JUDGMENT : DEPUTY MASTER VICTORIA WILLIAMS, COSTS JUDGE 30th June 2008

1. This is my reserved judgment on two significant issues raised as general points of dispute in the assessment of the Claimant's bill of costs payable by the second Defendant subject to assessment. Other issues (including a possible dispute as to whether the Claimant was properly advised about insurance) remain live and fall to be determined on another day if necessary.

2. As is often the case in the Law the issues to which this reserved judgment relates are straightforward to set out but less straightforward to answer:

   (I) Is it unlawful at common law (by reason of champerty or maintenance) for a solicitor's fee agreement (in this case a Conditional Fee Agreement or 'CFA') to include a term that the solicitors will indemnify their client against the opponent's charges and disbursements in case he loses?

   (II) Is such a retainer unenforceable by reason of ss. 23 and 26 of the Financial Services and Markets Act 2000 ("FSMA") as an unauthorised 'contract of insurance' entered into in the course of carrying on business, and if it is, can this court, and should this court, nonetheless permit it to be enforceable by reason of the powers given to the court under that Act?

Background

3. A short summary of the facts will suffice. Mr Dix was seriously injured on 4 May 2002 in a road traffic accident. The first Defendant was driving a stolen vehicle which collided with that of the Claimant, and the second Defendant was the insurer of the vehicle driven by the first Defendant. Ultimately the case settled for some £675,000 plus standard basis costs by a consent order of 25 May 2007.

4. The Claimant retained Messrs Lester Morrill Solicitors to act for him in his personal injury claim, and the basis on which the representation was funded (after an initial short pre-CFA period in Part I of the Bill) was a CFA with 25% success fee dated 12 June 2002. No ATE insurance policy was recommended or taken out. The bill is in the total sum of £146,094.10 inclusive of VAT, success fee and disbursements, and the base costs for the CFA part of the bill are claimed at £73,715.

5. The CFA had the following terms about insurance and alternative funding in an adapted form of what is otherwise fairly familiar wording in such agreements. The clause which has given rise to the issues considered here is underlined in the quotation below:

   "Other Points

   Immediately before you signed this agreement, we verbally explained to you the effect of this agreement and in particular the following:

   (a) the circumstances in which you may be liable to pay our disbursements and charges;

   (b) the circumstances in which you may seek assessment of our charges and disbursements and the procedure for doing so;

   (c) whether we consider that your risk of becoming liable for any costs in these proceedings is insured under an existing contract of insurance;

   (d) other methods of financing those costs, including private funding, Community Legal Service funding, legal expenses insurance, trade union funding;

   (e) (i) in all the circumstances, on the information currently available to us, we believe that a contract of insurance is not required.

   (ii) <u>In any event, we will indemnify you against your opponent's charges and disbursements in case you lose</u>."

6. I heard submissions from Mr Morgan QC for the Claimant as receiving party and from Mr Williams for the paying party and both counsel submitted helpful skeleton arguments and each side presented a bundle of authorities. I shall for convenience divide this judgment into two separate parts (I and II) dealing with the two issues each of which are quite substantial on their own.

<u>PART (I) Illegality at common law</u>

For the Paying Party (2nd Defendant)

7. For the paying party Mr Williams argued that a CFA is a species of maintenance sanctioned by law in the form of s.58 of the Courts and Legal Services Act 1990 ("CLSA") as amended, and that but for the statutory section, a CFA would be champertous maintenance, and unlawful. He referred to ***Thai Trading (A Firm) v Taylor*** [1998] QB 781 (CA) for the review of the pre-CLSA position which appears there.

8. It was said that in a case such as this where a CFA was coupled with an indemnity entered into by the solicitors themselves indemnifying their client against an opponent's costs, the court had to look at the agreement as a whole when deciding its lawfulness and that this agreement was unlawfully champertous and contrary to public policy when thus considered. Alternatively it was unlawful maintenance.

9. He laid emphasis on the dicta of Lord Phillips MR in ***R (Factortame) v Transport Secretary (No. 8)*** [2002] EWCA Civ 932, [2003] QB 381 as a statement of the modern approach to maintenance and champerty, and I was urged to approach older authorities with caution inasmuch as older expressions such as 'a division of the spoils' were reminiscent of an earlier age. On the facts of ***Factortame*** Grant Thornton (a firm of accountants) had provided services ancillary to litigation but had not conducted the litigation. Their percentage fee arrangement was upheld on the basis that the agreement was not governed by the limitations of s.58, and on the facts it was not otherwise

objectionable on public policy grounds because the court accepted that Grant Thornton as a reputable professional firm were not likely to give in to any temptation to 'inflame' damages.

10. I was taken to the passage in the holding part of the headnote in the Queen's Bench report (which appears to be an accurate summary of the relevant passages in judgment to which it relates) which I will quote:

"… it was a question of existing public policy directed to protecting the integrity of public justice whether agreements in support of litigation were lawful, and express legal provisions such as the Courts and Legal Services Act 1990 provided a powerful indication of the limits of public policy in analogous situations; that section 58 of the 1990 Act, both in its original form and as subsequently amended, applied only to agreements for the provision of litigation or advocacy services concluded by solicitors and others authorised to conduct litigation or those with rights of audience and did not apply to contingent fee agreements, such as those entered into by GT or by expert witnesses, for the provision of services ancillary to the conduct of litigation by authorised persons; that the agreements in question were therefore not "conditional fee agreements" within the meaning of section 58 of the 1990 Act and were not implicitly rendered unenforceable thereby; and that in the absence of applicable express legal provisions the court had to look at the facts of the particular case and consider whether they suggested that the agreement in question might tempt the allegedly champertous maintainer for his personal gain to inflame the damages, suppress evidence, suborn witnesses or otherwise undermine the ends of justice, ie in any individual case the court had to ask whether the particular agreement tended to conflict with existing public policy directed to protecting the due administration of justice with particular regard to the interests of the defendant, bearing in mind the importance which public policy now attached to access to justice."

11. In view of the modern approach exemplified in ***Factortame*** it was said that the courts were required to focus on the transaction in question and ask whether it risked offending public policy. Mr Williams accepted that in general the approach in *Factortame* (which in turn extensively relied on ***Giles v Thompson*** [1994] 1 AC 142) was a flexible approach which had led to some agreements which might otherwise have been seen as objectionable in the past being treated as unobjectionable.

12. Notwithstanding the flexible approach of the courts, it was argued that public policy against champerty retained one residual area of rigour, namely the case of those who conduct litigation. He relied in that regard on ***Factortame*** at p397 at paragraph 23 – per Lord Phillips – *"When we come to consider the law of champerty we shall find that its application requires an analysis of the facts of the particular case. Special principles apply to those who are entitled to have the conduct of litigation, and in particular to solicitors."*

13. I was also taken to paras. 31-33 and in particular to the quotation there from ***Trendtex Trading v Credit Suisse*** [1980] 629 at 663 per Oliver LJ: *"There is, I think, a clear requirement of public policy that officers of the court should be in inhibited from putting themselves in a position where their own interests may conflict with their duties to the court by agreement, for instance, of so-called 'contingency fees'…".*

14. I was taken to para. 60 of ***Factortame,*** where after concluding that s.58 of the CLSA (and its restrictions on the extent of CFA's) was applicable only to those conducting litigation the court proceeded to state that *"There is good reason why principles of maintenance and champerty should apply with particular rigour to those conducting litigation or appearing as advocates".* Mr Williams argued that although the introduction of CFA's showed (and the Court of Appeal had accepted) that public policy had relaxed somewhat and was not absolute, nonetheless public policy was still to the effect that officers of the court conducting litigation may be treated differently from others.

15. The essence of the concern of public policy with maintenance was said to be about behaviour which might 'inflame or stir up litigation', whereas champerty was an aggravated form of maintenance where the maintainer might not only inflame litigation but may also be tempted, by his interest in the litigation, to suborn justice. The 'key' to champerty was a financial stake in the outcome of the litigation, and it was that stake which increased the temptations which might exist to secure an outcome which was of 'financial comfort' to the solicitor.

16. Thus whilst the older cases used expressions such as 'division of the spoils', the public policy against champerty did not depend on that specific type of financial interest but was aimed generally against arrangements which might cause the temptation to interfere with justice as a result of the solicitor's financial interest. It was said that it would be irrational for the law to condemn a solicitor for taking, for example a 1% interest in litigation which might be a very small interest in winning, whilst not also condemning an agreement whereby the solicitor was taking the risk of being liable for a potentially very large sum by agreeing to indemnify the client against an opponent's costs in the event of loss in the litigation conducted by him, and therefore had a large potential financial interest in the outcome. Avoidance of a loss under the indemnity clause was equivalent to personal gain.

17. ***Giles v Thompson*** [1994] 1 AC 142 was cited as a case in point where focussing on the specific nature of the transaction (in that case, instances of 'credit hire' agreements with (in at least one instance) conditional liability for hire fees) had led to the conclusion that on the facts the credit hire agreements were unobjectionable. Mr Williams relied on dicta of Steyn LJ in ***Giles v Thompson*** in the Court of Appeal ([1993] 3 All ER 321) to the effect that the purpose of the doctrine of champerty was to protect the integrity of public justice and that it was intended to protect the party confronted with the litigation, and that the court should consider whether a particular agreement had the tendency to corrupt public justice, and that required the 'closest attention to the nature and surrounding circumstances of a particular agreement'.

18. Applying the test thus set out, it was the second Defendant's case that the CFA was just such an agreement and fell foul of current public policy. What one had here was a transaction exposing the solicitor to the temptations against which the modern policy was directed. The solicitor provided conditional fee terms and an indemnity against costs, which were an integral part of the retainer and were the sorts of things clients were most worried about, as part of the financial arrangement. There were two types of direct interest in the outcome namely the conventional 'division of the spoils' under a CFA and also the open ended liability taken on by the solicitor for adverse costs. That was the basis on which the solicitor acted and the court was to be concerned with the question whether this was a transaction which might have led to the temptation to act contrary to the interests of justice. It was also not a type of agreement specifically authorised by s.58 of the CLSA, and there was nothing in that section which prevented the court from finding that the agreement was unenforceable for reasons related to the nature of the solicitor's financial interest in the case.

19. The extent to which maintenance of actions by solicitors is permitted was described as being led by public policy but the limits of lawfulness were said to be demarcated by Parliament, and that it ought not to be for the Courts to extend or create newly acceptable categories: ***Awwad v Geraghty & Co.*** [2001] QB 570 (CA) at 600 per May LJ.

20. Mr Williams in concluding accepted that there was a general silence in the authorities as to what the legal position was in relation to indemnity clauses of this sort, as if the matter had never been anticipated, but the general thrust of the authorities was said to be one of caution. Whether the intentions were good or bad on the part of the solicitors, the transaction here was not one which he said the law yet permitted and the agreement was said to be unlawful at common law.

For the receiving party (Claimant)

21. Mr Morgan argued that the implication of the second Defendant's arguments was that in future, solicitors who (for no additional charge) offered the type of indemnity provided by this CFA agreement would stop doing so and thereafter invariably advise clients to take out ATE insurance at a premium payable by the losing defendant, with adverse implications for defendant insurers generally.

22. He characterised maintenance and champerty in the familiar terms per Fletcher-Moulton LJ in ***British Cash & Parcel Conveyors v Lamson Store Service Co.*** [1908] 1 KB 1006 at 1014:

    "It [maintenance] is directed against wanton and officious intermeddling with the disputes of others in which the [maintainer] has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse." to which Lord Mustill added (citing the above quotation with approval in ***Giles v Thompson*** [1994] 1 AC 142 at 161B) thus: *"'This was a description of maintenance. For champerty there must be added the notion of a division of the spoils."*

23. Given the above this form of indemnity clause could, not he argued, be said to fall foul of the common law against champerty thus described. There was not a division of the spoils. The potential application of the common law in this case was effectively limited to the question whether the indemnity clause rendered the agreement unlawful as a species of (specifically) maintenance.

24. The Claimant's position was that this court was being asked by the Second Defendant to invent a new definition of maintenance which had not been adopted in any court before, and to ignore the existing case law such as ***British Cash & Parcel Conveyors v Lamson Store Service Co.*** approved in ***Giles v Thompson*** in the quotation above which required a division of the spoils in order to establish champertous maintenance. It was said not to be a route which it was open to this court to take.

25. That distinction between champerty and maintenance, Mr Morgan said, was crucial. The essence of champerty was a division of the spoils, and conducting litigation for person gain from the results. It was not correct to equate the notion of personal gain with the notion of avoiding personal loss under the indemnity as the defendant did. The distinction had always been between cases where the spoils were shared and those where the spoils were not shared. A maintainer, as distinguished from a champertous maintainer, had always suffered the expense of maintaining the litigation and in most cases paying some or all of the costs in the event of a loss, and in that way had always had some interest in the outcome. In the case of champerty the public policy had been reflected in two ways namely that a solicitor could not take a percentage share of the spoils and the rule that a success fee could not exceed 100%. Both were essentially client protection concerns. CFA's had led to a relaxation of the old rule that solicitors could not stipulate for a share of the spoils, but the extent permitted was limited for client protection reasons.

26. The quotation in ***Factortame*** at paragraph 60 (paragraph 14 above) which had been relied on by the second Defendant as supporting the notion that the principles of champerty and maintenance should apply to solicitors with particular rigour was to be treated as dealing with potentially champertous maintenance. The quotation relied on did not equate champerty and maintenance. The use of the two words together was because champerty and maintenance were a class of which champerty was a subspecies of maintenance, hence the two words used together in the extract relied on by the second Defendant did not imply that there was a special rule for solicitors in relation to all types of maintenance.

27. The law did not treat champerty by solicitors in the same way as maintenance by solicitors. Former solicitors' practice rule 8 had barred contingency fees (payable only in the event of success). But there had been no hint in Rule 8 of a ban on maintenance by a solicitor in the form of agreeing to an indemnity against inter partes costs.

The focus, for champerty, was on the fee received, and that was why in the history of common law champerty and maintenance had been treated differently for solicitors. That distinction could not be elided now. The importance of that distinction went to whether or not the CLSA s.58 should be seen as 'an island of legality' in sea of illegality legitimising otherwise unlawful champertous maintenance in the form of a CFA, or whether it was seen as regulating entire gamut of maintenance. It was the Claimant's case that the former was correct and that s.58 related to champerty only and did not govern other species of maintenance.

28. Relying on ***R (Factortame) v Transport Secretary (No. 2)*** [2003] QB 381 at 44 he cited the following from the judgment of Lord Phillips MR:

*"This decision [**Giles v Thompson**] abundantly supports the proposition that, in any individual case, it is necessary to look at the agreement under attack in order to see whether it tends to conflict with existing public policy that is directed to protecting the due administration of justice with particular regard to the interests of the defendant."*

29. ***Adams v London Improved Motor Coach Builders*** [1921] 1 KB 495 (trade union indemnifying member in respect of his own costs) and to ***R v Miller and Glennie*** [1983] 1 WLR 1056 (employer indemnifying employee against costs incurred by him in his defence of a criminal charge) were cited to me as examples of the common law permitting a 'mere' costs indemnity (ie an indemnity without an interest in the outcome), and to ***Hamilton v Fayed*** at 77 (13/7/01, unrep.) BAILII: [2001] EWHC QB 389, in which Morland J observed that:

"Yet I do accept the argument of Sir Sydney Kentridge QC that the maintenance cases show that charitable financial support for impecunious litigants has accorded with public policy and the interests of justice since at least about 1400. Public policy is flexible and responds to the needs of the age. In my judgment with the availability of legal aid being much reduced charitable financial support for the impecunious litigant today is surely in accord with public policy and the interests of justice. I agree with Sir Sydney that the Courts should not discourage such charity."

30. The point was made that in some case law the courts have suggested that for lawful forms of maintenance, there was a requirement that the maintainer should be liable to pay the other side's costs if the litigation failed (and hence it was argued that far from being a factor going to illegality, the agreement to pay costs was, at least in the cases cited, a factor which was treated as a requirement for *legality* of the arrangement). On that point ***Hill v Archbold*** [1967] 1 QB 686 at 694G to 695B was cited (to quote partially from the judgment of Lord Denning MR at 695A: *"Most Claims by workmen against employers are paid for by a trade union. Most defences of motorists are paid for by insurance companies. This [maintenance] is perfectly justifiable and is accepted by everyone as lawful, provided always that the one who supports the litigation, if it fails, pays the costs of the other side."*).

31. I was also referred in the same vein to ***Mc Farlane v EE Caledonia (No. 2)*** [1995] 1 WLR 366 at 373C, a summons at first instance applying ***Hill v Archbold***, in which an agreement (for division of the spoils on a percentage basis) was held to have been illegal, independently of the champertous aspects of the agreement, because the funder had not accepted liability for the costs in the event of a loss. The maintainer was ordered to pay the winning party's costs. That was a liability also imposed in ***Arkin v Borchard Lines*** [2005] 1 WLR 3055, in which the Court of Appeal stated that it considered that a professional funder who financed part of a claimant's costs of litigation under an otherwise unobjectionable agreement should potentially be liable for the costs of the opposing party to the extent of the funding provided.

32. Referring back to Fletcher-Moulton LJ's dictum in ***British Cash & Parcel Conveyors v Lamson Store Service Co***. it was submitted that the solicitors for the Claimant in the present case could not be said to be wantonly intermeddling or interfering *"with the disputes of others in which the [maintainer] has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse."*, not least because the nature of the solicitor's involvement and influence over the litigation was with lawful justification or excuse ie under s.58 of the CLSA, and was regulated by professional rules of conduct. I was referred to the ***Factortame*** judgment (supra.) at 76:

"A solicitor who charges a contingency fee which does not satisfy the requirements of s.58 can hardly be said to be guilty of 'wanton and officious intermeddling with the disputes of others ... where the assistance he renders to one or the other party is without justification or excuse'. The public policy which is in play in the present case is that which weighs against a person who is in a position to influence the outcome of the litigation having an interest in that outcome." and at 87:

"The prospect of receiving 8% of recoveries would have provided a motive for Grant Thornton to inflame the damages, though not to the extent that a larger proportion would have done. As to the likelihood of their yielding to this temptation .... Grant Thornton are reputable members of a respectable profession whose members are subject to regulation."

33. Applying the above Mr Morgan argued that the conclusion must be that the indemnity arrangement whereby the solicitors agreed to indemnify the Claimant against the opponent's costs was a species of maintenance (and not champerty), that it was a type of simple maintenance long recognised as acceptable and not contrary to the common law, and that the CLSA had not been enacted to render such maintenance lawful (the common law had already made it legal in certain cases). Rather the CLSA had been enacted to render lawful and define the boundaries of certain limited types of champerty in the form of CFA's. (***Wallersteiner v Moir (No.2)*** [1975] 1 QB 373 was cited at 393 in support of the point that CFA's (even without a specific division of the spoils) were deemed to be a species of champerty).

Second Defendant's reply

34. Mr Williams noted that it was commonplace to say that a CFA would be champertous if not authorised by the CLSA, yet CFA fees could be payable even absent recovery of a sum of damages despite there being no 'division of spoils' when there was no money claim, such as where the claim was for an injunction. The key was to address the particular mischiefs against which public policy was directed. Was there an interest which might 'tempt one to tamper'? The promise to pay inter partes costs was all part of the process of making profit by gaining the instructions as a commercial activity. Financial gain was the point of the transaction as a whole. Avoidance of a loss should be seen as a gain and the court should not ignore an open ended liability to pay costs since that was more of a temptation to tamper than a modest percentage would have been.

35. Mr Williams sought to distinguish the cases of maintenance by unions and employers which had been relied on by the Claimant. None of them involved a profit from the litigation and they had not involved solicitors. They had been pure maintenance cases. ***Hill v Archbold*** had not involved a solicitor who was profiting from an exercise in which the maintenance was an integral part. ***Arkin v Borchard Lines*** at Court of Appeal level had not involved a solicitor. The people involved had been at arm's length from the litigation. He maintained his submission that the arrangement in this fee agreement was offensive as champerty or in any event as a species of maintenance without precedent and inappropriate on the basis that it exposed the solicitor to the temptations which the public policies in relation to champerty and maintenance were directed at.

MY DECISION AS TO ISSUE (I)

Champerty and the 'stake' in litigation

36. The origins of the doctrine of champerty are familiar to any costs lawyer, albeit that its linguistic origin is variously attributed. On any basis however the doctrine originates from the principle that it was undesirable for any person not legitimately interested in a suit to maintain it (from the Latin *manutenere*, a taking in hand, bearing up, or upholding of quarrels: Halsbury's Laws Vol. 9(1) at para. 850) in return for a share of the proceeds, whether that be a literal 'division of the field' in the form of a share of the land in dispute (*campi partitio*), or a percentage cut of monies recovered (which one could characterise as a 'division of the spoils' or of the product of the suit).

37. This case, in part, concerns the question of what is the extent of the public policy doctrine which underlies champerty in the modern context, far removed as it is now chronologically from its origins. I cannot do better than refer to the judgment of Steyn LJ in the Court of Appeal report in ***Giles v Thompson*** [1993] 3 All ER 321 at 328-329 for an eloquent introduction both to champerty and to the public policy origins behind it:

"If there is a controversy about the scope of a legal rule, or of a head of public policy, a good starting point is to inquire into the historical origin of it. Legal history can help to illuminate the present law. In modern idiom maintenance is the support of litigation by a stranger without just cause. Champerty is an aggravated form of maintenance. The distinguishing feature of champerty is the support of litigation by a stranger in return for a share of the proceeds. The evolution of maintenance is rooted in mediaeval history. In ***Martell v Consett Iron Ltd*** *[1955] 1 All ER 481, [1955] Ch 363 Danckwerts J stated that the English law of maintenance was the product of particular abuses which arose in the conditions of English mediaeval society. The judgment of Danckwerts J, which has long been regarded as the locus classicus in the field, contains a valuable review of the early reported case law. But it is in an article by Professor Winfield, the great Cambridge legal scholar, that a detailed explanation of the origin of maintenance and champerty is given: see 'The history of maintenance and champerty' (1919) 35 LQR 50. At the risk of oversimplifying the results of Professor Winfield's research, it seems that one of the abuses which afflicted the administration of justice was the practice of assigning doubtful or fraudulent claims to royal officials, nobles or other persons of wealth and influence, who could in those times be expected to receive a very sympathetic hearing in the court proceedings. The agreement often was that the assignee would maintain the action at his own expense, and share the proceeds of a favourable outcome with the assignor. Often these disputes involved a claim to the possession of land, and the subsequent sharing of land if the action was successful. Two factors contributed to the growth of these abuses. First, detachment and disinterestedness was not the hallmark of the mediaeval judiciary. There was in truth no independent judiciary. Secondly, the civil justice system was not yet developed, and it was not capable of exposing abuses of legal procedure and giving effective redress. In these conditions a patchwork of statutes created the offences of maintenance and champerty as well as the torts of maintenance and champerty. And there was apparently a parallel common law development in respect of maintenance and champerty.*

Gradually the conditions which led to the emergence of maintenance and champerty disappeared. Jeremy Bentham Works (Bowring (ed), 1843) vol 3, pp 19–20 argued:

'A mischief, in those times it seems but too common, though a mischief not to be cured by such laws, was, that a man would buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench. At present, what cares an English judge for the swords of a hundred barons? Neither fearing nor hoping, hating nor loving, the judge of our days is ready with equal phlegm to administer, upon all occasions, that system, whatever it be, of justice or injustice, which the law has put into his hands.'"

38. The doctrine in recent times developed in ways which are set out in the authorities cited by the parties and which I need not repeat, but the familiar quotation from the judgment of Lord Denning MR in ***Re Trepca Mines Ltd*** [1962] 3 All ER 351 at 355, [1963] Ch 199 at 219–220 provides some context as to the concern which the law has for the potential effects of champerty on the purity of justice:

'The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses.'

Solicitors

39. The common law has long recognised that agreements whereby a solicitor's fees are higher in the event of success in litigation than in the event of failure are regarded as (subject to statutory exceptions) champertous at common law. That applies even if the agreement is not strictly a division of the monies recovered on winning, but simply an agreement for a different fee in the event of winning than in the event of losing.

40. Thus in ***Wallersteiner v Moir (No.2)*** [1975] 1 QB 373 at 393-394 Lord Denning stated:

"English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a 'contingency fee' that is that he gets paid if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty. In its origin champerty was a division of the proceeds (campi partitio). An agreement by which a lawyer, if he won, was to receive a share of the proceeds was pure champerty. Even if he was not to receive an actual share but payment of a commission on a sum proportioned to the amount recovered - only if he won – it was also regarded as champerty … Even if the sum was not a proportion of the amount recovered, but a specific sum or advantage which was to be received if he won but not if he lost, that too, was unlawful: see ***Pittman v Prudential Deposit Bank Ltd.*** *(1896) 13 TLR 110 per Lord Esher MR. It mattered not whether the sum received was to be his sole remuneration, or to be an added remuneration (above his normal fee), in any case it was unlawful if it was to be paid only if he won, and not if he lost. […]*

The reason why contingency fees are in general unlawful is that they are contrary to public policy as we understand it in England. That appears from the judgment of Lord Esher MR in ***Pittman v Prudential Bank Ltd*** *… 111:*

'In order to preserve the honour of the profession it was a rule of law which the court had laid down and would always insist upon that a solicitor could not make an arrangement of any kind with his client during the litigation he was conducting so as to give him any advantage in respect of the result of that litigation.'"

41. In ***Trendtex Trading v Credit Suisse*** [1980] 629 at 652 Lord Denning reiterated the position thus:

"Champerty is a species of maintenance: but it is a particularly obnoxious form of it. It exists when the maintainer seeks to make a profit out of another man's action - by taking the proceeds of it, or part of them, for himself. Modern public policy condemns champerty in a lawyer whenever he seeks to recover - not only his proper costs - but also a portion of the damages for himself: or when he conducts a case on the basis that he is to be paid if he wins but not if he loses."

42. The present position determining which CFA's entered into on the part of solicitors or those conducting litigation are rescued from the taint of champerty is governed by s.58 of the Courts and Legal Services Act 1990 and related regulations. Section 58 is clear that a CFA which *does not* comply with the requirements of that section is unenforceable. A CFA which *does* comply with the section may still be unenforceable for other reasons, but it is not rendered unenforceable merely because it is a CFA. Section 58 applies specifically to CFA's as defined by s.58(2).

43. Subsequent authority has decided that it is no longer open to the courts to enlarge the scope of what is permitted by way of CFA by creating exceptions to s.58 by reference to the court's notion of evolving public policy, given that Parliament has legislated extensively in this area in the form of s.58 substituted by s.27 of the Access to Justice Act 1999. ***Awwad v Geraghty & Co. [***2001] QB 570 (CA) at 600 per May LJ:

"*… I accept the general thesis in the judgment of Millett LJ in the Thai Trading case that modern perception of what kinds of lawyers' fee arrangements are acceptable is changing. But it is a subject upon which there are sharply divergent opinions and where I should hesitate to suppose that my opinion, or that of any individual judge, could readily or convincingly be regarded as representing a consensus sufficient to sustain a public policy. The difficulties and delays surrounding the introduction of conditional fee agreements permitted by statute emphasise the divergence of view. In my judgment, where Parliament has, by what are now (with s.27 of the Access to Justice Act 1999) successive enactments, modified the law by which any arrangement to receive a contingency fee was impermissible, there is no present room for the court, by an application of what is perceived to be public policy, to go beyond that which Parliament has provided.*"

44. Section 58(1) and (2) of the CLSA as substituted states with my emphasis:

58. (1) ***A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.***

(2) For the purposes of this section and section 58A-

(a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and

(b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.

(3) The following conditions are applicable to every conditional fee agreement-

(a) it must be in writing;

(b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and

(c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor.

(4) The following further conditions are applicable to a conditional fee agreement which provides for a success fee-

(a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;

(b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and

(c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor.

(5) If a conditional fee agreement is an agreement to which section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies, subsection (1) shall not make it unenforceable.

45. The indemnity clause in this case is a conditional liability falling upon the solicitor to discharge his client's potential liabilities to an opponent, rather than a liability falling on the client to pay his solicitor's fees, and an agreement which contained such a clause on its own would not in my judgment be a CFA for the purposes of the section.

46. The question whether the law abhors such clauses on policy grounds is one which could arise in relation to any solicitor's retainer with an indemnity of this sort whether or not the retainer is also a CFA, albeit the extent of the solicitor's interest in the litigation might differ as between a CFA with an indemnity clause and a non-CFA with an indemnity clause in any given case.

The modern scope of Champerty

47. There was wide disagreement between the parties as to the current meaning and scope of the doctrine of champerty. On the Claimant's case the doctrine of champerty rests firmly on the notion of a 'division of the spoils' by a maintainer (including the entitlement to differential fees depending on success) such that a lawful CFA agreement does not become champertous by adding an indemnity clause which creates a conditional liability for inter partes costs in the event of loss.

48. On the second Defendant's case champerty was a public policy matter and must be given a more modern guise nowadays directed at *any financial stake* which might tempt the person concerned to interfere with the ends of justice, including an interest in the form of avoiding having to pay out under the indemnity clause in this case.

49. Can the avoidance of incurring a liability amount to a gain or benefit which is conditional on success and so potentially fall within the current understanding of public policy as the second defendant contends?

50. The oft quoted speech of Lord Mustill in *Giles v Thompson* in which he approved the definition of Maintenance given in ***British Cash and Parcel Conveyors Ltd v Lamson Store Service Co. Ltd*** and in which he then added that for Champerty one had to add '*the notion of a division of the spoils*' at first blush appears to limit notions champerty to cases where there is both a '*wanton and officious intermeddling … without justification or excuse'* and a *'division of the spoils'* between the maintainer and the party maintained. The extract from Steyn LJ's judgment in *Giles v Thompson* which was set out at the start of this part of the judgment similarly spoke in terms of champerty as involving a share of the proceeds of litigation.

51. I do however place weight on the interpretation of Lord Mustill's speech in ***Factortame*** in which Lord Phillips at para 76, I respectfully think rightly, qualified it thus in the case of solicitors and made it clear that the above definition was not the whole picture:

"That test [the test referred to by Lord Mustill] *is appropriate when considering agreements under which those who, in one way or another, support litigation in which they are not concerned. It is not, however, really in point when considering agreements under which those who are playing a legitimate part in the process of litigation provide their services on a contingency fee basis. A solicitor who charges a contingency fee which does not satisfy the requirements of s.58 can hardly be said to be guilty of 'wanton and officious intermeddling with the disputes of others… where the assistance he renders to the one or other party is without justification or excuse'. The public policy which is in play in the present case is that which weighs against a person who is in a position to influence the outcome of the litigation having an interest in that outcome."*

52. I do not read Lord Phillips' words as limited to non-solicitors or as limited to conditional gain or profit from litigation but rather as apt to include anyone in a position to influence litigation and to any form of material interest which might cause the sorts of temptations to corrupt the purity of justice with which the courts are concerned. I see every reason for concluding that Lord Phillips' words are if anything all the more apt in the case of solicitors than in the case of others having a less influential role in litigation.

53. It is clear from ***Wallersteiner v Moir*** quoted earlier at para. 40 of this judgment that any form of solicitor's fee which is conditional on success, even absent an actual division of spoils, has been seen by the common law as within the scope of champerty. It is also clear from the reference to ***Pittman v Prudential Deposit Bank Ltd.*** (1896) 13 TLR 110 per Lord Esher given by Lord Denning in the same quotation that the sense in which the term was used by Lord Denning extended not only to fees but to '*an arrangement of any kind with his client during the litigation he was conducting so as to give him any advantage in respect of the result of that litigation.'*

54. The case law cited to me and to which I have referred is consistent with the notion that whilst the doctrine of 'champerty' properly so called requires at least the taking of a benefit from the results of maintained litigation, it is but an instance of a wider underlying public policy in play per Lord Phillips in ***Factortame,*** namely that '*which*

weighs against a person who is in a position to influence the outcome of the litigation having an interest in that outcome'

55. Hence although I do not accept that avoiding the creation of a liability which only arises in the first place in the event of a failure in the litigation is to be treated as a notional 'gain' to the solicitors so as to make this an example of champerty properly so called, it is still necessary for this court to consider whether the agreement falls foul of the wider public policy to which I have referred.

56. Case law suggests that there has for some time been a recognition of the type of policy to which Lord Phillips refers. It is implied in ***Trendtex Trading v Credit Suisse*** [1980] 629 at 663 per Oliver LJ in which he states:

"There is, I think, a clear requirement of public policy that officers of the court should be in inhibited from putting themselves in a position where their own interests may conflict with their duties to the court by agreement, for instance, of so-called 'contingency fees'.

The fact that the quotation refers to contingency fees (which at the time of that decision was an expression in common use generally for fees which were conditional on outcome) simply as an example, to my mind discloses the anticipation that other forms of agreement apart from those for contingent fees might put a solicitor in a position where his or her own interests conflicted with duties to the court.

57. Whenever a solicitor has a stake in the outcome of the case there is at least the *potential* for the sorts of temptations which have exercised the courts in the past, and which are temptations which could just as readily arise where the stake is not (or not solely) in the form of a conditional fee. It follows that the agreement in this case has to be considered in that light on its own terms, weighing against it the countervailing public policy favouring access to justice and any other relevant matters. I will return to carry out that exercise in due course but will first deal with the alternative limb of Mr Williams' submissions which was that (whether or not champertous and contrary to public policy) this was an unlawful, unauthorised form of maintenance.

Maintenance

58. Wherever litigation is maintained it is possible that the result is that litigation is stirred up or prolonged or rendered more extensive, contrary to the defendant's interests and the interests of justice, because of the influence of the maintainer. That is the main concern of the specific public policy against *'wanton and officious'* unjustified maintenance (a concern different from the concerns discussed in the previous paragraphs of this judgment in relation to champerty and having its own historic roots). However it is also quite clear that maintenance is frequently a perfectly acceptable practice which can facilitate access to justice and actively prevent injustice, by enabling a litigant to pursue a case or defend a claim which might otherwise be inadequately presented.

59. The fee agreement in this case has an element of maintenance to it arising from the indemnity provision. The provision of the costs indemnity in this case is clearly a support to the claimant's litigation and would be capable of encouraging or providing reassurance in his pursuit of the case, by materially improving Mr Dix's own personal exposure to risk. I shall therefore first consider whether, simply by reason of that maintenance aspect, there are grounds to hold the agreement unenforceable.

60. Mr Morgan took me to several cases on the subject of 'mere' or 'pure' maintenance by which I mean maintenance in the absence of profit motive, financial stake in, or control over the litigation. It seems to me that they (in particular ***Adams v London Improved Motor Coach Builders*** [1921] 1 KB 495, ***R v Miller and Glennie*** [1983] 1 WLR 1056 and ***Hamilton v Fayed*** at 77 (13/7/01, unrep.) BAILII: [2001] EWHC QB 389) all amount to illustrations of essentially the same point which is that the law looks benignly upon the maintainer who provides support for charitable, public spirited or other dutiful reasons without intervening or taking control of the litigation or acting for essentially commercial reasons.

61. The solicitors in this case were neither at arm's length nor lacking in commercial interests. They are not comparable on a simple factual basis with the classes of persons who found the approval of the court in the 'mere' maintenance cases which Mr Morgan referred me to.

62. In ***Adams v London Improved Motor Coach Builders*** the maintainer was a Union acting at arm's length to assist a member, and did not conduct the litigation. **In *R v Miller and Glennie*** the case concerned an employer assisting its employee by agreeing to pay the employee's solicitor's bills for representing him in a criminal case. In *Hamilton v Fayed* one has the acme case of charitably minded individuals acting at arm's length and without profit motive to support a person they saw as in need of help.

63. Irrespective of the above, duly retained solicitors are permitted by law to render their professional skills conducting litigation. This was a serious personal injury case where the claimant had initially retained his solicitors on a conventional retainer and where I think it would not be tenable to say that the solicitors risked stirring up or prolonging litigation by providing the indemnity clause. Their client had suffered real injuries, had a real basis for his claim, and was rated (admittedly by the solicitors themselves) as standing a high prospect of success for the purposes of the CFA success fee (25% success fee, which, referring to the *'ready reckoner'* in Cook on Costs translates into an 80% prospect of success). Both in general and on the facts of this case this is not an instance of *'wanton and officious intermeddling'* which would be capable of rendering the fee agreement unenforceable simply on the grounds of the public policy relating to maintenance.

64. Even where there is no *'wanton and officious intermeddling'* rendering the maintenance objectionable, a commercial maintainer as opposed to a 'charitable' or dutiful maintainer may be expected to pay the other side's costs in the

event of a lost case, at least to the extent of the value of the support which the gave the maintained party. I was taken in argument by Mr Morgan to ***Hill v Archbold*** quoted earlier in this judgment. I was also taken to *Arkin v Borchard Lines* and the dicta there that suggest that a legitimate (but profit motivated) maintainer may be expected as a matter of course to be at risk of paying the opponent's costs at least up to the extent of the value of the support provided to the maintained party.

65. As Mr Morgan I think correctly pointed out, the solicitors in this case were agreeing to that which authority suggests the court would expect a maintainer to be willing to do, or to be liable to do. The inclusion of an indemnity clause in the fee agreement under consideration here would not, in and of itself, run contrary to what appears to be the expected state of affairs referred to in the above two cases. I am not of the view that, simply as maintenance, this agreement fell foul of public policy.

66. Mr Williams correctly pointed out that the issues in ***Hill v Archbold***, nor ***Arkin v Borchard Lines*** did not relate to solicitors, but the relevance of the fact that the 'maintainers' in this case are solicitors is not so much that it renders the maintenance per se open to criticism (financial maintenance by a solicitor is not on the face of it any more likely to stir up or prolong litigation than maintenance by anyone else) but rather the fact of them being solicitors engages the public policy concerns to which I referred in the context of champerty and other contingent interests or 'stakes' in litigation earlier in this judgment. It is to that policy which I must now return in order to decide whether the agreement so far offends that the court must decline to enforce it.

Does this agreement offend against the public policy '*which weighs against a person who is in a position to influence the outcome of the litigation having an interest in that outcome*'?

67. One must start by considering the objectives and nature of the policy and in that respect I refer to the dicta of Lord Justice Steyn in the Court of Appeal decision in *Giles v Thompson*, which were relied upon by Lord Phillips in ***Factortame*** at p400-401 and especially at paragraph 38:

"... The correct approach is not to ask whether, in accordance with contemporary public policy, the agreement has in fact caused the corruption of public justice. The court must consider the tendency of the agreement. The question is whether the agreement has the tendency to corrupt public justice. And this question requires the closest attention to the nature and surrounding circumstances of a particular agreement."

After citing the above and considering Lord Mustill's speech on further appeal in ***Giles v Thompson***, Lord Phillips affirmed the above at para. 40-41:

*"This decision [**Giles v Thompson**] abundantly supports the proposition that, in any individual case, it is necessary to look at the agreement under attack in order to see whether it tends to conflict with the existing public policy that is directed to protecting the due administration of justice with particular regard to the interests of the defendant."*

68. Later in Lord Phillips' judgment at paragraph 60 one sees the following quotation from the judgment of Buckley LJ in ***Wallersteiner v Moir* (No. 2)** at 401-402 in which the basis of the public policy in the context of maintenance and champerty is set out, but which in my judgment must apply equally to any form of agreement involving solicitors conducting litigation in which they have some interest.

"It may, however, be worthwhile to indicate briefly the nature of the public policy question. It can, I think, be summarised in two statements. First, in litigation a professional lawyer's role is to advise his client with a clear eye and an unbiased judgment. Secondly, a solicitor retained to conduct litigation is not merely the agent and adviser to his client, but also an officer of the court with a duty to the court to ensure that his client's case, which he must, of course, present and conduct with the utmost care of his client's interests, is also presented and conducted with scrupulous fairness and integrity. A barrister owes similar obligations. A legal adviser who acquires a personal financial interest in the outcome of the litigation may obviously find himself in a situation in which that interest conflicts with those obligations ..."

69. I must consider the public policy set out above, applied to this particular agreement with this particular indemnity clause and consider in the process any other relevant competing factors. The following are aspects which I consider are of most relevance, bearing in mind that the object of the public policy is to protect the due administration of justice having particular regard to the interests of the defendant (the party faced with the litigation funded under the fee agreement):

(1) The indemnity provision in this agreement was uncapped (whether by reference to a fixed sum or a percentage of costs). The solicitors faced the potential for liability for the whole of the opponent's costs if the case was lost. Their exposure in the event of failure potentially far exceeded the value to them in the event of success (success would bring normal fees plus a 25% success fee, failure would bring zero fees plus, probably, full liability to pay the opposing party's costs). In a significant case such as this that could have been a large sum to lose, by any standards, if the case was lost at a late stage or after a trial, and that could have placed pressure on solicitors to pursue litigation by improper means to avoid such a loss. Some firms would be put out of business by a loss of the size which one might incur from litigation of this sort, and virtually any firm would regard the potential exposure, if the litigation became prolonged, as significant. The court must concern itself with whether there is a material risk that a solicitor, perhaps late on in the litigation and faced with a duty to disclose a document likely to cause the loss of the case (under an order for standard disclosure creating the duty of disclosure of adverse documents) might be tempted to fail to discharge that duty rather than incur a – by that stage large - liability under the clause.

(2) The case was assessed as having a high chance of success (as noted before, 25% success fee connoting an 80% chance of success), which does go to mitigate the pressure which a solicitor would feel at the start. But of course the prospects of success are assessed at the outset and risks change in the course of litigation.

(3) I have been presented with no evidence that the potential loss was either underwritten, or otherwise provided for in advance. A solicitor who has either insured himself with some external policy, or has set aside a fund to risk for a given case or class of cases might be in a considerably less difficult position than a solicitor who risks money without having made advance provision to cover the loss.

(4) On the other hand, a claimant's solicitor having a stake of the sort imposed by the indemnity clause could, up to a point, benefit a defendant and the interests of justice in that a solicitor who is risking his own money may be less likely to fight a bad case from the outset and may be less likely to pursue a case in an extravagant or overblown manner.

(5) A further benefit to the defendant is that in the event of success, the provision of the indemnity by the solicitor is an additional source of funds from which the defendant may ultimately obtain satisfaction of his costs. He is not worse off, and may be better off in respect of recovering his costs in the event of a 'win' than he would be if the claimant had represented himself.

(6) Still further on the positive side, the provision of an indemnity clause could facilitate access to justice in a commercial environment where the availability of insurance cover is not necessarily guaranteed and where 'legal aid' funding is for most purposes now limited to those with very restricted means in specific areas of litigation.

(7) One must not lose sight of the further principle that freedom to contract is, on the whole, a positive freedom which encourages competition and flexible provision of services responsive to customer demand. Inability to enter into this type of agreement would tend to reduce the diversity of 'product' options open to users of legal services.

(8) An inability to enter into agreements of this sort would tend to ensure that all Claimants would, as of course, take out commercial insurance at a cost which would be borne by losing Defendants and their insurers, which may not be beneficial inasmuch as it adds to litigation cost.

(9) Sometimes a solicitor who has made a mistake such as missing a time limit, informs the client that an application can be made to rectify it, and that if the client wishes to attempt that application rather than taking his instructions elsewhere then the solicitor will not charge for the application and will bear the costs if it fails. On the face of it such an arrangement may be desirable in an appropriate case.

70. It is not said in this case that there was any actual interference with justice as a result of the indemnity clause and Mr Williams was at pains to point out correctly that the consideration is the *tendency* of the agreement. I very much regret that I am of the view that, having considered the matters above, this agreement would to an unacceptable degree tend to create the sorts of temptations with which the public policy is concerned, and accordingly that I must declare it unenforceable.

71. Although this agreement has some features which are in the interests of justice, the nature of this particular indemnity clause being a broad, uncapped, potentially large liability apparently unsupported by a fund or insurance policy, triggered upon the loss of the case whatever the cause, places the solicitor in the position of having too much at stake.

72. It would be unrealistic to expect a solicitor to keep a clear eye and an unbiased judgment, and to maintain that proper distance from the client and the litigation which it his duty to maintain, when the pressure mounts and ethical decisions are needed the consequences of which for the solicitor may be substantial personal liability under this clause.

73. The above said, nothing in this judgment should be understood as deciding that an indemnity such as that in (9) above, or any indemnity on different terms would inevitably suffer the same fate.

PART (II) Whether the retainer is illegal as constituting unlawful insurance contrary to ss. 23 and 26 of the Financial Services and Markets Act 2000 (FSMA).

Second Defendant's case

74. The second Defendant's position was that the fee agreement included insurance in the form of the indemnity clause. Mr Williams' skeleton cited as signs of the solicitor's intention the fact that the clause was in lieu of ATE insurance, but his position was that intention one way or the other was irrelevant and that the test was one of law. Either this was, or was not to be classified as insurance in law, and it mattered not what label was given to it if that was what it was. The familiar reference from ***Street v Mountford*** [1985] AC 809 concerning pronged instruments, forks and spades was duly referred to.

75. He defined insurance as the provision of an indemnity against a fortuity (a reference to the Judgment of Lord Phillips MR in ***Callery v Gray (No. 2)*** [2001] 1 WLR 2142 at para. 38) and characterised the fortuity in this case as being the event of a loss in the litigation. In ***Prudential Insurance Company v Commissioner of Inland Revenue*** [1904] KB 658 the question was whether a contract to pay to the insured a sum of money on his attaining the age of 65 or a smaller sum to his estate if he died before that age amounted to a policy of insurance upon a

contingency depending upon a life, for the purposes of Stamp Duty. The court held that it was and that (at 663 per Channell J):

"… It must be a contract whereby for some consideration, usually but not necessarily for periodical payments called premiums, you secure to yourself some benefit, usually but not necessarily the payment of a sum of money, upon the happening of some event, which event must have some amount of uncertainty about it, and must be of a character more or less adverse to the interest of the person effecting the insurance."

The court held that the contract was a contract of insurance.

76. I was referred to an extract from Halsbury's Laws vol. 25 paras. 22-25 which provides a general summary and in particular provides the statutory definition of a "*contract of insurance*" which appears in Art. 3 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544), in terms which include contracts of insurance against risks of loss to the persons insured attributable to their incurring legal expenses (including costs of litigation).

77. As to why such an unauthorised insurance contract ought to be deemed illegal, he relied on s.23 (unauthorised insurance a criminal offence) and s.26 (unenforceability on behalf of the insurer of a contract including unauthorised insurance) of the Financial Services and Markets Act 2000. The solicitors by entering into this contract had effected or carried out a contract of insurance and had done so in the course of carrying on a business such that under s.26 it was unenforceable. If the contract could not be enforced, as between solicitor and client, then the indemnity principle gave the second defendant the benefit in this case as the paying party.

78. There were good reasons for insurance which was unauthorised to be illegal. There was a regulatory body, the Financial Services Authority, which regulated insurers, vetted them and policed them. Their solvency was monitored and there were requirements as to asset holdings. Insurers were not permitted to perform other types of business in the UK so as to avoid conflicts of interest and prevent excessive asset risk. Mr Williams contrasted those protections with the protections to the Claimant in this case – he had none of them and the scope of the indemnity clause was limited inasmuch as it appeared to cover only a costs liability in the event of loss, not other costs liabilities such as interlocutory costs or the costs of losing a particular issue, which might be incurred and which might be covered by a commercial ATE policy.

79. On the question whether the solicitors were 'carrying on an activity by way of business' I was taken to ***R v Wilson (Rupert)*** [1997] 1 WLR 1247 CA (especially per Evans LJ at 1253C onwards). The Defendant was accused of carrying on unauthorised insurance business contrary to the Insurance Companies Act 1982. The court held that "carrying on" a business included soliciting business and negotiating business and invitations to treat, irrespective of whether insurance was actually effected. Accordingly it was the Second Defendant's position was that even if this was a "one off" contract of insurance (the 'one off' nature of which was not conceded by the Second Defendant), that would not in any event afford a defence to the allegation that entering into it was part of "carrying on" a business. Carrying on, on the second Defendant's case, simply meant 'performing'.

80. On the same issue I was also taken to ***Cornelius v Phillips*** [1917] AC 199 (especially per Lord Parmoor at p217) which upheld a decision at Court of Appeal level ([1915] 2 KB 719) where the question was whether a money lender had carried on business as a moneylender at an hotel, being an address other than his registered address, contrary to s.2(1)(b) of the Money-lenders Act 1900 so as to render the transaction void. The Court rejected an argument that the carrying on of business could not be satisfied by an isolated transaction. The judgment of the Court of Appeal, upheld on appeal, was to the effect which is summarised in the headnote namely "*though the transaction was an isolated one, in entering into it the money lender was carrying on the money lending business elsewhere than at his registered address…*"

81. As to whether a premium was required as an essential element of the definition of a contract of insurance and whether that premium had to be proportioned to the risk involved, Mr Williams referred me to ***Australian Health Insurance Association Limited (Formerly Voluntary Health Insurance Association of Australia Limited) v Esso Australia Limited*** [1993] FCA 376 in the Federal Court of Australia. In that case there was a dispute over the definition of 'insurance'. Esso relied on an extract from the Oxford English Dictionary and an extract from *MacGillivray and Parkington on Insurance Law* (8th ed) which suggested that a premium was one ingredient of a contract of insurance and that the payment was proportioned to the nature of the risk insured. The Federal Court per Black CJ held at paras.18-20 that:

> *"[18] It is understandable that in some, though not all, dictionary definitions of Insurance, the proportionality of the premium to the risk is included as an element. In a definition, rather than in an elaboration of the topic, the proportionality of the premium may help to distinguish the concept of insurance from other concepts but it is not an indispensable element. […]*
>
> *[19] The correct position is outlined in Colinvaux's Law of Insurance 6th ed (1990) at 131 where attention having been drawn to the fact that a premium may be a consideration other than a money payment, as for example in mutual insurance, it is stated:*
>
> *"A premium is in no respect a prerequisite of a contract of insurance: all that is necessary is the undertaking by the insurer for good consideration. The policy may be by deed, in which case no premium or other consideration flowing from the insured is necessary to render the insurer bound. The premium more usually, however, takes the form of a money payment. It has been defined as 'a price paid adequate to the risk', but the adequacy of the premiums is purely the insurer's concern. The amount of the premium may be of assistance, however, in showing the*

scope of the policy, for it is measured by the insurer's estimate of the risk formed upon an average of his previous experience of similar risks…"

[20] In any event, suppose an insurance company decided, for the purpose of attracting custom … to lower its premiums so that they were less than an actuarial apportionment to the risk would require. It could not sensibly be suggested that the transactions in which lower premiums were charged did not involve undertaking liability by way of insurance, and the reason why it could not be so suggested is that the essence of the relationship between insurer and insured would remain, namely, the relationship of indemnity in the context of contingent loss."

82. On the exercise of discretion under s.28 the second Defendant's position was that there were two reasons why this court could not make an order under that section. The first was that this court could not make such an order unless some other court as between the solicitors and the Claimant made an order rendering the contract enforceable. The Claimant came before the court with an unenforceable contract and this court did not have the power under s.28 to make such an order. Further, if the court was considering making such an order it would be impossible for the same counsel to represent both the solicitor and client. If this court refused to allow the contract to be enforced in respect of the costs proceedings it would be unthinkable that a later court would think it just and equitable to allow it to be enforced as against Mr Dix by the solicitors. The second reason was that there was simply a lack of evidence which could show there was any reason to suppose the solicitor reasonably believed she was not contravening the 'general prohibition' in s.19. The statutory criterion in s.28(5) concerning reasonable belief was not merely directed to ignorance of the law, not knowing that carrying out or effecting unauthorised insurance was unlawful, but was intended to deal with the scenario where someone embarked on a transaction giving it thought, and reasonably believed that it was not caught by the general prohibition.

Claimant's case

83. For Mr Dix it was said that s.23 of FSMA was irrelevant – it creates a criminal offence called an 'authorisation offence' and adds nothing since, per s.28(9) the commission of an authorisation offence added nothing to the sanctions for illegality imposed by s.26 or s.27. s.28(9) states *"(9) The commission of an authorisation offence does not make the agreement concerned illegal or invalid to any greater extent than is provided by section 26 or 27."*

84. Mr Morgan's analysis proceeded as follows in relation to the s.26 point (unenforceability due to illegality):

(i) Effecting or carrying out a contract of insurance as a principal was a 'specified kind of activity' for the purposes of Art. 10 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the Order), and carrying out or effecting a contract of insurance was a 'regulated activity' under Art. 4 of the Order and s.22 of FSMA if it was carried on by way of business.

(ii) There was a 'general prohibition' precluding a person from carrying on a regulated activity or purporting to do so unless authorised or exempt (FSMA s.19, Art 4 of the Order).

(iii) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition was unenforceable against the other party to it (s.26).

(iv) There were no statutory definitions of 'contract of insurance' 'carrying on an activity' or 'by way of business'.

(v) The court had a discretion in any event to permit a contract to be enforced if it was 'just and equitable in the circumstances of the case' and in so considering, the court was required to have regard to whether the person carrying on the regulated activity reasonably believed that he was not contravening the general prohibition by making the agreement (FSMA s.28(3)-(5)).

85. Applying the above, he argued that the CFA in this case was (i) not a *'contract of insurance'*, (ii) it was a *'one off'* activity which could not be called 'carrying on an activity' (iii) it was a *'one off'* activity which could not be called *'by way of business'*.

86. If he was wrong, he invited me to exercise the discretion which he said s.28 gave me, in favour of permitting this agreement to be enforced. As to that discretion he relied on his instructions that the agreement was entered into in good faith, was a 'one off' with the best of motives, and that there was a lack of belief that the solicitor was dong anything wrong but had been relying on information gleaned from attending a costs lecture by another solicitor.

87. As regards the submissions on exercise of discretion to which I have just referred, I heard an application for permission to rely on a very recently produced witness statement at the start of the day from the solicitor who had conduct of the case when the agreement was entered into. I heard that application as a preliminary issue, and ruled that the Claimant could make use of the statement if it elected to do so, but that if it did rely on the statement there would have to be an adjournment in view of the second Defendant's legitimate request to be able to properly prepare cross examination on the facts stated in it, which were not necessarily accepted by the second Defendant. Mr Morgan on instructions did not rely on the statement in evidence.

88. On issue (i) – whether this was a contract of insurance - Mr Morgan relied on *MacGillivray on Insurance Law* 10th ed. at para. 1-1 which spoke in terms of a contract of insurance being a contract whereby a party in return for receipt of a premium agreed to pay a sum of money to the insured party (or provide him with some other benefit) on the occurrence of one or more specified events, and was a definition based on the dicta of Channell J in ***Prudential Insurance Company v Commissioner of Inland Revenue***.

89. Mr Morgan accepted that the notion of 'a premium' did not necessarily mean a money payment (Channell J at 663 had said only that the consideration was 'usually' for payments called premiums) but submitted that there was nonetheless a requirement for something that could properly be called a premium. There was in this case no premium, and the sums payable to the solicitors were not related to the risk of the indemnity becoming payable

or to the sums payable if the indemnity was triggered. Instead the sums payable to the solicitors were related to the amount of work done by the solicitors and the risk that they would not earn the base costs for their work (he cited para. 1-2). Para. 1-8 of the same text was cited in support of the view that separate consideration referable to the risk which the indemnity represents was an essential ingredient of insurance which was missing in this case. There was no premium.

90. He accepted that there was a contractual obligation to pay in the event of the case being lost, but argued that care was needed not to apply the common law definition of contract insurance, in a regulatory context, in such a broad way that a range of activities which would not otherwise be regulated fell within the scope of regulation. Not every contract of indemnity, even for consideration, was a contract of insurance. He gave examples such as a contract for the sale of a business which included warranties that certain things have been done, backed by indemnities against the things warranted turning out in fact not to have been done. Such contracts were for consideration and contained indemnities but had never been said to be unregulated contracts of insurance. There could be situations where insurance benefits linked to a credit card were separately provided in a contract of insurance, but there were also occasions where insurance linked to a credit card was but a small part of a wider contract with the card provider, which he said would not a *'contract of insurance'* for the FSMA. He also referred to the practice whereby a solicitor who has made a mistake in the course of litigation tells the client that he has made a mistake and that an application can be made to try to rectify the problem, and that he will not charge the client for making the application, and will pay the costs if the application fails. That was a common arrangement – there was consideration in the form of forbearance by the client from taking his instructions elsewhere, there was an indemnity, and that was a contractual arrangement.

91. Para. 1-8 of *MacGillivray* was also supportive of the view that where a contract contained elements of insurance and non-insurance the question whether it was a contract of insurance depended on whether taking the contract as a whole it could be said that its principle object was the provision of insurance. The CFA had as its predominant objective that of enabling the solicitors to represent the Claimant in return for base costs and success fee in the event of success. The indemnity was incidental.

92. As to issues (ii) and (iii) (not carrying on an activity, not carrying it on by way of business) Mr Morgan argued that a one-off event is not a carrying on of an activity, as a simple matter of language for the purposes of s.19. Repetition was required. He relied on a case concerning the expression 'carrying on a regulated activity in the United Kingdom' in s.19 ***FSA v Fradley and Woodward*** [2005] EWCA Civ 1183. In that case at 52-53 Arden LJ with whom the rest of the court agreed stated:

> *"[52] The FSMA does not contain an exhaustive description of what constitutes the carrying on of business within the United Kingdom. All that s 418 (set out above) provides is that the requirement is to be satisfied in certain specific cases if it would not otherwise be so satisfied. This case is not within those cases. Accordingly, the court is left with the question whether the activities described above (so far as not disputed), of themselves, constituted the carrying on of business in the United Kingdom. FSMA does not require that the entirety of a business activity be carried on in the United Kingdom. If it did, it would be open to obvious abuse.*
>
> *[53] In my judgment, it is sufficient if the activities in question which took place in this jurisdiction were a significant part of the business activity of running the CIS (if any) constituted by the betting services offered by 147 and TBPS. In this case, the communications with clients and prospective clients, and the maintenance of a bank account and an accommodation address, all of which took place in the United Kingdom, were all business activities. In my judgment they were of sufficient regularity and substance to constitute the carrying on of business here even after Mr Fradley moved his own office to Ireland in April 2003 and gave instructions by post or internet from there. I leave open the question whether the requirement of carrying on business within the jurisdiction can be satisfied in any other case."*

93. On the Claimant's case the older authorities to which Mr Williams had referred were to be distinguished. The mischief to which the Money-Lenders Act 1900 Act in the ***Finegold v Cornelius*** case was directed was that stated at 728 per Swinfen-Eady LJ and which was a mischief which could arise from a single transaction:

> *"The transaction would certainly appear to be within the mischief against which the Money-Lenders Act was intended to provide. Lord Loreburn said in **Kirkwood v Gadd:** 'The mischief is that this dangerous business may be conducted by persons under false names or a variety of names without the security of an ascertained address, or at places where men may be taken unawares or off their guard'"*

94. As to ***R v Wilson***, that could be distinguished on the footing that the court's focus there was the intention of the defendant to carry on business, in the case of that criminal charge, and whether by his actions in setting up an office but falling short of actually entering into a contract the defendant to the charge had shown an intention to carry on business. There was no evidence here that the indemnity was offered in any other way than in this particular case.

95. Finally if the arguments above failed I was invited to exercise discretion under s.28 of FSMA to allow the agreement to be enforceable, having regard to the circumstances of the case, albeit that Mr Morgan accepted that he could not rely on s.28(5) without evidence. I was nonetheless he argued not prevented from exercising that discretion. The submission was that the court was being asked to declare the agreement enforceable only after the litigation was over and the indemnity was not to be called upon and where the solicitor only sought entitlement to be paid costs on success. It was not just and equitable to disallow such costs.

Second Defendant's reply

96. As to whether I should exercise the discretion apparently given to the court under s.28(3) to permit the agreement to be enforced, the Claimant's position was that the court did not have sufficient evidence to enable it to exercise that discretion in the Claimant's favour. It was disputed that the discretion provided by that section was applicable in a case such as this where the matter to which s.28 was directed related to the contractual relationship within an insurance contract between the solicitor and his client and not to the relationship between the opposing parties in the context of a costs matter. It was accepted that in general a Master could exercise the powers of the High Court albeit that it would be improbable that a dispute over the contractual enforceability of an insurance contract as between the client and solicitor would ever come before a costs court for a decision under s.28. In CFA cases for example the costs courts had not previously made use of general powers such as the power to rectify a contract, so as to enable an otherwise invalid CFA to be relied on in costs proceedings.

97. As to whether disallowing this agreement would give rise to a 'floodgates' situation where contracts not usually characterised as insurance would be seen as now regulated by FSMA, he said that there was an unreality about that argument. This was a case where a solicitor had agreed to stand in the position of an insurer instead of the client taking out ATE insurance and the agreement should be seen as insurance. Insurance was said to be something which one recognised when one saw it despite being difficult to describe in advance.

98. It was accepted that not all indemnities were insurance, such as where they were a kind of surety for performance. The concept of 'principal object' set out in 1-8 of *MacGillivray* was on the second Defendant's case derived from a VAT case and the passage went on to accept that the principal object test was not always applicable. It would he said be surprising if one could defeat the regulations on the basis that the insurance was not a significant part of the contract. It was not in any event the case that the provision of an indemnity was a merely minor matter. One of the main concerns of a client would be what happened if there were adverse costs.

99. It was argued that one would expect the insurance legislation to protect a client in a case such as this. There was no evidence about whether the solicitors could meet the costs if they were required to pay in 14 days, for example.

MY DECISION AS TO ISSUE (II)

100. It is unfortunate that those who drafted the Financial Services and Markets Act 2000 chose to create a criminal offence under s.23 whilst leaving the expression "contract of insurance" defined in terms the boundaries of which are difficult to determine. That deficiency also impacts on the operation of s.26, the section which renders unenforceable an agreement made in contravention of the 'general prohibition' created by the Act. I accept Mr Morgan's argument in relation to s.23 that it adds nothing to the arguments which were presented to the court under s.26, other than to create a criminal offence, given the wording of s.28(9).

101. Turning to the arguments as to the unenforceability provisions of s.26, I shall set out the statutory sections referred to by the parties, partly from the Financial Services and Markets Act 2000 and partly from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 SI 2001/544

FSMA s.19 The general prohibition

(1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is—

(a) an authorised person; or

(b) an exempt person.

(2) The prohibition is referred to in this Act as the general prohibition.

FSMA s.22 The classes of activity and categories of investment

(1) An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and—

(a) relates to an investment of a specified kind; or

(b) in the case of an activity of a kind which is also specified for the purposes of this paragraph, is carried on in relation to property of any kind.

(2) Schedule 2 makes provision supplementing this section.

(3) Nothing in Schedule 2 limits the powers conferred by subsection (1).

(4) "Investment" includes any asset, right or interest.

(5) "Specified" means specified in an order made by the Treasury.

Art.10 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (which sets out kinds of 'specified activity' for the purposes of s.22)

10 Effecting and carrying out contracts of insurance

(1) Effecting a contract of insurance as principal is a specified kind of activity.

(2) Carrying out a contract of insurance as principal is a specified kind of activity.

FSMA s.23 Contravention of the general prohibition

(1) A person who contravenes the general prohibition is guilty of an offence and liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both.

(2) In this Act "an authorisation offence" means an offence under this section.

(3) In proceedings for an authorisation offence it is a defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.

FSMA s.26 Agreements made by unauthorised persons

(1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.

(2) The other party is entitled to recover—

(a) any money or other property paid or transferred by him under the agreement; and

(b) compensation for any loss sustained by him as a result of having parted with it.

(3) "Agreement" means an agreement—

(a) made after this section comes into force; and

(b) the making or performance of which constitutes, or is part of, the regulated activity in question.

(4) This section does not apply if the regulated activity is accepting deposits.

FSMA s.28 Agreements made unenforceable by section 26 or 27

(1) This section applies to an agreement which is unenforceable because of section 26 or 27.

(2) The amount of compensation recoverable as a result of that section is—

(a) the amount agreed by the parties; or

(b) on the application of either party, the amount determined by the court.

(3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow—

(a) the agreement to be enforced; or

(b) money and property paid or transferred under the agreement to be retained.

(4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the court must—

(a) if the case arises as a result of section 26, have regard to the issue mentioned in subsection (5); or

(b) if the case arises as a result of section 27, have regard to the issue mentioned in subsection (6).

(5) The issue is whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement.

(6) The issue is whether the provider knew that the third party was (in carrying on the regulated activity) contravening the general prohibition.

(7) If the person against whom the agreement is unenforceable—

(a) elects not to perform the agreement, or

(b) as a result of this section, recovers money paid or other property transferred by him under the agreement,

he must repay any money and return any other property received by him under the agreement.

(8) If property transferred under the agreement has passed to a third party, a reference in section 26 or 27 or this section to that property is to be read as a reference to its value at the time of its transfer under the agreement.

(9) The commission of an authorisation offence does not make the agreement concerned illegal or invalid to any greater extent than is provided by section 26 or 27.

102. The net effect of the above is that if this is a "*contract of insurance*" effected by the Claimant's solicitors *"the making or performance of which constitutes, or is part of, the regulated activity in question*" (s.26(3)) then the contract is unenforceable, always provided the effecting or carrying out was an "*activity carried on by way of business*" (s.22(1)).

103. Art. 3 of the 2001 Order gives the following definition which is of relevance to the definition of what is a contract of insurance for the purposes of the Act. I do not fully accept the suggestion put by Mr Morgan that there was no statutory definition, but to the extent that the definition is circular it is limited to the point where it comes close to being no useful definition. By "*circular*" I mean that the definition of a contract of insurance in Art. 3 is in terms that it is a contract of either of two types of insurance, and legal expenses insurance is defined as one such type of contract of insurance. Nowhere does the statute elaborate further upon what is actually intended by "*contract of insurance*".

3 Interpretation

(1) In this Order — …

"**contract of general insurance**" means any contract falling within Part I of Schedule 1;

"**contract of insurance**" means any contract of insurance which is a contract of long-term insurance or a contract of general insurance, and includes—

(a) fidelity bonds, performance bonds, administration bonds, bail bonds, customs bonds or similar contracts of guarantee, where these are—

(i) effected or carried out by a person not carrying on a banking business;

(ii) not effected merely incidentally to some other business carried on by the person effecting them; and

(iii) effected in return for the payment of one or more premiums;

(b) tontines;

(c) capital redemption contracts or pension fund management contracts, where these are effected or carried out by a person who—

(i) does not carry on a banking business; and

(ii) otherwise carries on a regulated activity of the kind specified by article 10(1) or (2);

(d) contracts to pay annuities on human life;

(e) contracts of a kind referred to in article 1(2)(e) of the first life insurance directive (collective insurance etc); and

(f) contracts of a kind referred to in article 1(3) of the first life insurance directive (social insurance);

but does not include a funeral plan contract (or a contract which would be a funeral plan contract but for the exclusion in article 60);

"**contract of long-term insurance**" means any contract falling within Part II of Schedule 1

104. Schedule 1 para. 17 of the 2001 order includes the following as a category of "contract of general insurance":

"Legal expenses

17 Contracts of insurance against risks of loss to the persons insured attributable to their incurring legal expenses (including costs of litigation)."

105. This indemnity did cover losses attributable to costs of litigation, but was the retainer contract a "contract of insurance"?

106. It is quite commonplace in the law of contract for one contracting party to include some form of indemnity in favour of the other party in respect of non-performance of the contract. What those agreements have in common is that they are indemnities in respect of matters over which the contracting party has at least some control in his performance of the agreement. If such indemnities were invariably seen as contracts of insurance then the offence under s.23 would be widespread as would the unenforceability created by s.26.

107. I refer here to a passage in *MacGillvray on Contracts of Insurance* which appears in the authorities provided by the Claimant, which in my judgment is apt:

"1-6 The question was raised in both the St Christopher Motorists Association case and the Medical Defence Union case whether the event on which the insurer's liability depends must be one outside the control of the insurer. The point was not decided in either case. It is certainly necessary to distinguish an insurance contract from the express or implied undertaking of a contracting party to pay damages, or to perform some other secondary obligation, such as the repair of a defective article, in the event of his own failure to perform a primary obligation. To admit that a person may offer insurance against the possibility that he himself may commit some voluntary act would be to risk confusing this necessary distinction. It is therefore submitted that the event upon which a contract of insurance depends must be an event outside the control of the insurer."

108. In my judgment insurance has as a key feature that it 'pays out' or provides a benefit to the insured upon the happening of a 'fortuity' beyond the control of the insurer. That distinguishes it from a type of contractual clause which relates to the performance of a contractor's obligations which are under his control.

109. In asking the question what category the indemnity clause here falls into – indemnity in respect of performance, or indemnity in respect of chance events - one has to look at what circumstances would probably be the 'trigger event' for the indemnity provision and whether the solicitors in this instance had control over the trigger event. One point which Mr Morgan made was that this case was considered by the solicitor to be so strong that, effectively, losing it would have amounted to conceding a claim in damages for negligence. I follow his point but, events beyond a solicitor's control – pure fortuities - can cause a lost case just as surely as negligence.

110. Why might a case be lost? A case can be lost simply because that is the just outcome. That is not a matter under the control of the solicitor. A case can be lost through misfortune – such as the death of a witness, also not a matter properly under the solicitor's control. On the other hand a case can be lost through negligent performance of the retainer which is a matter caused by the solicitor's performance of the retainer or similarly by non-negligent acts which with the benefit of hindsight are misjudged. Again, that is within the control of the solicitor.

111. I think it is apparent that if a solicitor provides an indemnity of the sort given here, he is *in part* providing an indemnity against loss caused by matters which are outside his control, but also against matters which are under his influence or control. In that respect he differs from an ATE provider in the marketplace, which contracts at relative arm's length and does not exert the level of (incomplete) control which a solicitor can exert over the outcome. If such a clause as encountered in this case stood alone in a contract, the contract would be for the provision of cover which had elements of insurance and elements of conventional contractual indemnity in respect of matters under the solicitor's control.

112. The contract in this case does not solely consist of the indemnity provision (which I have just noted does not itself consist solely of indemnity against events outside the solicitor's control). It is a contract under which a CFA is created, and under which legal services are to be provided, and as part of which the indemnity clause is included.

113. I am assisted somewhat by the extract from *MacGillivray* in the authorities provided to me, at para. 1-8 as follows:

"… The inclusion of indemnity provisions within a contract for the supply of services neither makes the indemnifier an insurer nor justifies describing the contract as wholly or partly one of insurance. When a contract of sale or for services contains elements of insurance it will be regarded as a contract of insurance only if, taking the contract as a whole, it has as its principal object the provision of insurance. So where a 'card protection plan' offered insurance and

other facilities to subscribers, it was held to be a contract for the provision of insurance, and so exempt from value added tax, because the dominant objective of the plan was to offer insurance against financial loss and the non-insurance services provided were viewed as minor and ancillary to that aim. The 'principal object' test is not, however appropriate where the contract in question does not have distinct insurance and non-insurance elements, and the question at issue is whether it is properly to be characterised as insurance. In Fuji Finance Inc v Aetna Life Insurance Co.[…] the Court of Appeal held that the correct approach was to characterise the contract as a whole and then see if it came within the definition of life assurance, which it did."

114. The above analysis is perhaps more persuasive when one considers that if Parliament had intended to criminalise and render unenforceable contracts which have an insurance element but where the principal object and the bulk of the terms are unrelated to insurance, then it could have said so either in Art. 10 of the 2001 Order or elsewhere. Instead when we look at the provision rendering agreements unenforceable we see at s.26(3) the words that an "*Agreement*" is an agreement *"the making or performance of which constitutes, or is part of, the regulated activity in question"*, which does not include provision that *"Agreement"* is an agreement the making of any part of which constitutes the regulated activity.

115. That one must look at the effect of the contract as a whole underscored by *Prudential Insurance Company v Commissioner of Inland Revenue* at 664 per Channell J:

"It seems to me that for the purpose of determining whether that contract comes within the definition [of contract of insurance] we must look at it as a whole, and not split it up into two separate parts." I also remind myself of the definition of insurance given by Channell J in the same case also at p664 quoted at paragraph 74 above in summarising the second Defendant's submissions where reference was made to the requirement for an element of uncertainty and for the event insured against to be more or less adverse to the interests of the insured.

Is a premium required?

116. I am not persuaded that a contract of insurance must necessarily require a specific premium or separately identifiable consideration referable solely tot the insurance, or that the premium or consideration must be apportioned to the risk. The dicta of Black CJ in *Insurance Association of Australia Limited) v Esso Australia Limited* quoted earlier, whilst not binding on me, are persuasive to the effect that a specific premium is not required (nor necessarily is actuarial apportionment of the premium to the risk). Furthermore if a specific separate premium was required for a contract to be a contract of insurance it would become trivially easy to circumvent the provisions of the FSMA. It is sufficient that there is consideration consistent with the creation of a contract (and that would in my judgment be satisfied by the Claimant's agreement to be liable for fees in the event of success).

What is a 'contract of insurance', is this such a contract, and is it unenforceable under FSMA?

117. Bringing the above threads together, a contract of insurance in my judgment is *a contract which when considered as a whole has as its principal object the provision of an indemnity against an event which is beyond the control of the insurer and which involves an amount of uncertainty, and where the event insured against is of a character more or less adverse to the interests of the insured.*

118. Approaching the matter in that way although the contract contained one element having the character of insurance (namely an indemnity which covered loss of the case for reasons outside the solicitor's control as well as reasons within the solicitor's control), this agreement looked at as a whole had as its primary object the supply of legal services on a CFA basis by a solicitor to a client. Accordingly the contract was not "a contract of insurance" and would not have been rendered unenforceable under s.26 of FSMA. The second Defendant accordingly fails on preliminary point II.

Carrying on an activity by way of business

119. I will briefly state my conclusions the issue of whether an alleged 'one off' insurance contract amounts to the carrying on of an activity by way of business.

120. I accept (at least when it comes to the question of whether a business is carried on in the UK or elsewhere) Mr Morgan's submissions that the effect of ***FSA v Fradley and Woodward*** supports an interpretation of s.19 which is satisfied if the activity in question has *'sufficient regularity and substance*". It is unfortunate that the older authorities on similar expressions in earlier legislation were not cited to the Court of Appeal in ***FSA v Fradley v Woodward,*** because it may be that the court would have expressed a view on what if any lesser activity would suffice.

121. Whilst not concerning the same section of the same statute as applicable in this case I do accept Mr Williams' submissions that the effect of the cases to which he referred on this point is not to require the repetition of activities, for the statutory sections which those cases relate to. I accept his argument that a similar approach should prevail in the case of s.19, and my reasons are that (i) the expressions construed in those cases are sufficiently similar to that that under consideration here, (ii) the general objectives of the statutes to which those earlier authorities relate (financial business regulation, prevention of fraud) are similar and (iii) I think it would render unworkable the regulatory scheme of FSMA (and might facilitate fraud) if each business was entitled to a single 'one off' unregulated instance of unauthorised insurance activity before it could be said to be infringing the Act.

Discretion

122. Given my previous conclusions, it is not necessary for me to decide upon the exercise of discretion to permit this agreement to be enforced if it had fallen foul of s.26 of FSMA or whether s.28 of FSMA properly understood

could have been relied on in the circumstances in this case if my conclusion had been that this was a contract of insurance.

My order

123. In view of my conclusions under Part I of this judgment and solely for the reasons given there, I indicated in my draft judgment that I would declare that the Conditional Fee Agreement dated 12 June 2002 and made between Lester Morrill and Mr John Dix is unenforceable. I invited counsel to propose a draft order for my consideration including any proposed case management directions. Counsel jointly submitted a draft which I am content to adopt, but with a modified first paragraph to reflect the fact that although in substance Mr Williams succeeded in respect of the first preliminary point I expressed reservations about the use of the label 'champerty' in this instance (see paragraph 55 above). My order is as follows:

1. It is declared that the Claimant's retainer is unenforceable on the ground that the retainer is contrary to public policy.
2. The Second Defendant's objection that the Claimant's retainer is unenforceable as constituting unlawful insurance is dismissed.
3. Time for the parties to apply to this Court for permission to appeal against paragraphs 1 and 2 above is extended until the hearing presently listed for 11th September 2008.
4. It is directed under CPR 52.4(2)(a) that time for filing an appellant's notice be extended to 21 days after the conclusion of the said hearing.
5. All matters consequential upon the judgment delivered today be adjourned to the said hearing.
6. The detailed assessment of the remainder of the Claimant's costs will take place at the said hearing.
7. The said hearing be listed with a time estimate of a day.

Mr Jeremy Morgan QC (counsel instructed by Lester Morrill, Solicitors) for the Claimant
Mr Benjamin Williams (counsel instructed by Weightmans LLP, Solicitors) for the Second Defendant
The First Defendant did not attend and was not represented