJ.

88. The high point of AIG's argument on this broad issue was reflected in some passages in Ms Shuttleworth's witness statement dated 2 October 2018. The background to what she said was the factual position relating to the appeal to the Court of Appeal, namely, that AIG did not fund it and did not regard itself as required under the HOTS to fund it. The correspondence referred to in paragraphs 60-66 and 69 above relate to the arguments raised by Avvocato Giambrone about that issue. Nonetheless, the fact is that the appeal was not funded by AIG – or, as it turns out, not directly by AIG.

89. In her witness statement, Ms Shuttleworth said this at [135]:

> "The Giambrone Partners issued further proceedings against AIG on 7 August 2015 …. Notwithstanding that dispute (which was ultimately settled by way of a settlement agreement dated 2 October 2015) AIG stood firm and provided no funding for the appeal to the Court of Appeal. As far as I am aware, the

> Giambrone Partners funded the appeal to the Court of Appeal personally. For the avoidance of doubt, if and to the extent that they did so with money they borrowed then that was not money borrowed from AIG. AIG has never loaned any money to any of the Defendants."

90. She also indicated that AIG also declined to provide any funding for the proposed appeal to the Supreme Court.

91. Her conclusion was as follows:

> "I infer from the fact that the Giambrone Partners managed to pursue a full appeal to the Court of Appeal and make an application for permission to appeal to the Supreme Court, instructing in each case RPC and both leading and junior counsel, that, even if AIG had not provided funding for the proceedings at first instance, then the determination and resources of the Giambrone Partners was such that the Claimants' claims would have been defended at first instance exactly or substantially as they were. That inference is fortified by the fact that, when pushed, the Giambrone Partners have in fact paid tens of thousands of pounds in adverse costs."

92. She then gave several examples including Avvocato Giambrone's payment of £70,000 in costs in relation to the proceedings before the Solicitors Disciplinary Tribunal in 2013/2014, the payment in November 2014 of a little over £11,000 in relation to a costs order of the Court of Appeal and payment of a little over £36,000 in March 2016 in respect of a costs order I made.

93. Leaving aside what has subsequently been revealed about those (and indeed certain other) payments, I am not sure that it is a legitimate inference that the partners would have funded a trial lasting several weeks from resources they were able to tap even if the claims of impecuniosity (see paragraphs 75 and 76 of the main judgment) are treated with caution. An appeal, certainly one essentially raising points of law, usually costs significantly less than a trial.

94. I will return to the appropriate inferences to be drawn in due course, but the second string of Ms Shuttleworth's argument on the causation issue is reflected in the following passage in her witness statement:

> "Even if the Giambrone Partners had defended the claims against them without any funding from AIG, as litigants in person there is no reason to believe the Claimants' costs would have been any smaller. Indeed, given the passion demonstrated at all stages by the Giambrone Partners and especially Mr Giambrone in the defence of the claims and given their lack of previous experience of civil litigation in England, it may well have been the case that the Claimants would have incurred increased costs dealing with them as litigants in person rather than dealing with RPC and counsel conducting their defences professionally on their behalves."

95. She alluded to Avvocato Giambrone's attitude reflected in the Facebook post quoted at [64] of the main judgment.

96. Again, I will return to that possible scenario in due course.

97. It was the giving of the examples referred to in paragraph 92 above that caused the Claimants' solicitors to take what I have already characterised (see paragraph 51 above) as the "surprising" step of contacting Avvocato Giambrone. That resulted in a witness statement from him (by virtue of which he waived privilege to a degree) and a witness statement from Mr Buchan, each dated 23 October 2018. Ms Shuttleworth responded to that evidence in a witness statement dated 6 November 2018 (to which she exhibited her file of correspondence concerning the negotiation of the HOTS, some features of which were redacted). Witness statements from Mr Lawrence Fine, former Global Head of Professional Liability Claims for AIG, and Mr Stuart Webster who was the claims handler with day to day responsibility for approving and processing payments by AIG in the litigation, both dated 6 November 2018, were also lodged.

98. Avvocato Giambrone's statement contains allegations of bad faith by Kennedys and AIG in relation to the circumstances in which the HOTS were concluded. In short, he says that at that time he was obliged to find £70,000 to pay the costs order made by the SDT following the disciplinary proceedings. He and Mr Buchan had been in discussion with AIG, through Kennedys, in trying to resolve the amount of a payment to be made to the partners for the time that Mr Buchan and another person had spent in trying to reconstruct the partnership accounts and ledgers so that the partnership could respond to the claims being made. Until Avvocato Giambrone's statement there had been no suggestion that this claim was not justified, the only issue being the amount. Eventually, the sum of £100,000 was agreed, but what Avvocato Giambrone now says, as I understand it, is that this was an arrangement made so that he could discharge the costs order and had nothing to do with reimbursing the partnership for the work done.

99. This is strongly refuted by Ms Shuttleworth and Mr Webster. It forms no part of my remit to decide which version is correct, but I should say that Avvocato Giambrone's account seems far-fetched and not consistent with the contemporaneous documents. What is true is that the HOTS were being discussed at the same time as the payment for the work done and it is plain that there came a time when AIG wanted both matters resolved. That is evidenced by the following email sent by Ms Shuttleworth to Avvocato Giambrone on 4 February 2013:

> "I have taken instructions from AIG concerning a contribution of £100,000 in respect of your claim for reimbursement of defence costs and confirm that AIG is willing to offer this sum on condition that it is in full and final settlement of all claims for reimbursement of costs by the partners, Giambrone & Law LLP and its successors and on the basis that the revised Heads of Terms of agreement as sent through on Friday evening are agreed." (Emphasis added.)

100. In relation to her knowledge of Avvocato Giambrone's liability for the SDT costs, she says this:

> "I was not aware of the terms of Mr Giambrone's costs liability in the SDT proceedings. I did become aware during the course of the negotiation for the HOTS that he had a liability. That seemed to be one of the reasons he was pressing for reimbursement of defence costs although I do not know if he would have paid them anyway."

101. Like so many aspects of this case, this issue has acquired "State trial" dimensions when, in reality, it is of only marginal significance. However, I think Mr Majumdar is justified in contending that in the circumstances outlined, it was not appropriate to invite the court to draw the inference that Avvocato Giambrone had access to resources enabling him readily to discharge the costs liability of £70,000 even if, as I am sure is the case, there is every reason to be cautious about what he says about his personal finances. In one sense, this is confirmed by another passage in Ms Shuttleworth's witness statement dated 6 November 2018 when she said this:

> "In paragraph 10 of Mr Buchan's statement, he asserts that Kennedys was aware that 'Mr Giambrone did not have the funds to settle his obligations to the SRA.' …. I do not recall that Kennedys had a detailed knowledge of Mr Giambrone's financial situation one way or the other. It is fair to say that he pleaded impecuniosity when it suited him whilst at the same time operated a practice in Italy which purported to be successful and regularly took extensive holidays abroad. My own impression was always that it suited Mr Giambrone's interests to plead poverty but I took his representations with a pinch of salt. Even now my understanding from my dealings with him is that Mr Giambrone carries on business as a lawyer, engages in international travel and utilises various fixed and movable property …."

102. I do not intend to extend this part of the judgment much further. On the evidence now available, it has been demonstrated that quite a number of further obligations in relation to costs orders (including paying the £11,000 odd balance of the Court of Appeal costs in November 2014) were met from funds actually made available to Avvocato Giambrone by AIG although not supplied by AIG for that express purpose (with the possible exception of one that may have been supplied with that in mind). Whilst it is quite correct that AIG did not fund the appeal to the Court of Appeal, the net effect of a mediation that took place in Rome in October 2015 is that AIG paid £195,000 to Giambrone Consulting Limited on 12 October 2015, a time when actions had to be taken to move the proposed appeal forward. Mr Webster and Mr Fine say that the payment had nothing to do with the appeal although Mr Fine accepts that he knew that the money might be used to fund the appeal.

103. Again, the only relevance of all this for present purposes is that it must have appeared to AIG that Avvocato Giambrone was using the monies provided by them for the purposes of discharging liabilities in connection with the litigation and, accordingly, the inference that he had substantial other resources upon which to draw could not properly be drawn. In my view, Mr Majumdar was justified in making that submission.

104. Despite the conclusions to which I have referred on the material now available, one other factor has emerged that adds support to questioning the reliability of anything Avvocato Giambrone says in the context of this case. In his recent statement he said this:

> "In my affidavits of 17 February 2014 and 19 February 2015, I said that the monies to pay both the SDT costs and the balance of costs under the Court of Appeal's order of 3 November 2014 had come from an unsecured loan from a friend. I accept I had not made clear that in fact the monies had come to me indirectly from AIG."

105. What he had said in his affidavit of 17 February 2014 was this:

> "In respect of the remaining £11,162.75, I did not have any money to pay that so I borrowed £11,162.75 on an unsecured basis from a friend who is not a defendant in these proceedings. We have no time to formalise the agreement, which is that I will pay him back in full when I can afford to do so."

106. I do not have his affidavit of 19 February 2015 to hand, but it would seem that a similar misrepresentation of the true position was advanced in that affidavit.

107. I do not, therefore, consider that I can infer that Avvocato Giambrone, or the partnership more generally, could lay his or their hands on the kind of money (apparently approximately £1.5 million) required to fund the defence of the claims if AIG had not been the funder. Despite his protestations of impecuniosity, I would think it highly likely that Avvocato Giambrone would have been able to obtain sufficient funding to obtain some advice on the position in the UK courts, probably at Leading Counsel level, if he had wanted to do so. By the time that the Claimants in these proceedings came on the scene, however, he would have had the benefit of the advice of an experienced English solicitor (given in 2010) that the claims would be extremely difficult to defend. It is difficult to believe that he would ever have received truly optimistic advice (say, 66% or more) from a reputable and experienced source about the prospects of success and the evidence suggests that he never did.

108. Although plainly a mercurial character, my assessment of him is that Avvocato Giambrone is as much, if not more, a businessman than a lawyer and, against the background of advice of the nature indicated in the previous paragraph, if he was acting personally in the litigation or was funding it personally to a degree, I have no doubt that he would have been much more circumspect about his potential exposure to a costs order against him notwithstanding his occasional outburst about the way the Claimants were pursuing him (see paragraph 95 above). As it was, I have little doubt that he extracted every conceivable benefit from the liberal funding given to him by AIG since it cost him nothing (see further at paragraph 110 below) and he was in a position to refuse for a long time any settlement that would have exposed him to any personal liability. If acting without AIG's support so far as defence expenditure was concerned, he would have been assessing his position by reference to what he could do to maintain his business and the reputation it appears to have acquired. I cannot see him deciding that that could be achieved by pursuing on his own (or perhaps with the assistance of a friend to act as an advocate) a trial lasting 18 days. So far as any

future application to be readmitted as a Registered European Lawyer was concerned, he had complied with the order of the SDT (see paragraph 98 above). I think it is likely that he would have tried to "cut a deal" which would be attractive to the Claimants, though whether that could have been achieved without the co-operation and support of AIG (with a loosening of its position in relation to aggregation) is itself doubtful. Ultimately, he might well have simply walked away from the litigation, not contested the trial in any meaningful way, and then made enforcement of any judgment difficult, if not impossible, in the practical sense. On that basis, a good deal of the Claimants' costs of trial would not have been incurred, although there would have been expenditure over enforcement. I am, however, going to assume that the Claimants would have to have prepared the case for trial and may have had to satisfy the court that the claims were made out.

109. It follows from the foregoing analysis that I do consider that AIG's funding of the defence did materially increase the costs expended by the Claimants in pursuing the claims. The question is by how much?

Quantification

110. It is quite impossible to perform the task of deciding what proportion of the costs incurred by the Claimants would not have been incurred but for the support for the defence given by AIG other than on a broad impressionistic basis from the vantage point of being the judge who presided over the trial. Avvocato Giambrone had a more or less free hand in dictating the tactics of the trial and I have little doubt that he did just that. Ms Shuttleworth says that "AIG certainly did not adopt or pursue a strategy of delay or a policy of making life difficult for the Claimants." I am, of course, prepared to accept that no conscious decision to that effect was taken by AIG, but the issue is to a large extent determined by an objective appraisal of what in fact happened. As I observed in both judgments and the Final Ruling on Costs, every possible point was taken on behalf of the Defendants and such concessions as were made were made very late and made only when the position being maintained hitherto was plainly untenable. The objective observer, which I was for this purpose, could readily conclude that this was a war of attrition, but one which would probably have been substantially avoided if AIG's funding had not been provided and AIG had exercised proper control over the expenditure.

111. I have little option but to conclude this judgment with the time-honoured expression "doing the best I can", but on that basis I consider that the Claimants will have spent twice as much on pursuing their claims than they would have done if AIG had not funded the defence of the claims in the way it did after the HOTS were concluded. That may be being somewhat generous to AIG, but I have elected to err on the side of caution. AIG has accepted that it controlled the defence of the claims against the LLP until it ceased funding those claims and, unless I have overlooked some nuanced argument in relation to that aspect, I do not see why the order to be made under section 51 should not be the same for the whole period during which AIG was funding the defence of the claims brought by the Claimants in this action during the time they were represented by PM and EC. In other words, although AIG ceased funding the defence of the claims against the LLP prior to the trial, the order should be one that provides that AIG should pay one half of all of their costs, not merely up until AIG stopped funding the defence costs of the LLP.

Conclusion

112. I will invite Counsel to agree a form of order giving effect to this decision, but I apprehend that it will be an order that requires AIG to pay one-half of the costs of the Claimants, to be assessed on the standard basis if not agreed.

113. I repeat my expression of gratitude to Counsel for their assistance and I include the solicitors' teams on both sides. Whatever differences may have arisen at various times, it has not got in the way of presenting the material to the court in immaculate fashion for which I express my thanks.

APPENDIX 1

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

BETWEEN

Claims: HQ14X02923

HQ14X02917
HQ14X02920
HQ14X02918
HQ14X02921
HQ14X02922
HQ14X02919
HQ14X03091

VARIOUS CLAIMANTS

Claimants

-and-

GIAMBRONE & LAW (A FIRM) & OTHERS

Defendants

MR JUSTICE FOSKETT

PROVISIONAL RULING ON COSTS

12 February 2016

1. The remaining issues following the trial of the generic issues held in March 2015 and the applications for summary judgment heard in October 2015 relate to the costs of those proceedings. The substantive judgment was given on 7 July 2015 (see [2015] EWHC 1946 (QB)) and the Supplemental Judgment was handed down on 17 November 2015 (see [2015] EWHC 3315 (QB)).

2. It had been my intention that the costs of the trial would be dealt with on the basis of written submissions and I did indeed receive written submissions on the issue from the parties during late July and August 2015. However, in view of the then proposed application by the Claimants for summary judgment, the matter was left unresolved and I intended to return to it (on the basis of the written submissions) after those applications had been dealt with.

3. After the decision on the summary judgment applications (on which the Claimants succeeded) I received various communications from the parties about the costs issue generally, including the costs of the summary judgment applications. I was unable to allocate

sufficient time before the Christmas vacation to deal with these various communications and when I sought to revisit the issue more recently I was somewhat confused about what precisely I was being asked to do and whether a further hearing was being sought. On my behalf, my Clerk contacted all parties by e-mail on 8 February 2016 indicating some provisional views I had formed on the material available, but seeking clarification of what the current issues were.

4. My Clerk received helpful responses from Mr Flenley and Mr Carpenter on behalf of the Defendants and from Mr O'Brien (solicitor for the PM Claimants) on the following day (9 February). She had received an indication from Edwin Coe on behalf of their clients of their position in a letter dated 14 December 2015 and my understanding of an e-mail to her from Mr David Greene on 4 February 2016 is that the position from their point of view remains as stated in the earlier letter.

5. The problem appears to be the possible existence of Part 36 or other offers of settlement.

6. The Defendants, in particular, take the primary stance that I should not consider any issue as to costs until the whole case is concluded - in other words, on the assumption that my decisions remain unaffected by the proposed appeal of the Defendants to the Court of Appeal, not until I have decided any unresolved issues concerning the financial relief to the Claimants which would be the next step in the proceedings. They say that if I was to make decisions as to costs now (either in relation to the generic issues trial or the summary judgment applications) and to do so justly, it might be necessary for me to see what is currently privileged material and, having done so, I would be sufficiently embarrassed by the knowledge thus obtained to preclude me from dealing with the next stage in the proceedings. They suggest that another judge should consider (presumably having seen any privileged material to which any party wishes to draw attention) my ability to deal with the issue of costs. Mr Flenley and Mr Carpenter have said this:

> "In the event that another Judge were to decide that Mr Justice Foskett could deal with the issue, then the Defendants would have no objection to Mr Justice Foskett making the substantive decision, but they would need the opportunity to put in further written submissions as their written submissions to date have not addressed all of the relevant material."

7. Both sets of Claimants say that I should simply deal with the issues of costs in the ordinary way at this stage and consider the question of possible recusal from further involvement in the case thereafter if the issue arises. I do not think there is any material difference between their respective positions, but I will record what I believe those positions to be in case there are any subtleties that I have overlooked.

8. So far as the EC Claimants are concerned, Edwin Coe said this in their letter of 14 December 2015:

> "We believe that the costs of the EC claims can be determined both in relation to the summary judgment application and the general costs of the claims, if the EC Claimants agree to limit their claims, as described above[3],

[3] i.e. to limit their claims to the judgment for sums equivalent to their deposits and appropriate interest provided that the judgment remains unaffected by the proposed appeal to the Court of Appeal.

> to the sums awarded in the summary judgment. The EC Claimants filed and served a statement of costs in relation to the summary judgment application and ask that this be summarily assessed. We can see no impediment to Foskett J dealing with the EC Claimants' costs of the claims. We are not aware of any communications between this firm and RPC which would preclude Foskett J from dealing with the issues. If RPC for the Defendants take a different view, they will no doubt set out their position.
>
> We are not privy to all without prejudice communications (if any) between Penningtons Manches and RPC. It is in our view important that Foskett J should continue to deal with these claims.
>
> We suggest it may be sensible therefore for Foskett J to determine the Defendants' liability for the costs of the EC Claimants, both in the summary judgment application, and generally, separately from (and prior to) any determination of whether any Part 36 Offers passing between the Penningtons Manches Claimants and the Defendants can be before the Court."

9. RPC did disagree with the view expressed in the penultimate sentence of the first paragraph quoted above and said as follows in an e-mail of 4 February 2016:

> "We consider that we cannot state our position on this issue without risking disclosing whether relevant privileged correspondence has passed between RPC and Edwin Coe. For that reason, our position remains that this issue ought to be dealt with by a different judge."

10. The position of the PM Claimants on the suggestion made by the Defendants is as follows:

> "It does not appear likely to the PM Claimants that any material or submissions put before the Judge to resolve these issues would compel the Judge to recuse himself, and it is my clients' preference that Foskett J deal with these issues given his familiarity with the case. We also do not agree that it should be for another judge to decide what material Foskett J should see in order to reach his decisions on costs: that should be a matter entirely for him."

11. Since there is no agreement on the way forward I must decide how to proceed.

12. The position, subject to the outcome of any proposed appeal, is that both sets of Claimants were the substantive victors at the generic issues trial and in the summary judgment applications. The summary judgment applications were consequent upon the outcome of the generic issues trial and, whilst strictly speaking those applications were separate from that trial, they were in reality simply a supplementary part of the trial process.

13. Subject to the matters mentioned below, the position ordinarily would be that the Claimants would be entitled to their costs of both the trial and the summary judgment applications. The PM Claimants would wish to postpone consideration of whether the basis for the assessment of any costs of the trial should be on an indemnity basis or the standard basis, and say that there should be an interim payment on account in the meantime. The EC Claimants do not, as I understand it, invite any adjournment of the issue of the basis of assessment, but seek an interim payment on account also. On the summary judgment

applications, I believe both sets of Claimants will seek an order for costs by way of summary assessment. The hearing took less than one day.

14. So far as the trial of the generic issues is concerned, the PM Claimants estimate that the amount of the base costs is a little over £1.5 million and the EC Claimants say theirs (inclusive of VAT) is about £1.8 million.

15. However, the Defendants ask me to proceed "on the assumption that offers might have been made which might in some way affect the costs order which the Court would otherwise make now" and that consequently the costs should be reserved. That assumption, it is said, arises from the proposition that the version of Part 36 that is applicable to the relevant period in this case (i.e. the version in force until 1 April 2015) precludes the trial judge from being told whether a Part 36 offer has been made until the conclusion of the entire proceedings and does not permit disclosure following a split trial: *Beasley v Alexander* [2013] 1 WLR 762. It appears to be the proposition also that an offer 'without prejudice save as to costs' (but outside Part 36) - traditionally called a *Calderbank* offer - is similarly not permitted to be disclosed.

16. In the e-mail sent by my Clerk I ventured the provisional view that, having read the relevant parts of the CPR and the authorities to which I was referred, "none of the provisions of Part 36 of the CPR or of any of the authorities … prevent [me] from being told that a Part 36 offer (or indeed a *Calderbank* offer) has not been made." Mr Flenley and Mr Carpenter have said this in response:

> "We agree that the Judge can be told that no Part 36 offers have been made, but submit that the Court cannot ask the question without putting the parties in a position where the answer will inevitably reveal whether or not Part 36 offers have been made. Therefore, unless told otherwise, the Court should proceed on the assumption that Part 36 offers might have been made …."

17. How is this apparent impasse to be resolved? My starting point is that, as the trial judge for the generic issues trial and the summary judgment applications, I should decide the issues concerning the costs of those proceedings. If that involves considering the impact of any offers of settlement drawn to my attention, then, since I am plainly in a better position than any other judge to assess the potential impact of any such offer on costs, I should take responsibility for doing so. I will almost certainly be in a better position than most to assess whether my knowledge of any such offer would embarrass me in hearing issues concerning financial relief in due course and whether I ought to recuse myself from doing so. I have already communicated to the parties my view that such a decision is a discretionary matter and judges are well used to putting out of their minds irrelevant and inadmissible material. Obviously, I am in no position to judge that issue at this stage, but I am not prepared to accept, simply on basis of the assertion of one party, that I will necessarily be obliged to recuse myself in that situation. However, it is quite impossible to foresee the outcome of that issue at this stage and I will confront it if and when it arises.

18. In deciding as I have I have borne in mind the considerations referred to by Mr Flenley and Mr Carpenter, having drawn my attention to *Weill v Mean Fiddler Holdings Ltd* [2003] EWCA Civ 1058 and *Beiber v Teather & Greenwood* [2012] EWHC 539 (Ch), that I should be cautious about making an immediate order for costs part way through a staged trial - and indeed I have also borne in mind what Jackson J, as he then was, said in *Multiplex Constructions (UK) Limited v Cleveland Bridge UK Limited* [2007] EWHC 659 (TCC) at [26]:

> "I deduce from the authorities which have been cited that, following the trial of a preliminary issue, the court may make an order for costs in favour of the party that has won that issue. Before doing so, however, the claimant must consider all the circumstances of the case. If the judge is told that the unsuccessful party on that issue has made a payment into court, or a Part 36 offer, the normal order should be to reserve costs. Nevertheless, in an exceptional case, despite such a payment in or offer, the judge may still make an immediate order for costs if the circumstances warrant such a course."

19. Arising from this formulation, Mr Majumdar has made the point that whilst reserving costs is the "normal order" when the judge is told that there is a Part 36 offer, in this case I am being told no such thing and, as a result, the "normal order" need not be made.

20. I agree with that analysis as it stands, but more importantly the fact is that there was a 4-week generic issues trial (following several case management hearings when the framework of that trial was considered in detail) in accordance with the wishes of all parties, including the Defendants. Whilst I recognise the possibility that the Defendants may draw my attention to an offer of settlement (whether in Part 36 form or otherwise) that might change my view of the Claimants' immediate *prima facie* entitlement to all their costs of the trial, subject to assessment, (see paragraphs 25 and 28 below) irrespective of the outcome of the financial relief part of the proceedings, I do not consider that the mere possibility of such an offer should preclude me from considering the issue now.

21. Before indicating what I propose, I should address the question of whether I can make an order for costs in favour of one or other set of Claimants at this stage, but deferring (or adjourning) the issue of the basis of assessment until the conclusion of the whole case. The Defendants argue that I cannot make such an order. It is suggested that if I do so any such order will be "incomplete and defective". Alternatively, it is argued that if I do make an order in which the basis of the assessment is deferred, the effect of CPR 44.3(4) is that the order would be deemed to be made on the basis of a standard assessment.

22. I have indicated my provisional view to the parties that there is nothing in the CPR that prevents an order for costs to be made (the existence of which would then permit the making of an interim order) with the basis of assessment being adjourned or postponed until a later date or that doing so has the effect suggested. I have revisited the issue since seeing the e-mail from Mr Flenley and Mr Carpenter which adheres to the position outlined in an earlier note they prepared about this issue.

23. I am sure I have seen such orders made in other cases and I am unaware of any submission such as that made by the Defendants having been made or having succeeded in other cases. Doubtless I would have been referred to any such case if it had. However, irrespective of that fact, I do not consider that the CPR constrain the court's powers as the Defendants seek to argue. There is, in my judgment, nothing in the Rules to prevent the court from deferring (or adjourning) the issue of the basis of assessment until a later stage in the proceedings having made an order for costs to be assessed by the court in due course. CPR 1.2 requires the Rules to be implemented and interpreted in a way that gives effect to the overriding objective. If it not possible for the court to decide whether an award of costs which is otherwise justified should be on the standard or the indemnity basis (because, for example, any offer that might impact on that decision cannot be referred to or that there are issues concerning the conduct of the litigation that could more conveniently be left until a later stage), I can see nothing unjust (indeed quite the converse) in adjourning consideration

of the question of the basis of the assessment until the issue can be considered properly and fully. The only impact that adopting such a course could have on an interim payment is that the court should, in my view, ordinarily adopt the cautious approach of assuming that the assessment will be on a standard basis rather than an indemnity basis pending final determination of that issue. Furthermore, it should in any event be recalled that there is always power to order the re-payment of sums paid on account if the order is shown subsequently to have been inappropriate.

24. It follows from the foregoing that I propose to consider the issue of the costs of the trial and the summary judgment applications personally and at this stage. I see no basis for taking the very unusual step of inviting another judge to decide whether I should consider the issue. I will retain an open mind about the consequences of taking this course, but I am aware of the likely position of each of the parties.

25. So far as the costs of the generic issues trial are concerned, there will be an order in favour of each set of Claimants (in the form referred to in paragraph 28 below) for their costs of that trial unless within 14 days of the sealing of the order giving effect of this decision the Defendants lodge with the court and serve upon the Claimants' solicitors written representations as to why such an order should not be made. Those written representations are to include reference to the terms of any offer of settlement relied upon by the Defendant which is said to affect the order that otherwise is proposed and copies of any such offer(s) must be attached to those written representations. The Claimants should reply in writing to those representations within 7 days.

26. So far as the costs of the summary judgment applications are concerned, again I shall award those costs to each set of Claimants subject to the same proviso concerning written representations from the Defendants as the proviso which applies to the costs of the generic issues trial.

27. So far as the summary judgment applications are concerned, I propose summarily to assess the costs of those applications. I have a schedule of costs from the EC Claimants, but I do not have such a schedule from the PM Claimants. Any schedule from the PM Claimants must be served on the Defendants and lodged with the court within 7 days of the sealing of the order giving effect to this Ruling. The Defendants may make written representations about that schedule (and the schedule of the EC Claimants' costs) within 7 days thereafter. The Claimants may reply within 7 days if so advised.

28. So far as the costs of the generic issues trial are concerned, subject to any further submissions about the basis of the assessment of those costs in the light of any offer of settlement relied upon by the Defendants (to which reference must be made in the written representations to which I have referred), the basis of the assessment will be adjourned to the conclusion of the proceedings.

29. Again, subject to the written representations to be received from the Defendants, I propose that each set of Claimants should receive £1.2 million by way of payment on account of the costs of the generic issues trial.

30. I will ask Mr Duddridge and Mr Majumdar to prepare as soon as possible a draft order giving effect to this Ruling and submit it to Mr Flenley and Mr Carpenter for agreement. It should be with me in its final form within 7 days of receipt of this Ruling.

APPENDIX 2

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

BETWEEN

Claims: HQ14X02923
HQ14X02917
HQ14X02920
HQ14X02918
HQ14X02921
HQ14X02922
HQ14X02919
HQ14X03091

VARIOUS CLAIMANTS

Claimants

- and -

GIAMBRONE & LAW (A FIRM) & OTHERS

Defendants

MR JUSTICE FOSKETT

FINAL RULING ON COSTS

19 May 2016

Introduction

1. I gave a Provisional Ruling as to costs in this matter on 12 February 2016. The parties helpfully agreed a form of order giving effect to that ruling which incorporated a timetable for the lodging of written submissions concerning the remaining issues. That order was sealed on 21 March 2016. The terms of that order are set out in the Appendix to this Ruling. The timetable was extended by agreement and I received the PM Claimants' submissions late on Friday, 22 April.

2. There are two principal issues: (i) whether I should confirm the provisional order as a final order so far as the costs of the main action are concerned or whether, as Mr Flenley and Mr Carpenter submit, I should order the Claimants to pay the Defendants' costs from 2 March 2015 onwards; (ii) whether I should confirm the provisional order as a final order so far as the costs of the summary judgment applications are concerned or whether, as Mr Flenley and Mr Carpenter submit, the Claimant should be ordered to pay the Defendants' costs of those applications from 30 September 2015 onwards. If I were to confirm the provisional order in relation to the costs of the summary judgment applications, I am asked to assess those costs summarily. It has been agreed that I should leave that matter over pending my decision on the main issues.

3. I will not repeat what was set out in the Provisional Ruling, but I indicated that if offers of settlement by or on behalf of the Defendants were relied upon, I would need to have them drawn to my attention. The Defendants have now revealed the offers that they seek to rely upon and, in doing so, have revealed communications emanating from the two sets of Claimants. Since any response to a "without prejudice" offer is itself covered by the "without prejudice" privilege, it is, strictly speaking, for the Claimants to say whether they are content for their own responses to be revealed. However, since no objection has been taken (and indeed express reference to these responses has been made in the submissions made by both sets of Claimants), I propose to assume that there is no objection to my seeing these communications. I recognise, of course, that I must take into account any admissible offers to settle and that the approach is not as confined as consideration of a Part 36 offer (see, e.g., *Coward v Phaestos Ltd* [2014] EWCA Civ 1256), but I would observe that an "offer" is indeed an offer, not the equivalent of an invitation to treat.

The costs of the trial

4. It is worth reminding myself at the outset that the trial in March 2015 lasting 4 weeks was a trial of certain agreed (or directed) "generic issues" – it was not the trial of the whole action as such. This was what the parties wanted, including the Defendants. As I observed in paragraph 10 of the main judgment, almost every issue raised by the Claimants was "hotly contested". A few matters were conceded during the trial, but all major issues were fiercely fought by the Defendants. The revelation of some of the "without prejudice" material indicates that the Defendants had little confidence in success on many of the major issues, but nonetheless the proceedings were fought and no admissions or concessions were made on the principal issues that formed the subject matter of the trial. That position was maintained throughout the trial even though many individual claims had been settled prior to the hearing.

The Defendants' appeal to the Court of Appeal, for which they have obtained leave, is of no direct relevance to my decision, but I would observe that I do not know the basis upon which leave has been granted and I do not know whether all the matters that were contested at the trial are still the subject of contention. The application for permission to appeal made to me was limited to the matters to which I referred in paragraph 46 of the judgment handed down on 17 November 2015. If that remained the position in relation to the application to the Court of Appeal for permission to appeal, it would seem that a good many of the matters that had been in issue at the trial are now no longer issues. On that basis general liability for breach of duty does not now appear to be disputed although my conclusions as to breach of trust remain in issue.

5. All this is only relevant to the proposition that a very great deal of the time at the trial was spent in litigating issues about which there appears no longer to be a dispute and about which there was little confidence of success prior to the trial. Notwithstanding that situation, I am being asked to award the Defendants the costs of the trial. For such an application to succeed I would certainly anticipate being shown an offer that matched or over-topped that which the Claimants succeeded in obtaining at the generic issues trial, together with an appropriate offer of costs in relation to those matters. The starting point for my consideration of whether I should adjust the position I adopted in my provisional ruling is, one would have thought, whether such an offer has been made. It may not be the end of the issue given that such a trial is simply a staging post on the way to a final resolution by the court, but it may at least constitute the start. However, it is not being suggested by the Defendants that any offer limited solely to the generic issues trial was made which ought to influence the decision as to costs. What is suggested is more complicated than that. The argument starts with the position taken by the Defendants' insurers, AIG.

6. In paragraph 73 of the principal judgment, I alluded to that position, namely, that they had a right to aggregate all the claims relating to developments in Calabria where VFI was the promoter. The net effect of that position, if the insurers are indeed entitled to aggregate the claims, is that there is no money from that source to pay the Claimants in this action any damages or any costs for which the insured are responsible (see paragraphs 74 – 76 of the principal judgment). The claimed right to aggregate the claims could be challenged by the Claimants pursuant to the mechanism provided for by the Third Parties (Rights Against Insurers) Act 1930[4], but that is contingent on two conditions: (i) that the existence and amount of the insured's liability to the third party have been established and (ii) that the insured has become bankrupt or made a composition or arrangement with his creditors. In that situation, there is a statutory assignment of the insured's rights against the insurer to the third party. The third party (in this case, the Claimants) could challenge the right to aggregation. However, in principle, where (as here) the third party would be relying upon the findings made by a court, the insurer would not necessarily be bound by those findings: *Omega Proteins v Aspen Insurance* [2011] Lloyd's Report IR 183 and *Enterprise Oil Limited v Strand Insurance Co Limited* [2006] 1 Lloyd's Rep 500. It remains open to the insurers to dispute that the insured was liable, either at all or as based on the court's findings, and/or to demonstrate that the liability fell within an exception to the policy.

7. For the Claimants in this case to avail themselves of this mechanism, it would in the ordinary course of events be necessary for them to await the outcome of the issues of liability and, if liability is established, of quantum. What the Defendants seek to point to is an offer

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[4] The 2010 Act is not in force yet.

(or various offers) that, if accepted by the Claimants, would have short-circuited this procedure. The essential approach underlying each such offer made before the trial was that the Defendants would, in principle, accept liability to the Claimants in sums that were quantified and that the Claimants would have, in effect, immediate access to the mechanism under the 1930 Act without having to bankrupt the individual Defendants before doing so. It was a condition of each such offer that all Claimants should accept it. Each offer was made on behalf of AIG as well as the individual Defendants. The individual Defendants sought, as part of the proposed settlement, a release from any personal liability, contingent or otherwise.

8. The first offer made along these lines was made "without prejudice save as to costs" in a letter dated 7 January 2015 from RPC to Pennington Manches LLP and to Edwin Coe LLP and thus just over 7 weeks before the commencement of the trial. The letter runs to 8 pages. The essence of the offer was that each Claimant would receive "90% of the deposit … paid … excluding … the *acconto*" and that simple interest of 3% per annum would be paid on that sum from the date of payment of the deposit to the date of the letter. However, those sums would be paid by AIG "only in the event of the Claimants' success in future 1930 Act proceedings against AIG …." The same contingency was to be applied in relation to the costs of the proceedings – in other words, a failure by the Claimants in the 1930 Act proceedings would not result in the payment of their costs of the present proceedings and, further, the costs of the 1930 Act proceedings were also to be at large.

9. The terms upon which AIG would approach the 1930 Act proceedings were spelt out in the following paragraphs of the letter:

> "In the context of this 1930 Act Mechanism the court will be asked to proceed on the basis that (a) the claimants have obtained default judgments in the sums quantified in the schedule and on the basis of their pleaded claims; and (b) that the defendants are insolvent for the purposes of the 1930 Act. These two assumptions will enable the Claimants to invoke such entitlements as they would otherwise be entitled to if judgments were made at trial and steps taken thereafter to bankrupt the [individual Defendants].
>
> Accordingly AIG will not seek to assert in the context of the 1930 Act Mechanism that neither the [individual Defendants] nor the LLP bear any liability in respect of the Claimants' claims. However, AIG shall be entitled within the scope of the 1930 Act Mechanism to seek to establish that either the partnership or the LLP is not liable in respect of one or more of the claimants' claims and/or to prove the basis on which the liability arose or an additional basis on which liability arose. The court will proceed as if the dates of the judgments and the insolvencies were the date of the agreement. (This is necessary to ensure that AIG does not by reaching this settlement waive any rights it would otherwise have in 1930 Act proceedings consistent with the authority in *Omega Proteins v Aspen* …, to assert that a proximate cause of the liability was the unauthorised payment away of client monies for the purposes of its obligation to indemnify within the scope of the aggregation under the Policy)."

10. The terms of settlement would, it was said, be "set out in a written contract of settlement" which would include as a schedule "an agreed form of draft Tomlin order, providing for the disposal of [the claims] on the usual terms …."

11. Penningtons Manches sought clarification of the offer in a letter dated 9 January 2015, also headed "without prejudice save as to costs". They asked whether the settlement was available to the claimants on an individual basis (so that some might accept and some might refuse) and, having noted that the offer was "subject to contract", invited RPC to say "what additional terms [would be imposed] before the offer [was] capable of acceptance by a particular claimant." I have been told that there was no response to that letter. In those circumstances, I find it difficult to understand how it could be said that the PM Claimants "delayed unreasonably" in responding to the offer. I have not been shown any specific response to that offer from Edwin Coe shortly after it was made, but equally there is no letter or e-mail from RPC chasing up a response to the offer

13. I have not been given a full history of communications between the parties between then and 18 February, but I assume that there were some communications because by the time of the offer made on that day (to which I will refer shortly), the "sticking point" had been identified. The parties appeared before me on a pre-trial review on 4 February and it is hard to imagine that there were no discussions outside court on that occasion. At all events, a revised offer was put forward by RPC on 18 February (7 working days before the trial). It was essentially in the same terms as the previous offer, but it left open the possibility of the claimants pursuing Avvocato Giambrone for any shortfall under the settlement following the conclusion of the 1930 Act proceedings. The offer confirmed that it had to be accepted by all claimants. It was said to be open until 4.00pm on Friday 27 February, which was the Friday before the trial commenced on the Monday. It was said expressly to be "subject to contract".

14. That offer was rejected the same day by Edwin Coe. They indicated, whilst "quite willing to resolve the issues between our respective clients", they would require admissions from all defendants and that Avvocato Giambrone would not be released from liability, though they might be prepared to release Avvocati Bellanca and D'Arpa. Penningtons Manches replied on 20 February 2015 saying that they would prefer a reasoned judgment to be given by the court "rather than settling on terms that give AIG carte blanche to argue that the approximate cause of loss is some or other unlikely scenario in order to allow it to escape liability." They also said that they did not wish to give up their entitlement to join AIG as a party to the proceeding to enable the court to make a third party costs order. The letter concluded with the suggestion that the Defendants "could always admit liability."

15. In an e-mail dated 23 February 2015 RPC asked what admissions Penningtons Manches would want the Defendants to make and how they could be implemented. RPC made it clear that in return Avvocati Bellanca and D'Arpa would need to be protected from personal liability arising from any admissions, but proceedings based upon them could be brought against AIG "on the basis of our letter of 7 January 2015". Two alternative options for potential enforcement against Avvocato Giambrone were put forward. One was to give the Claimants the right to pursue Avvocato Giambrone personally, but only after 1930 Act proceedings against AIG had run their course, and the other was to give them the immediate right to pursue Avvocato Giambrone personally for the amount of the deposits and a delayed right to seek the costs from him (after they had been assessed on the standard basis if not agreed), but in those circumstances there would be no 1930 Act "shortcut" with the result that they would have to bankrupt him first and AIG would be entitled to assert all its rights under the policy.

16. The response from Penningtons Manches on 24 February 2015 (and confirmed in writing the next day) was that the PM Claimants were "not interested in admissions without the payment of real money." Edwin Coe had not replied by that time.

17. On 25 February 2015 (at 16.50) RPC made what they described as a "final approach" which "subject to contract" increased the settlement sums to 100% of the deposit amounts (excluding the *acconto*) and the balance of the terms were as set out in the offer of 23 February. It said that "[save] as aforesaid, the terms of the offer will be the same as those set out in the letter of 7 January." It was said to be open for acceptance until 10.00 am on Monday, 2 March, the first day of the trial.

18. No settlement occurred though discussions continued during the trial. For this purpose I can stop reciting the nature of the discussions. Mr Flenley's primary argument is that had the Claimants acted reasonably, they would have reached a settlement along the lines proposed by RPC on 25 February 2015 and would have done so in sufficient time to avoid the whole of the costs of the trial. His alternative submission, it would seem, is that they could have saved part of part the costs of the trial, presumably on the basis that they should have achieved a settlement during the trial. The reason for so contending is, he asserts, that they "are in no better position now than they would have been had the offer been accepted and in some respects are in a worse position."

19. There are, in my view, some formidable objections to this approach. In the first place, in my judgment, Mr Flenley would need to point to some unequivocal offer that resolved the generic issues trial that was not bettered by the Claimants at that trial before any such argument could be sustained. As I have observed previously, it is not suggested that that occurred. If, contrary to my view, the test is whether the offer to settle the whole proceedings ought reasonably to have been accepted, the offer was predicated on the basis that the only realistic way in which the Claimants would achieve anything arising from the litigation was to relinquish any claims against the individual Defendants and "take their chances" in the 1930 Act claim. This again is based upon what has to be the assumption that the Defendants, either singly or collectively, would not be able to pay the significant sum that has currently been assessed as payable both in respect of damages and costs. The suggestion is also made that the Claimants are proceeding against Avvocato Giambrone in this way simply because of "personal animosity".

20. In my view, the Claimants are perfectly entitled to say that, if they so choose, they do not wish to abandon their entitlement to enforce the award against some or all of the individual Defendants. It is not unreasonable, particularly in the case of Avvocato Giambrone, for them to have reservations about the veracity of what has been said about their respective financial positions. Even if he or the others do not have sufficient capital to meet the claim or any significant part of it at the present time (which is not conceded by the Claimants), there are a lifetime's earnings, in Avvocato Giambrone's case as an international lawyer, for the claimants to consider attacking in whatever way is legitimate. However, it seems to me that this is entirely a matter for the Claimants to choose and it is not for the Defendants (or the court) to make the choice for them.

21. Furthermore, for the reasons given in the responses by the Claimants to the Defendants' submissions, the Defendants (including their insurers) have nothing to lose and everything to gain from the offer of settlement made – the individual Defendants (including Avvocato Giambrone until the offer of 18 February) would effectively be exempt from any personal liability and the insurers could take any point they wished in the 1930 Act proceedings to defeat the claim, a right that would exist at some later stage in any event if the individual Defendants were made bankrupt. In the process the Claimants would lose their right to enforce directly against the individual Defendants.

22. The extant offer relied upon by the Defendants before the commencement of the trial was the offer made on 25 February, only two working days before the trial was due to commence. There were two firms of solicitors representing a good number of individual Claimants. Even had every aspect of the offer been tied down it would be difficult to regard the period given for acceptance as reasonable. However, the offer was "subject to contract". It was not unreasonable, in my view, for the Claimants' representatives to be suspicious about what they were being asked to recommend to their clients. It was perfectly reasonable for them to consider the offers as best they could because some of their clients might have been interested, but it was equally not unreasonable for them to say, as at least the PM Claimants did towards the end of this period, that they would only contemplate settlement if some money was forthcoming given that what was being attempted at that stage was a settlement of the whole claim, not just a settlement of the generic issues.

23. In my judgment, therefore, the defendants can point to no offer made before the commencement of the trial that should influence the normal order for the costs of such trial.

24. As I have indicated, discussions continued during the trial. I have been shown e-mail exchanges starting on the first day of the trial, continuing through the first week and into the first weekend. By the middle of the second week (on 11 March) all the Claimants put forward a comprehensive draft settlement agreement attached to an e-mail at 09.46. This was not addressed directly by RPC, but at 17.53 on that date, they made a "final offer … to settle this litigation". It had to be accepted by all Claimants and was "open for acceptance in principle until 10.00 am on Monday morning". It was headed "subject to contract" and contained certain admissions which AIG agreed to treat as findings of the court and in respect of which they would not raise any defence or dispute in the 1930 Act proceedings. However, there would be no right of recourse against any of the individual Defendants.

25. On 12 March the Claimants asked to see "the Italian insurance policies" before they could assess the offer properly and asked whether RPC had considered the draft agreement sent the previous day. The e-mail chain continued for another week by which time the substantive part of the trial in the form of evidence was nearing completion. There is little point in my reciting the thrust and counter-thrust of the exchanges: all that can be said is that no agreement was reached and I do not consider that the Defendants can point to any specific and unequivocal offer that ought to affect the costs of the generic issues trial. It remained open to them to make admissions before or during the trial – which indeed they did to some, albeit very limited, extent – but they did not do so.

26. For all those reasons, I see no reason to alter the Provisional Ruling I made on 12 February.

The costs of the summary judgment applications

27. The history of the summary judgment applications can be seen by reference to my Supplemental Judgment handed down at the same time as the main judgment and my further judgment handed down on 17 November 2015. Mr Flenley contends that had the claimants "negotiated reasonably" the costs of the summary judgment applications would have been avoided.

28. He seeks to make good this proposition in the first instance by reverting to the e-mail exchanges that took place during the course of the trial. He says that the Claimants' insistence that they retain the right of enforcement of any award against the individual

Defendants was an unreasonable starting point. He argues, in effect, that Avvocati Bellanca and D'Arpa are "not worth powder and shot", that the same applies to Avvocato Giambrone and, in any event, the Claimants are simply being vindictive towards him. I have already dealt with that issue (see paragraph 20 above): it is a matter for the Claimants to assess that matter and it is not, so far as I can judge, unreasonable for them to take the view they have. It is not unreasonable for them to have real reservations about what appeared in the affidavits of means, particularly the affidavit of Avvocato Giambrone.

29. Mr Flenley says that the Claimants will have great difficulty in bankrupting Avvocato Giambrone (and indeed the other Defendants), particularly if the process has to be undertaken in Italy. He goes so far as to say that, if the Defendants can only be bankrupted in Italy, the Claimants will never be able to take advantage of the 1930 Act. I do not think I am in any position to assess that proposition – again, it is a risk that the Claimants will doubtless have considered and taken into account in deciding their position.

30. Mr Flenley's submissions contain many criticisms of the alleged unreasonable stance taken by the Claimants' advisers in their demands. I will content myself by repeating that, in my view, the Claimants' advisers have had every reason to be suspicious of what was being suggested by the Defendants, whether on their behalf personally or through their insurers. Every point was being taken to obviate or diminish the Defendants' liability and/or exposure and, unless some watertight proposal was on the table, it was not unreasonable for them to be very cautious before accepting what was suggested. I do not think it reasonable for the Defendants to be critical of the Claimants' advisers in this regard.

31. Mr Flenley suggests that the offer made in RPC's e-mail of 8 September 2015 should have been accepted by 29 September, allowing the 21 days to consider it provided for in the e-mail. (I note, incidentally, that the period for acceptance of the offer of 25 February was two working days.) Again, the offer was conditional on the individual Defendants (including Avvocato Giambrone) being released from any liability. Any payment would have to await the outcome of the 1930 Act proceedings. The offer was said expressly to be "subject to agreement of detailed terms." I have to say that this does not appear to me to have advanced the substance of any offer to settle on the part of the Defendants: it was really a repetition of that which had been offered previously, albeit in light of the knowledge of the terms of the judgment.

32. Mr Flenley submits that the Claimants got no more by reason of the summary judgment application than had been offered previously. I do not think that that is so. As Mr Majumdar says, the breach of trust finding enabled the summary judgment applications to be made for specific sums of money for each Claimant in advance of the individual causation trials that it was certain that the Defendants would require if a breach of duty was established. That seems to me to constitute something more than was offered. But irrespective of that consideration, the Claimants were entitled, if they so chose, not to agree to an arrangement that absolved the individual Defendants from liability and left them (the Claimants) in a position of having no option but to pursue 1930 Act proceedings.

33. Finally, the PM Claimants did put forward a counter-offer to the Defendants through the e-mail from Penningtons Manches dated 7 October 2015 to which there was no substantive reply.

34. All that can be said, having reviewed all this material, is that there were negotiations during the period leading up to the hearing of the summary judgment applications that did not result in an agreement. I do not consider that the Defendants can point to a clear and unequivocal offer to resolve the summary judgment proceedings that ought reasonably to

have been accepted by the Claimants such that the provisional order for costs that I have made should not stand as a final order.

Conclusion

35. It follows, therefore, that I have not been persuaded that any of the "without prejudice" material that has been drawn to my attention by the Defendants alters the Provisional Ruling. The terms of that ruling may now be converted into a final order. If there is any further matter of assessment that needs to be considered, I would be grateful if my attention could be drawn to the relevant documents.