Neutral Citation Number: [2024] EWHC 2195 (Ch)

Case No: BL-2023-000815

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30/08/2024

Before :

MASTER MCQUAIL

- -

Between :

(1) THE COMMERCIAL LAW PRACTICE LIMITED **(2) STEPHEN JOHN MAKIN**	**Claimants**
- and -	
ATKINSON WHELLER LIMITED	**Defendant**

- -
- -

David Berkley KC and Jonathan Lester (instructed by **The Commercial Law Practice**) for the Claimants
John Wardell KC (instructed by **HCR Legal LLP**) for the **Defendant**

Hearing date: 7 June 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 30August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER MCQUAIL

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1. On 7 June 2024 I heard:

(i) the first claimant's application dated 27 February 2024 seeking to amend the particulars of claim (**the Amendment Application**), which is supported by the witness statement of Virginia Wilkins, managing director of the first claimant, dated 26 February 2024;

(i) the defendant's application dated 2 April 2024 seeking reverse summary judgment and/or strike out of the claim (**the SJ Application**), which is supported by the witness statement of Simon Biggin a partner with the defendant's solicitors, also dated 2 April 2024. That witness statement is also made to oppose the Amendment Application.

Background

2. This is a professional negligence claim:

(i) the defendant is a firm of patent, trademark and design attorneys. It is alleged that the second claimant suffered loss and damage as a consequence of advice negligently provided to him by the defendant in 2018;

(ii) the first claimant is a firm of solicitors which has acted for the second claimant since 2017;

(iii) Permavent Limited (**Permavent**) sued the second claimant in connection with certain patents invented by the second claimant while a director of that company;

(iv) the first claimant acted for the second claimant in connection with the execution of a settlement agreement (**the Settlement Agreement**) between the second claimant and Permavent. By the Settlement Agreement the second claimant agreed not to claim any right or interest in certain patents which were transferred to another company, Greenhill Industrial Holdings Ltd (**Greenhill**). Adverse pecuniary consequences (**the Consequences**) would flow from any breach by the second claimant of the Settlement Agreement;

(v) The defendant's advice to the second claimant was given in connection with the Settlement Agreement and was advice that he register his interests in the patents;

(vi) Following the registration, the second claimant was sued by Permavent and Greenhill to enforce the Consequences;

(vii) The first claimant acted for the second claimant in the enforcement proceedings which resulted in a Judgment against the second defendant for a sum of just under £680,000 dated 4 March 2021 (**the 2021 Judgment**) together with an order for costs (**the Costs Order**);

(viii) The claimant was made bankrupt on his own petition on 19 March 2021.

3. On 15 March 2021, immediately before his bankruptcy, the second claimant purported to assign his causes of action against the defendant to the first claimant (**the First Assignment**).

4. The relevant recitals contained in the First Assignment are as follows:

"(B) …It is believed that the Attorney's advice was negligent as a result of which the Assignor has suffered considerable losses including but not limited to:

(a) the requirement to repay all consideration received under the Settlement Agreement;

(b) The loss of future income payments that would have been derived under the Settlement Agreement;

(c) damages that the Assignor would have been entitled to if such registration had not been a breach of the Settlement Agreement; and

(d) costs including, but not limited to, the right to recover all costs that the Assignee has been ordered to pay together with all present and future legal and professional costs reasonably and properly incurred (**the Claim**).

(C) The Assignee represented the Assignor in the subsequent proceedings for breach of contract and has suffered loss as a result of the Assignor being unable to pay the Assignees legal and professional fees incurred in representing the Assignor.

(D) The Assignor is unable to prosecute the Claim and has agreed to assign all his rights under the Claim including the right to claim costs against the Attorney, to the Assignee on the terms of this deed with effect from the date of this deed (**Effective Date**).

(E) From the Effective Date the Assignee has agreed to pursue the Claim in order to preserve the Claim for the benefit of the Assignor's estate and with a view to maximising the Assignor's recovery under the Claim and agrees to hold the net proceeds of the Claim on trust for the Assignee and his estate (**Trust**)."

5. The relevant operative terms are as follows:

"1. Assignment and declaration of trust

1.1 The Assignor assigns all his rights, title, interest, and benefit in and to the Claim to the Assignee with effect from the Effective Date ('Rights').

1.2 Subject to 1.3 below, the Assignee agrees to pursue all the Assignor's Rights under the Claim from the Effective Date and to hold any resulting proceeds of the Claim on Trust for the benefit of the Assignor and his estate.

1.3 In the event that the Assignee's claim against the Attorney is successful the Assignee shall be entitled to retain a payment equal to 20% of the resulting proceeds of the Claim.

"2. Consideration

In consideration for the assignment contained herein the Assignee shall pay to the Assignor the sum of £500 (receipt of which is hereby acknowledged) by way of direct transfer to the Assignor's bank account…

6. The first claimant sent a notice of the First Assignment to the defendant under cover of a letter dated 28 May 2021. By a letter of claim of the same date it set out its claim against the defendant.

7. The defendant responded by a letter dated 4 August 2021 which explained the defendant's stance on the invalidity of the First Assignment.

8. The Claim Form was issued on 7 June 2023. By its terms the first claimant claims damages for negligence and breach of contract as the second claimant's assignee pursuant to the First Assignment. Additionally both claimants seek declarations that the defendant acted negligently and in breach of contract. Particulars of claim accompanied the Claim Form.

9. By its defence dated 5 August 2023, the defendant denies any negligence. The defence denies that the first claimant has any standing to bring the proceedings because the First Assignment is void and avers that this is not an appropriate case for the grant of declaratory relief which adds nothing to the damages claim. The defendant intends to make amendments to its defence, which are accepted in principle by the claimants, to introduce a break in causation and/or contributory negligence line of argument that the second claimant's dealings with Permavent and Greenhill after the registration of the patents brought the Consequences

upon himself, at least in part. There is a further proposed plea by amendment to the effect that the second claimant's right to declaratory relief is vested in his trustees in bankruptcy.

10. On 1 November 2023, the defendant's solicitors put the first claimant on notice that the defendant intended to apply to strike out the claim on the basis that the First Assignment was invalid.

11. By a letter dated 1 December 2023, the second claimant's trustees in bankruptcy stated that they believed the First Assignment to be valid but would consider executing a fresh assignment themselves in the event that it was not.

12. By the Amendment Application, the first claimant seeks to amend the particulars of claim to introduce amendments which plead that either the First Assignment is valid or, in the alternative, that a fresh assignment from the second claimant's trustees in bankruptcy dated 1 March 2024 of their claims against the defendant to the first claimant (**the Second Assignment**) is valid and can be relied upon to make good the claim. Ms Wilkins concedes at paragraph 27 of her witness statement that, if the First Assignment is void, the claim will fail without amendment.

13. The first CCMC was listed to be heard on 4 March 2024. My order made on that occasion provided for the listing of the Amendment Application, and for the service of further evidence in relation to that application. Following its issue, the SJ Application was listed to be heard at the same time as the Amendment Application.

14. The SJ Application is brought because defendant denies that the first clamant has locus to bring the claim on the ground that the First Assignment is void. In addition the defendant says that the claims by each claimant for a declaration add nothing to the damages claim.

15. The claimants have not put in any evidence in opposition to the SJ Application. Although an executed copy of the Second Assignment and an undated Notice of the Second Assignment are in the bundle, they have not been formally adduced in evidence.

16. At the March hearing the second claimant acted in person. By letter to the Court dated 20 May the first claimant informed the court that the first claimant would be representing the second clamant at the June hearing and counsel confirmed at the hearing that they are instructed by both claimants.

Law - Summary Judgment

17. CPR r. 24.3 provides that:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if –
>
> (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

18. The judgment of Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] includes a convenient and well known summary of the principles on an application for summary judgment which was approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098.

19. The seventh principle to which Lewison J referred is as follows:

> "[I]t is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial."

Law - Strike Out

20. Under CPR 3.4(2)(a) the court may strike out a claim on the basis that the statement of case discloses no reasonable grounds for bringing the claim.

Law - Amendments

21. The permission of the Court is required under CPR 17.1(2)(b) for amendments which have not been consented to. The general principles governing the grant of permission to amend are discussed in the White Book Note at 17.3.5 and 17.3.6. The Court has a broad discretionary power to grant permission to amend. A list of the factors that the Court should take into account are set out by Lambert J in *Pearce v East and North Hertfordshire NHS Trust* [2020] EWHC 1504 at [10]. In brief the factors there referred to are:

> (i) the overriding objective and the balance of justice between the parties and other litigants;
> (ii) compliance with the CPR;
> (iii) the timing of the application and the impact on a trial date; and
> (iv) the amending party's conduct.

22. To be allowed an amendment must show some prospect of success, be arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence that establishes a factual basis for the allegation, see *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18].

23. Whether to allow a party to amend its statement of case is a case management decision to be decided with reference to the overriding objective. Where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right, see *Kim v Park* [2011] EWHC 1781.

Law – Champerty- Defendant's Submissions

24. Mr Wardell relied primarily on the first instance and Court of Appeal decisions in *Farrar v Miller*. He directed my attention to the following parts of those decisions.

25. The judgment of Marcus Smith J at [2021] EWHC 1950 helpfully explains the law of champerty:

> "14. In *R (Factortame Limited) v Secretary of State for Transport, Local Government and the Regions (No 8) [[2022]EWCA Civ 932 at [32]]*, Lord Phillips MR adopted the definitions of champerty and maintenance in *Chitty on Contracts.* A person is guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse. Champerty occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit. Champerty can thus be seen as an aggravated form of maintenance."
>
> "15. Champerty and maintenance are rules that apply to all contracts or transactions falling within their scope. The rules are not limited to agreements. Assignments, and particularly assignments of rights to litigate or of causes of action, are no exception. It is perfectly possible for the mere transfer of a cause of action to be voided because it infringes the rules of champerty and maintenance.
>
> "16. However, not all assignments of rights to litigate or of causes of action are invalid by these rules. As Lord Roskill noted in *Trendtex Trading v. Credit Suisse* [[1982] 1 AC 679 at 703] "[t]he court should look at the totality of the transaction. If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance."

26. Marcus Smith J went on at [21] to refer to Knowles J's judgment in *Akhmedova v Akhmedova* [2020] EWHS 1526 (Fam) where the judge said:

> "35. The tests for maintenance and champerty are set out in the decision of the house of Lords in *Giles v Thompson* [1994] 1 AC 142. Maintenance and champerty (where profit is involved) will only be established where there is "wanton and officious intermeddling with the disputes of others in which the [maintainer] has no interest whatsoever and the assistance he renders to the one or the other party is without justification of excuse (per Lord Mustill at 164C-D) …
>
> "36. In *Sibthorpe v Southwark LBC* [2011] EWCA Civ 25 the Court of Appeal explained that, when considering an allegation of champerty in relation to an agreement to which the person conducting the litigation (or providing advocacy services) is not a party, the modern approach was for the court to decide whether the agreement would undermine the purity of justice or would corrupt public justice which is a question to be decided on a case-by-case basis ([35] to [36])… In *Davey v Money* [2019] EWHC 997 (Ch) Snowden J held that in determining whether an agreement with a non-party as regards the conduct of litigation would tend to undermine or corrupt the process of justice "the crucial issue appears to be whether the non-party can exercise excessive control or influence over the conduct of the proceedings in such a way as, for example, to suppress evidence, influence witnesses, or procure an improper settlement" (at[78])."

27. Marcus Smith J pointed out at [22] that the cases to which he had referred thus far were ones not involving lawyers and that in relation to lawyers Parliament had intervened by the provisions of the Courts and Legal Services Act 1990 (**the 1990 Act**) which expressly sanction certain fee arrangements between clients and solicitors. Conditional fee agreements (**CFAs**) and damages-based agreements (**DBAs**) which, at common law would have been unlawful for champerty and maintenance, are now expressly permitted under ss 58 and 58AA of the 1990 Act.

28. At [33] Marcus Smith J referred to Lord Neuberger's explanation in *Sibthorpe*:

> "17. A type of contract which has relatively often given rise to an allegation of champerty or maintenance is one between a claimant in a piece of litigation and the person conducting the litigation (almost always a barrister or solicitor) on the claimant's behalf. At any rate until the recent past, the law had set its face against those who conduct litigation placing themselves in a position where they could profit from their client's success. As Lord Denning MR put it in *Wallersteiner v Moir* (No. 2) [1975] QB 373, 393 "English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a "contingency fee", that is he gets paid the fee if he wins, but not if he loses", describing that as champerty. He relied at 394 on a dictum of Lord Esher MR in *Pittman v Prudential Deposit Bank Ltd* (1896) 13 TLR 110, 11:
>
> > "In order to preserve the honour and honesty 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 the litigation"

29. In [35] of Marcus Smith J's judgment he explained that

> "As Lord Neuberger has made clear there is now a very hard distinction between potentially champertous transactions between non-lawyers and potentially champertous transactions involving a lawyer. The former cases are considered according to the broad and flexible standard articulated [in [36 & [35] of *Sibthorpe*]. The latter cases are assessed according to an altogether different standard: they are either sanctioned by statute or they are not; and if they are not the common law does not ride to the rescue. In this case the Assignment is not sanctioned by the 1990 Act and – assuming it to stand alone clearly fails as a champertous transaction."

30. At [54] of Marcus Smith J's judgment, he went on to consider whether or not an assignment of a cause of action to avoid the consequences of the assignor going bankrupt was objectionable. He concluded that it was. In summary his reasons, relevant for present purposes, were these:

> (i) control of the litigation would pass permanently from the claimant or his estate to a stranger to the litigation, that is a person with no legitimate interest in prosecuting the proceedings, apart from its interest in fee recovery if successful. That was not consistent with the purity of justice;
>
> (ii) the effect of such an assignment to avoid bankruptcy is that the assignee becomes in effect a secured creditor of the assignor, with first call on any recovery out of the assigned proceedings.

31. Accordingly Marcus Smith J found that an assignment of a claimant's cause of action to his solicitors was champertous and void. His decision was upheld by the Court of Appeal. The decision is reported at [2022] EWCA Civ 295. The Court of Appeal stressed three points in particular:

> (i) a bare cause of action can only be assigned where the assignee has a genuine commercial interest in enforcing a claim, see [22];
>
> (ii) the Court was bound by its previous decision in *Pittman v Prudential Deposit Bank* (1896) 13 TLR 111, [1896] 1 WLUK 7 that a solicitor acting for a client in legal proceedings could not validly take an assignment of the client's cause of action prior to judgment, see [51]; and

(iii) a champertous agreement not sanctioned by the 1990 Act remained contrary to public policy and was therefore unenforceable. Parliament had relaxed the common law rules to allow for CFAs and DBAs to be enforceable but had gone no further than that. This meant that it was unnecessary for the Court to consider whether the assignment was offensive to justice (on the basis that it avoided the effects of bankruptcy), although the appellate court stated it was "far from obvious… that [the judge's] concerns were misplaced" at [53].

Law - Champerty – Claimants' Submissions

32. Mr Berkley submits that the First Assignment was not champertous and makes the following submissions on the authorities in support of that proposition:

(i) In *Trendtex Trading Corporation v Credit Suisse* [1982] 1 AC 679 Lord Roskill at 703C explained how the test for champerty had evolved:

> "I am afraid that, with respect, I cannot agree with Lord Denning M.R. when he said in the instant case that "The old saying that you cannot assign "a bare right to litigate" is gone." I venture to think that still remains a fundamental principle of our law. But it is today true that in English law an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty."

And accordingly the question in these proceedings is how to apply "the genuine commercial interest test." Mr Berkley cited the case of *Brownton Ltd v Edward Moore Incubon Limited* [1985] 3 All ER 499 as an example of the application of the test and referred to Megaw LJ's statement at 182 e

> "An agreement to assign is not champertous merely because the assignee, or assignor, or both has as a part of his genuine commercial interest the contemplation that he will be better off as a result."

and to Lloyd LJ's summary of *Trendtex* and the need to judge the question of genuine commercial interest in the context of the transaction as a whole at 509 c to e. He relied upon these statements as a counter-indication to the granting of summary judgment.

(ii) In *Factortame v Secretary of State for the Environment (No. 2)* [2002] EWCA Civ 932 Lord Phillips MR cited Lord Mustill's words about the law on maintenance and champerty in *Giles v Thompson* [1994] 1 AC 142 at 164 as being:

> "best kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants."

And said of that decision that it:

> "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."

33. So far as concerns the particular case of solicitors Mr Berkley made the following submissions:

> (i) By reason of the 1990 Act CFAs and DBAs satisfying stipulated conditions are now permissible;

(ii) There is a significant qualification at section 58AA(9) of the 1999 Act which provides that

> "Where section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies to a damages-based agreement other than one relating to an employment matter, subsections (1) and (2) of this section do not make it unenforceable."

Section 57 of the Solicitors Act 1974 which concerns non-contentious business agreements provides that:

> "(1) Whether or not any order is in force under section 56, a solicitor and his client may, before or after or in the course of the transaction of any non-contentious business by the solicitor, make an agreement as to his remuneration in respect of that business.
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> "(2) The agreement may provide for the remuneration of the solicitor by a gross sum or by reference to an hourly rate, or by a commission or percentage, or by a salary, or otherwise, and it may be made on the terms that the amount of the remuneration stipulated for shall or shall not include all or any disbursements made by the solicitor in respect of searches, plans, travelling, taxes, fees or other matters.
>
> "(3) The agreement shall be in writing and signed by the person to be bound by it or his agent in that behalf.
>
> "(4) Subject to subsections (5) and (7) [relevant to assessment] the agreement may be sued and recovered on or set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor.

(iv) Section 87(1) of the 1974 Act provides the following definitions:-

> "contentious business" means business done, whether as solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator … "non-contentious business" means any business done as a solicitor which is not contentious business as defined by this subsection.

Pre-action work by a solicitor is by reason of these definitions non-contentious even when advice is being given whether or not to bring proceedings.

(iii) In *Farrar v Miller* the solicitors entered into a damages-based agreement under which Mr Farrer agreed to pay them 50 percent of the proceeds of the litigation. In the course of the litigation Mr Farrar assigned his claims to the solicitors. The assignment provided that any recoveries would be distributed first towards payment of their fees and then any balance to Mr Farrer. In anticipation of being bankrupted Mr Farrar executed a deed of assignment of his claims to the solicitors. After Mr Farrar died the solicitors applied to be substituted as claimant in his place. The important and distinguishing features of the case were that:

(a) it was conceded at first instance that section 59 of the Solicitors Act 1974 suggested there was a rule that outlawed an assignment between a client and solicitor because of conflict of interest; and

(b) the solicitors did not on appeal pursue the argument that the judge should have applied the genuine commercial interest test and accepted that *Trendtex* was authority for the proposition that a solicitor who has the conduct of

litigation may not take an assignment of their client's cause of action prior to judgment.

Defendant's Submissions on SJ Application

34. Mr Wardell places reliance on the seventh principle in *Easyair* and urges the Court to grasp the nettle and decide the question of whether or not the First Assignment is void for champerty. He submits that that question is a short point of law, the Court has before it all the necessary evidence it needs to determine it and the parties have had an adequate opportunity to address it.

35. Mr Wardell says that it is obvious that the First Assignment was champertous and therefore void:

(i) recital (B) to the First Assignment sets out that the claim to be assigned was the claim for damages which the second claimant had against the defendant for negligence. By clause 1.1 of the First Assignment, that claim was assigned to the first claimant. By clauses 1.2 and 1.3, the first claimant promised to pursue the claim and to hold the proceeds on trust for the second claimant and his estate, with the first claimant able to retain 20% of the resulting proceeds of the claim in the event it was successful. The First Assignment was the transfer of a cause of action from a client to his solicitors, with the solicitors entitled by its terms to profit from the underlying claim. The claimants cannot rely on the First Assignment itself to generate a genuine commercial interest, there must be some "other" pre-existing such interest, see [54(1)(b)] of Marcus Smith's judgment in *Farrar v Miller*;

(ii) the First Assignment was neither a CFA or a DBA sanctioned under the 1990 Act. As Marcus Smith J explained in *Farrar* at [24], an assignment like the First Assignment cannot be a CFA or a DBA because it is not an agreement between a person providing litigation services and the recipient of those services. Following such an assignment the claim would be the claim of the solicitor, who would no longer be providing legal services to another party, but instead prosecuting a claim in his own right;

(iii) In *Belsner v CAM Legal Services* Ltd [2023] 1 WLR 1043 Sir Geoffrey Vos MR at [51-55] referred to the judgments of Lord Leggatt and Lady Rose JJSC in *Bott & Co Solicitors Ltd v Ryanair DAC* [2022] 2 WLR 634 at [52] and Wyn-Parry J in *Simpkin Marshall* [1959] Ch 229 at 235 explaining that business done before proceedings are commenced with a view to commencement is to be regarded as contentious if proceedings are in fact commenced as is business in the course of proceedings, while all other business is non-contentious and that this is what generations of text books have said;

(iv) the First Assignment is also objectionable and therefore void as undermining the purity of justice, because it was plainly intended to avoid the effects of the second claimant's bankruptcy and to put the first claimant in the position of a secured creditor entitled to 20% of the proceeds of the claim, rather than needing to prove in the second claimant's bankruptcy. It is further objectionable that the First Assignment had the effect of passing the claim to a person with no commercial interest in the claim other than securing payment of its own fees;

(v) the First Assignment further undermines the purity of justice because it is an assignment to solicitors with an existing duty to advise the second claimant in a proper manner concerning the benefit or otherwise of a transaction which would clearly benefit the first claimant and not to take advantage for their own benefit of information obtained from their client during the course of acting for him. The First Assignment clearly

created an own interest conflict for the first claimant pursuant to paragraph 6.1 of the SRA Code of Conduct, and the first claimant should have declined to act.

36. Mr Wardell says the consequence of the First Assignment being void is that any cause of action belonging to the second claimant vested in his trustees in bankruptcy following his bankruptcy. It follows that the first claimant's claim for damages must fail since the first claimant has no title to sue. Further any right to seek declaratory relief also vested in the trustees in bankruptcy. The consequence of that is that neither of the claimants is entitled to bring a claim for a declaration and those claims must fail too. In any event, however, the grant of declaratory relief is discretionary, as explained by Aikens LJ in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387. To grant declaratory relief to the effect that the defendant had been negligent would add nothing to a substantive damages claim. To allow a declaratory claim to proceed separately from any damages claim would run a risk that proceedings for that relief would go to trial without issues of causation and quantum of damage being determined in the same proceedings.

37. It is submitted, the claim as pleaded has no real prospects of success. There is also no other compelling reason why the case should be determined at trial. The defendant therefore asks to be granted reverse summary judgment on the claim, or for it to be struck out.

Claimants' submissions on SJ Application

38. Mr Berkley contends that the present case is plainly unsuitable for summary determination. He says that the defendant is seeking to conduct a summary trial. A full investigation into the facts and surrounding circumstances is needed before the court can make a decision, where reasonable grounds exist for believing that further evidence would be available to a trial judge and so affect the outcome. The claimants only need to show a realistic as opposed to fanciful prospect of success

39. Mr Berkley submits that this case should be distinguished from *Farrar v Miller* on the grounds that:

(i) the First Assignment took place before any pre-action protocol had been commenced or proceedings issued or any engagement or retainer to conduct any litigation on behalf of Mr Makin had been entered into;

(ii) under the terms of the First Assignment, the first claimant is pursuing its own suit, albeit that it has agreed to hold the entire proceeds on trust for the second claimant and the first claimant merely had a right to payment calculated at 20% of the recovery;

(iii) the 20% is not objectively speaking excessive and the trustees in bankruptcy have endorsed the transaction;

(iv) since the First Assignment pre-dated the first claimant's conduct of any litigation it may properly be regarded as a non-contentious business agreement within the meaning of section 57 of the 1974 Act and therefore not caught by section 58 or 58AA of the 1990 Act;

(iv) it is well arguable that the First Assignment would pass the "genuine commercial interest test" from the perspective of both parties to that transaction viewed at the time it was entered into;

(vi) it is difficult to see how a conflict of interest issue arose as the First Assignment was to the mutual benefit of the first and second claimants.

40. Mr Berkely submits therefore that the case is not appropriate for summary determination and the SJ Application should be dismissed.

Discussions and Conclusion on SJ Application

41. The question that must be answered to determine the summary judgment application is a short one of law. There is nothing to suggest further evidence would be available at trial which would affect the outcome.

42. On a plain reading of the First Assignment in its commercial context which is not in any substantial dispute, the words of clause 1.2 whereby the whole proceeds would be held for the second claimant and his estate cannot be severed from the words of clause 1.3 whereby the first claimant would be entitled to retain 20% of those proceeds, to have the effect of downgrading the first claimant's entitlement to share in the proceeds to something less than an outright entitlement to that 20% share. The First Assignment is plainly an agreement by which the first claimant sought to acquire the right to pursue the second claimant's claim against the defendant, agreed to pursue it and agreed that the proceeds would be shared between the first claimant and the second claimant.

43. Such an agreement cannot be a CFA or DBA sanctioned by the 1990 Act as it is not an agreement by the first claimant to provide litigation or advocacy service to the second claimant. It also cannot be a non-contentious business agreement as it is not an agreement by which the first claimant was to transact non-contentious business for the second claimant for a commission or percentage. The nature of the agreement was that it purported to transfer the second claimant's contentious claim against the defendant to the first claimant to pursue in its own right.

44. The validity of the First Assignment must be considered in the context of the law of champerty as explained in *Farar v Miller*. It is undoubtedly an agreement by which the solicitor first claimant has endeavoured to acquire the cause of action of its client the second claimant. That it was entered into before proceedings were issued or a letter before action was sent cannot be material to whether it falls foul of the law of champerty. It falls on the lawyer side of the hard distinction referred to by Marcus Smith J in *Farrar v Miller* and the genuine commercial interest test has no relevance.

45. As to the points of alleged distinction between *Farrar v Miller* and this case:

(i) the fact that it was conceded that section 59 of the Solicitors Act 1974 meant an assignment between client and solicitor was not valid because of a conflict of interest, does not mean that an assignment between client and solicitor which is champertous would cease to be so if section 59 of the 1974 Act did not invalidate it;

(ii) that the solicitors did not on appeal pursue the argument that the judge should have applied the genuine commercial interest test and accepted that *Trendtex* was authority for the proposition that a solicitor who has the conduct of litigation may not take an assignment of their client's cause of action prior to judgment because the assignment is champertous does not mean that I should not follow Marcus Smith J and the Court of Appeal in rejecting the applicability of the genuine commercial interest test in a lawyer case because such an assignment is champertous.

46. I therefore conclude that the First Assignment was champertous and void so the first claimant has no title to sue. The second claimant's title to sue, having never been validly assigned to the first claimant, has passed to his trustees in bankruptcy. I will therefore grant summary judgment against the first claimant who has no right to pursue its claim as presently formulated. I do not therefore need to deal with the further arguments about the First

Assignment undermining the purity of justice whether because of its consequence for the creditors in the second defendant's bankruptcy or because of a conflict of interest. I will deal with the second claimant's claim for declaratory relief after I have considered the Amendment Application.

Amendment Application

47. The substantive amendments are at paragraphs 7.3 to 7.6 of the draft amended particulars of claim. The first claimant, which is the sole applicant, proposes to plead that either the First Assignment was valid and the first claimant has title to sue or, if it was invalid, the Second Assignment is valid and thus gives the first claimant title to sue. Since I have decided the SJ Application against the first claimant, amendments could only be permissible to allow reliance upon the Second Assignment and the proposed form of amendment which includes a pleading in the first alternative of reliance on the First Assignment cannot be permitted.

The Claimants' Submissions on the Amendment Application

48. Mr Berkley submits:

(i) In *Hendry v Chartsearch* (2000) 2 T.C.L.R. 115 the Court of Appeal held that a claimant who had taken an assignment of contractual rights after the writ was issued was entitled to amend his claim and plead the assignment and the suggestion that the claimant must have had some valid cause of action when the claim was issued to enable reliance on a post-issue assignment was rejected. It was said (still in the context of the RSC) by Evans LJ at pp. 124-125 that:

> "Mr Freedman submits in effect that it follows from this passage and from the judgments in *Roban Jig and Tool Co*. that leave to amend cannot or should not be given unless the party seeking leave to add a fresh cause of action had some cause of action at the date of the writ (or counterclaim). This would amount to a significant restriction on the apparently general discretion given by Ord. 20, r. 5(1) and Ord. 19, r. 9. I would reject this submission.…. the court has a general discretion which should not be restricted by hard-and-fast rules of practice, if not of law, such as that which is suggested here. The judge therefore was wrong to consider that the court had no power to give leave to make the re-amendment. In my view, he was wrong also to consider that the discretion was somehow restricted by what he called "the principle set out in *Eshelby* and in *Roban*" (p.22). It is a general power which in modern parlance has to be exercised in accordance with the justice of the case.
>
> "…The purpose of the re-amendment is to specify the reason why the plaintiff alleges that he is entitled to bring the claim. The cause of action [i.e. breach of contract] remains the same: the additional facts cause no prejudice or embarrassment to the defendants. I cannot see any ground for refusing leave to make the re-amendment, and as the exploitation agreement does not contain an assignment clause there is no contractual basis for objecting to the amendment."

(ii) In the *Maridive & Oil Services* case the Court of Appeal reviewed the authorities dealing with amendments raising post-issue facts. Mance LJ found the Court was bound to follow *Hendry v Chartsearch* and said at [23]:

> "We are in my view bound by *Hendry v. Chartsearch Ltd*., which appears to me also to reflect the appropriate modern approach. Further, if and so far as it may be material, I do not regard the present case as one where, as at the date when Moore-Bick J. made his order allowing an amendment, the original claim could be said to be "incurably bad". The validity or otherwise of the first demand was

> a properly arguable point, which was only decided after a preliminary issue (issue (i)) leading to full argument first before HHJ Hallgarten and now before this court.
>
> "I therefore consider that, if the appellants had prior to 20th August 2000 [i.e. the contractual limitation period], sought permission to amend their particulars of claim to rely on the second demand, the court would have had power to grant and could properly have granted such permission. Although this is a matter which is probably anyway concluded in the appellants' favour by Moore-Bick J's order, I also consider that the court would have done so. It would not have been sensible to insist on separate proceedings being begun."

Chadwick LJ said this at [54]:

> "There is no absolute rule of law or practice which precludes an amendment to rely on a cause of action which has arisen after the commencement of the proceedings in circumstances where (but for the amendment) the claim would fail. The court has a discretion whether or not to allow the amendment in such a case; a discretion which is to be exercised as justice requires. In the present case I have no doubt that, had the claimants sought to amend their particulars of claim (so as to rely on the demand of 13 March 2000) within the period from 12 April to 30 August 2000 [i.e. the contractual limitation period], they should have been permitted to do so. There was no reason why they should have been required to commence new proceedings."

In *Maridive* the claimant was therefore permitted to rely upon the amended pleading and rely upon the second demand, which had been served after proceedings were issued and even after a contractual time bar had expired and even though the first demand had been found to be invalid.

(iii) In *Finlan & anr v Eyton Morris Winfield (a firm)*, [2007] EWHC 914 Blackburn J considered whether to allow the claimant to make an amendment to allege a deed as being the effective assignment to him of causes of action against the defendants and said starting at [44]:

> "The need for an amendment was the consequence of my finding that Mr Finlan was not able to rely on the assignment that he had pleaded, namely an oral assignment effected before issue of the claim form. He needed instead to plead the assignment by which he had in fact acquired the right to bring his claims against the defendants, namely the deed executed at about 4.45 pm on 28 June [which was some 3 and a half hours after the claim form was issued]…
>
> "46. The modern practice is to allow an amendment, the effect of which is to make good a defect in the claimant's title to sue, even though the event relied on did not arise until after the proceedings were issued so that, in strict law, the claimant did not have a cause of action at the time he issued his process."

(iv) In *Munday v Hilburn and Fields* [2014] EWHC 4496 (Ch) Nugee J was concerned with a claim issued by a bankrupt at a time when the cause of action vested in his trustee, but had then obtained an annulment of the bankruptcy with the result that the estate reverted to him. The Judge said at [47]

> "it is not I think suggested that the fact the cause of action was not vested in both claimants at the outset makes the proceedings incurably bad. There was some ancient authority to that effect but the modern law is that even if there is a defect in the proceedings when issued in that either the claimant's cause of

> action is not then complete, or that the claimant's cause of action is not then vested in the claimant, it is open to the Court to cure the defect."

49. Mr Berkley says that the Second Assignment provides the answer to the problem with the First Assignment since there is no dispute that trustees in bankruptcy have the power to assign without regard to the law of champerty and maintenance.

50. Mr Berkley submits that the argument in favour of granting the Amendment Application is overwhelming as it will enable the case on the merits of the negligence claim of the second claimant against the defendant to be determined. Requiring the first claimant to issue a fresh claim and incur a further issue fee, involves wasted costs and disbursements and is not an efficient use of court time and resources and is in costs terms disproportionate.

51. The relation back principle does not cause prejudice where there is no limitation defence and no other prejudice is identified. Even the relation back principle is not an inflexible rule. For example in *British Credit Trust Holdings v UK Insurance Limited* [2003] EWHC 2404 [Comm] Morison J said at [31]:

> "The doctrine of relation back will only be a relevant consideration if the other party's position will be prejudiced if the new claim takes effect earlier than the date on which leave to make it was granted. This is only likely to be so where the effect of relation back would deprive the other party of a limitation defence."

And at [32]

> "if there is an existing claim which needs amendment then the amendment will relate back so that the claim begins as though in its amended form as from the date when the pleading in question was first delivered. These simple rules produce no difficulty. In respect of any amendment the court is entitled to impose such conditions as it thinks fit, including, I think, conditions as to the date from which the proposed amendment is to take effect. The doctrine of relation back does not apply inflexibly, the court can adjust its operation to achieve the overriding objectives."

52. Accordingly Mr Berkely submits that the Amendment Application should be granted, subject to the usual costs orders in relation to consequential amendments.

Defendant's Submissions on the Amendment Application

53. Mr Wardell says, on the footing that the SJ Application has been successful, the real question is whether the first claimant can now cure the defect in the claim as originally pleaded by pleading a title to sue which it only acquired after proceedings commenced.

54. He says that the relevant authorities are discussed in the White Book Commentary at 17.3.3 and its sub-paragraphs and the following principles may be extracted:

> (i) prior to the CPR, an amendment duly made took effect not from the date when the amendment was made, but from the date of the original document which it amended. This is the "doctrine of relation back". The doctrine has been diluted under the CPR, but it is still of relevance;
>
> (ii) the doctrine meant that historically parties could not raise by amendment causes of action or a right to sue that they did not have at the commencement of the proceedings in question as in *Ingall v Moran* [1944] KB 160. Instead of raising such matters by amendment claimants were left to commence new proceedings, exposing themselves to possible costs liabilities and limitation problems.

(iii) pre-CPR the first claimant would have been unable to amend to rely on the Second Assignment. Its remedy would instead be to issue new proceedings;
(iv) the position post-CPR is not so clear cut and, at least in most cases, the Court will have a discretion whether or not to allow an amendment to permit the claimant to pursue a cause of action that he or she did not have at the time proceedings were issued;
(v) In *Maridive & Oil Services (SAE) v CAN Insurance Company (Europe) Ltd* [2002] EWCA Civ 369. The Court of Appeal held that there is no absolute rule of law or practice which precludes an amendment to rely on a cause of action which accrued only after the date of the original claim. The Court has a discretion whether to allow the amendment, a discretion to be exercised as justice requires;
(v) there are certain cases where the proceedings suffer from an incurable nullity at the outset. *Ingall v Moran* is authority for the proposition that commencement of proceedings in the capacity of administrator without first obtaining a grant of representation amounts to an incurable nullity. Such a claim is born dead and incapable of being revived, such that the Court has no discretion to allow an amendment to revive the claim. *Ingall v Moran* was followed by the Court of Appeal in *Milburn-Snell v Evans* [2011] EWCA Civ 577;
(vi) Chief Master Marsh surveyed and summarised the relevant authorities in *Football Association Premier League Ltd v O'Donovan* [2017] FSR 31 at [14] – [34]. Having referred to the two lines of authority, the Master concluded that on the facts before him the case was clearly one where he had a discretion to permit the amendment and so he did not need to resolve the tension. However, he said at [34(vi)]:

> "It does not follow that simply because the court has power to permit an amendment adding a new claim, it will necessarily exercise its discretion to do so. As with all such decisions, the provisions of the overriding objective are paramount."

55. Mr Wardell says that the starting point is that the claim is defective as no arguable claim exists on the pleadings, because the first claimant did not have title to sue under the First Assignment and to the extent that declaratory relief is sought by the second claimant that claim vested in the second claimant's trustee in bankruptcy.

56. The real question is whether the first claimant can amend to rely on the Second Assignment in order to resuscitate a dead claim. As to that:

(i) this is within the category of "incurable nullity" cases. This is because there can be no argument that the First Assignment was valid with the result that, as currently pleaded, the claim is bound to fail. The claimants knew about the invalidity when the proceedings were issued as the defendant put them on notice as long ago as 2021. The defendant has been forced to resist an invalid claim;
(ii) if the defendant is wrong about its categorisation of the claim as being incurably bad, then it accepts that the Court would have a discretion whether or not to permit the amendment. In that event, justice points firmly against exercising the discretion in favour of the claimants. The claimants should have taken steps to regularise the position years ago but chose not to. Now the original claim has been held not to be available they are effectively seeking to replace it with a new one. Their proposed amendment does not even acknowledge that the First Assignment is void. Therefore the just outcome is for this litigation to end now;
(iii) the claimants may issue new proceedings. Such prejudice as will be caused, including the payment of a fresh issue fee is prejudice of their own making since the

defendant had warned them of the argument as to enforceability of the First Assignment which has now succeeded;

57. The defendant therefore asks the court to refuse the Amendment Application. If contrary to that submission the court allows the amendments, the defendant should be entitled to its costs of these proceedings to date, to reflect the fact that D has succeeded in resisting the claim as originally formulated.

Discussion and Conclusion

58. The only cases to which I was referred in which the court has concluded that proceedings are an incurable nullity so that amendment was not permitted to save them are *Ingall* and *Millburn-Snell*, where the problem was that there was no grant of representation made to the claimant as administrator of the estate of a deceased intestate. As Rimer LJ explained at [14] of *Millburn-Snell* "their claim was a nullity that must be struck out and could not be retrospectively validated by a grant of letters of administration… an administrator derives his title to sue solely from the grant of administration." Rimer LJ went on to explain that CPR 17.4(4) which gives the court power to amend to alter the capacity in which a party claims is inapplicable where the limitation period has not expired. He further explained at [30] that CPR 19.8 (now CPR 19.12) "does not have any role to play in the way of correcting deficiencies in the manner in which proceedings have been instituted."

59. It is notable that in *Millburn-Snell* Rimer LJ proposed an order at [36] of his judgment along the lines that: if within a short period one or more of the claimants were to issue a new claim steps taken in the old claim would be deemed to be steps in the new claim , subject to the claimants paying the defendant's costs wasted by the old claim being a nullity.

60. In all the other cases to which I have been referred the Court did not reach the conclusion that there was an incurable obstacle to amendment even where the claimant did not have title to sue at the outset:

(i) in *Hendry* Evans LJ allowed an amendment notwithstanding that it was to plead a post-issue assignment, where the claimant had no valid cause of action at the time of issue, in that case the cause of action was the same and the additional facts were said to cause no prejudice or embarrassment to the defendants;

(ii) in *Maridive* Mance LJ concluded that the Court was bound by *Hendry* and that it represented the modern approach while Chadwick LJ referred to the absence of any absolute rule precluding amending to rely on a post-issue cause of action, explaining that it is a matter of discretion to be exercised as justice requires;

(iii) in *Finlan* Blackburn J having found that the assignment originally pleaded was not effective allowed an amendment in accordance with the modern practice to plead a post-issue assignment, even though "in strict law" the claimant did not have a cause of action at the time he issued;

(iv) in *Munday*, although it does not seem to have been contended that the claim was incurably bad, Nugee J's conclusion was that the modern law is that even if the claimant's cause of action is not complete or not vested at the time of issue the Court may allow the defect to be cured.

61. Since this is not a case that concerns the particular case of the representative of an intestate, who lacks capacity to institute valid proceedings, I consider that in accordance with the modern practice referred to in the Court of Appeal and High Court judgments to which I

have referred, I should allow an amendment as a matter of my discretion if to do so would be in accordance with the overriding objective or as justice requires.

62. The claimants could have engaged at a much earlier stage with the potential difficulties with the First Assignment and, once the Second Assignment had taken place should have put it in evidence but, without any explanation, did not do so.

63. The parties have pleaded their substantive cases by reference to the facts underlying the original professional negligence claim of the second claimant against the defendant. The facts so far as concern the First Assignment and the Second Assignment are brief and, once the SJ Application is disposed of in favour of the defendant, not seriously controversial. Refusing to allow the first claimant to amend would require the first claimant to issue a new claim and incur a further issue fee. The parties would also need to go through the statements of case stage of the litigation again albeit with the benefit of material that could to a large extent be recycled.

64. Allowing the amendment now before any effective CCMC has occurred does not put any trial date or any directions timetable in jeopardy, because neither has been set.

65. If I were to refuse the amendment I would, like Rimer LJ in *Millburn-Snell*, propose to make an order or give directions to the extent possible allowing steps taken in the original claim to be steps taken in any new claim and, save for costs wasted by relying on the First Assignment, order that the costs of such steps be deemed to be incurred in any new claim.

66. Taking into account the possible courses open to me I conclude that allowing the first claimant to make an amendment to plead the Second Assignment is the course that best accords with the overriding objective.

67. To the extent the second claimant's claim for declaratory relief was not a claim which passed to the trustees in bankruptcy, it adds nothing to the claim which the first claimant will have permission to bring by amendment. The arguments of the claimants why that claim should be allowed to proceed separately were directed to the situation where permission was not given to the first claimant to amend. There are no reasonable grounds for a claim for declaratory relief being brought separately by the second claimant.

Summary and Arrangements for Giving Judgment

68. I will therefore:

(i) grant the defendant summary judgment against the first claimant;

(ii) give permission to the first claimant to amend its claim to plead reliance on the Second Assignment; and

(iii) strike out the claim of the second claimant for declaratory relief.

69. This judgment will be handed down remotely and without attendance at 10 am on Friday 30 August 2024. If the parties are unable to agree matters consequential on the judgment a further hearing will be listed in due course.