Neutral Citation Number: [2010] EWHC 941 (QB) **Date: 29 April 2010**

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**MANCHESTER DISTRICT REGISTRY**

**MERCANTILE COURT**

**Before:**

**HIS HONOUR JUDGE WAKSMAN QC**

**(sitting as a Judge of the High Court)**

**BETWEEN:**

Claims no: 9SF02648, 9SF02506, 9MA10331 and 9SF02121

**MOHAMMED ADRIS**
**SHELAGH BROWNLOW**
**RAJAN MANDAL**
**IAIN MCNICOL**

Claimants

**and**

**THE ROYAL BANK OF SCOTLAND PLC**

Defendants

**and**

**(1) CARTEL CLIENT REVIEW LIMITED**
**(2) RICHARD BURLEY**
**trading as CONSUMER CREDIT LITIGATION SOLICITORS**
**(3) MR CARL WRIGHT**

Additional Parties

**AND BETWEEN:**

Claim no: 9MA11185

**ROBERT ATKINSON**

Claimant

**and**

**BANK OF SCOTLAND PLC**

Defendant

**and**

**(1) CARTEL CLIENT REVIEW LIMITED**
**(2) RICHARD BURLEY**
**trading as CONSUMER CREDIT LITIGATION SOLICITORS**
**(3) MR CARL WRIGHT**

Additional Parties

**AND BETWEEN:**

Claim no: 9MA07104

**MR ANDREW MILLS**

Claimant

**and**

**MARKS AND SPENCER FINANCIAL SERVICES PLC**

Defendant

**and**

**(1) CARTEL CLIENT REVIEW LIMITED**
**(2) RICHARD BURLEY**
**trading as CONSUMER CREDIT LITIGATION SOLICITORS**
**(3) MR CARL WRIGHT**

Additional Parties

**AND IN THE MANCHESTER COUNTY COURT**

**Before:**

**HIS HONOUR JUDGE WAKSMAN QC**

**Claim Nos:** 9MA07731 (Layton v RBS); 9MA10155 (Barks v RBS); 9MA10192 (Taylor v RBS); 9MA10330 (Gotts v RBS); 9MA10654 (Sheeran v RBS); 9MA11047 (Hodgkins v RBS); PMA08210 (Richardson v NatWest); 9SF01519 (Parry v NatWest); 9SF02559 (Lippiatt v NatWest); 9SF02397 (Braley v NatWest); 9TS02035 (Whittaker v NatWest); 9TS02102 (Obilade v RBS); 9AL03639 (Partt v RBS); 9MA13594 (Sykes v RBS); 9MA15036 (Cooper v NatWest); 9MA16652 (Kyei v RBS); 9TS01646 (Thompson v RBS); 9BL01330 (Wernham v NatWest); 9MA10227 (Anthony Whittaker v RBS); 9BL01563 (Rosalind Whittaker v RBS); 9AL01717 (Scales v RBS); 9TS01926 (Skellett v RBS); 9SF03912 (Penketh v RBS); 9TS01604 (Riley v NatWest); 9SF02654 (Ritchie v NatWest); 9TS01770 (Jones v NatWest); 9TS01757 (Gilbert v RBS) ; 9MA 07741 (Edmondson v BoS); 9MA 07739 (Kerr v BoS); 9MA 08502 ( Potts v BoS); 9MA 07501 (Tasker v BoS); 9SF 02643 (Broadman v Lloyds TSB); 9MA10228 (Samuel Clark v HSBC); 9SK03194 (Christine Monk-Slocombe v HFC); 9MA10157 (Jodie Mills v HSBC); 9MA10652 (Christopher Hicks v HSBC); 9SK03035 (Karl Byers v HSBC); 9SK03421 (Karl Byers v HFC); 9SK03389 (Richard Batson v HFC); 9SK03404 (Naini Ahluwalia v HSBC t/a First Direct); 9TS01772 (Gavin Feaver v HSBC); 9MA11617 (Marcus Morgans v HSBC); 9SK03661 (Scott David

Collins v HSBC); 9TS01733 (Keith Dickenson v HSBC); 9MA11979 (Raj Khan v HSBC); 9MA12214 (Anthony Blackler v HSBC); 9MA12544 (William Henry Guthrie v HFC); 9SK04021 (Michael McCullagh v HSBC); 9SK04092 (Deborah Dalton v HSBC); 9MA14453 (Matthew Fletcher v HSBC); 9SK02498 (Maureen Beal v HSBC); 9TS01425 (Susan Wheelhouse v HSBC); 9SK04627 (Aran Curry v HSBC); 9SK03122 (Yvonne Sleight v HSBC); 9TS01436 (Amanda Freeman v HSBC); 9SK02993 (Philip Hadland v HFC); 9SK02636 (Michael Love v HSBC); 9SK02563 (David Richardson v HSBC); 9SF03651 (Douglas Fairbairn v HFC); 9MA07798 (Julian Trodden v HSBC); 9MA15964 (Wendy Mitchell v M&S); 9SK03621 (Mark Loveridge v HSBC); 9SK02543 (David Miller v HSBC); 9SK03954 (Lee Robey v HSBC); 9SK03307 (Emma Wright v John Lewis); 9BI05479 (Jonathan Potter v HSBC); 9SF 02686 (Abraham v Lloyds TSB); 9MA 13514 (Douglas v Lloyds TSB); 9MA 17781 (Maddren v Lloyds TSB); 9SK 04192 (Purves v Lloyds TSB); 9MA 12520 (Braund v BoS); 9MA 11044 (Curry v BoS); 9MA 09906 (Green v BoS); 9MA 14731 (Joyce v BoS); 9MA 11260 (Lee v BoS); 9MA 12671 (Morton v BoS); 9MA 14106 (Smee v BoS); 9MA 11031 (Taylor v BoS); 9MA 07555 (Blackman v HBOS); 9MA 12545 (Hitcham v Sainsbury's Bank PLC); 9MA 10492 (Pearce v Sainsbury's Bank Plc).

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Julia Smith (instructed by DLA Piper (UK) LLP Solicitors) for The Royal Bank of Scotland Plc
James MacDonald (instructed by Addleshaw Goddard LLP Solicitors) for HSBC Bank Plc and Marks and Spencer Financial Services Plc
Fred Philpott (instructed by SCM Solicitors) for Bank of Scotland Plc
Julie-Anne Luck (instructed by Slater Heelis Solicitors) for Mr Wright
Mr Burley appeared in person on 24 March 2010

**Hearing dates: 24 and 25 March 2010**

## INTRODUCTION

1. Cartel Client Review Limited ("CCR") is a claims management company. At all material times it was authorised by the Ministry of Justice to carry on the business of claims management. On 18 March 2010 that authorisation was suspended. The sole shareholder in and Managing Director of CCR at all times has been Mr Carl Wright. Consumer Credit Litigation Solicitors ("CCLS") is the trading name for a sole solicitor's practice carried on by Mr Richard Burley. It was expressed to be a "division" of a pre-existing practice carried on by him in Nottingham called Burleys. On 10 March 2010 both "divisions" or offices of Mr Burley's practice were intervened by the Solicitors' Regulation Authority ("SRA").

2. On 23 December 2009 I handed down a lengthy judgment in *Carey v HSBC* [2009] EWHC 3417 which dealt with various issues arising in a very large number of County Court cases in relation to s78 of the Consumer Credit Act 1974 ("the 1974 Act"). The hearing to which that judgment related took place over 5 days commencing on 30 November 2009. Some of the Claimants involved in that hearing had made their claims as a result of initial contact and involvement with CCR. They were represented in relation to their claims both before and at the hearing by CCLS. On 2 February 2010 I made various costs orders consequential upon that judgment, some of which were against those Claimants. There is also a large number of other claims made by Claimants through CCR and CCLS. Some of those have now been discontinued. On 23 March 2010 I handed down a related judgment in the case of *Teasdale v HSBC* [2010] EWHC 612. This dealt with applications made by a number of discontinuing Claimants (including those involved with CCR and for whom CCLS had acted) for some or all of their costs to be paid by the Defendant banks. I dismissed all of those applications with costs.

3. On 2 February 2010 I also permitted CCR and CCLS to be joined as additional parties in various actions for the purpose of an application for a non-party costs order ("NPCO") made against them made by The Royal Bank of Scotland Plc ("RBS") in relation to three cases. On the same occasion I permitted their joinder, and that of Mr Wright, for the purpose of a similar application to be made by Lloyds TSB Bank Plc and Bank of Scotland Plc ("HBOS") in relation to five other cases. On 8 and 9 March 2010 I permitted the joinder of those parties in respect of yet further applications for NPCOs made by RBS, NatWest Bank Plc ("NatWest"), HBOS and HSBC and other banks or finance companies associated with or which form part of those banking groups. The upshot was that on 24 and 25 March 2010 I heard substantive applications for NPCOs by RBS/NatWest, HBOS and HSBC in effect in relation to the costs incurred by them in respect of all the claims made, or transferred into the Manchester County or Mercantile Court where the Claimants had been represented by CCLS. In each such case the relevant claims management company was CCR. These applications are made whether the Court had already made a substantive costs order against the individual Claimant (as it has in the cases involved in the hearings leading to the judgments in *Carey* or *Teasdale*) or not.

## THE HEARING ON 24 AND 25 MARCH

4. By his first witness statement ("WS") dated 5 March 2010, Mr Wright conceded on behalf of CCR that it should be liable, jointly and severally with the relevant Claimant, for any costs order made or to be made against any Claimant whose claim had been processed by CCR and then brought by CCLS. This was reflected in paragraphs 10 – 12 of my order of 8 and 9 March. Accordingly the live issues before me concerned whether or not to make NPCOs against CCLS and/or Mr Wright personally.

5. At the hearing Mr Burley (ie CCLS) was not represented. He confirmed however that he was nonetheless content to proceed on the basis that he would represent himself. He was cross-examined on his WSs on 24 March but did not appear on 25 March when Mr Wright was cross-examined. He was informed that he had the opportunity to put in written submissions following the hearing but declined to do so. Mr Wright was represented at the hearing by Ms Luck of Counsel. Put in very broad terms the case against CCLS and Mr Wright was that they had both funded and/or controlled or instigated and/or were the "real party" to the claims made by what I shall refer to as "the CCLS Claimants" and/or they were party to what was said to be the speculative nature of such claims.

6. Following the hearing I received written submissions from Ms Smith and Mr MacDonald, and Mr Philpott for the Defendant banks on 1 April, and from Ms Luck for Mr Wright on 8 April, for which I am most grateful.

## THE LAW

7. The general power to make an NPCO is contained in s 51 (3) of the SCA 1981. The leading case is *Dymocks Franchise Systems v Todd* [2004] 1 WLR 2807. In giving the judgment of the Privy Council, Lord Brown said this:

> **20** Although the position may well be different when a number of non-parties act in concert, their Lordships are content to assume for the purposes of this application that a non-party could not ordinarily be made liable for costs if those costs would in any event have been incurred even without such non-party's involvement in the proceedings.
>
> **25** ..... their Lordships,.. would seek to summarise the position as follows. (1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against. (2) Generally speaking the discretion will not be exercised against "pure funders", described in para 40 of *Hamilton v Al Fayed (No 2)* [2003] QB 1175, 1194 as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights. (3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real

> party" to the litigation, a concept repeatedly invoked throughout the jurisprudence... (4) Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests.....
>
> **29** In the light of these authorities their Lordships would hold that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his own interests.

8. In *Goodwood Recoveries Ltd v Breen* [2006] 1 WLR 2723, the Court of Appeal dealt in particular with two aspects of this jurisdiction, namely the liability of company directors and the question of causation. On the first, Rix LJ (with whom May LJ agreed) said this after reviewing the authorities:

> **59** In my judgment, it is clear from these passages that the law has moved a considerable distance in refining the early approach of Lloyd LJ in *Taylor v Pace Developments Ltd* [1991] BCC 406. Where a non-party director can be described as the "real party", seeking his own benefit, controlling and/or funding the litigation, then even where he has acted in good faith or without any impropriety, justice may well demand that he be liable in costs on a fact-sensitive and objective assessment of the circumstances. It may also be noted that in Lord Brown's comments in the *Dymocks* case [2004] 1 WLR 2807, para 33 "the pursuit of speculative litigation" is put into the same category as "impropriety".

9. As to causation, in paragraph 61, Rix LJ referred to the judgment of Morritt LJ in *Globe Equities v Globe Legal Services* [1999] BLR 232 where he said at p234 that the costs claimed must have been caused "to some extent" by the non-party but did not see why they must be caused by all the factors which rendered the case exceptional. At paragraph 62 he referred to the judgment of Chadwick LJ in *Byrne v Sefton Heath* [2002] 1 WLR 775 where at paragraph 35 he said that there must be a "sufficient causal link" between the costs at issue and the non-party, whose conduct should be "really an effective cause of the costs incurred." In paragraph 64 he referred to paragraph 20 of Lord Brown's judgment in *Dymocks* [supra]. He concluded that if one were to apply that latter "but for" approach, it was in fact satisfied in the case before him. Otherwise, he stated in paragraph 65 that the issue of causation as raised by Morritt LJ in *Globe Equities* (supra) has not received a "determinative decision binding on this court".

10. In *Arkin v Borchard Lines* [2005] 1 WLR 3055, Lord Phillips MR giving the judgment of the Court of Appeal said this:

> **24** Causation is also often a vital factor in leading a court to make a costs order against a non-party. If the non-party is wholly or partly responsible for the fact that litigation has taken place, justice may demand that he indemnify the successful party for the costs that he has incurred. There have been various circumstances in which the court has considered making an order for costs against a non-party.

11. In *Total Spares v Antares* [2006] EWHC 1537, David Richards J held in paragraph 54 of his judgment that in the light of recent statements including that set out in paragraph 24 of *Arkin* (supra) it could no longer be said that causation was a necessary pre-condition for an NPCO. In the case before him, the order was sought because the individual behind the losing Defendant had covertly arranged for the transfer of its

business and assets to another, offshore, entity with the intention and result that the costs order obtained by the Claimant against the Defendant was nugatory and would not adversely affect the business previously carried on by the Defendant. That was obviously a very different kind of case from that which is before me or indeed most NPCO cases, and one can see why the question of causation in the usual sense was simply not relevant. It demonstrates that the categories of case where an NPCO is appropriate are not closed. But where the allegation is the more usual one of control, "real party" etc in respect of the litigation itself, for my part, I would have thought that causation is still an important element which should be shown at least to some extent.

12. Indeed it is hard to see how a party can "control" litigation without it following that such conduct had a bearing on the incurring of costs by the other side. The same is true of funding – if the funding was necessary, it follows that in its absence the litigation may not have started or continued – with the consequence that some or all the costs would not have then been incurred.

13. It is worth adding of course that it does not follow that the existence of a causal connection will itself always be a necessary and sufficient condition for an NPCO, albeit that it may be a "vital factor". So, for example, the provider of legal expenses insurance for a Claimant may be said to have "caused" the other party to incur the costs of the (ultimately unsuccessful) litigation because without that funding the case would not have started, but that is hardly a sufficient reason to make an NPCO against the insurer. See *Murphy v Young & Co's Brewery plc* [1997] 1 WLR 1591 and in particular the judgment of Phillips LJ at p1602 F-H.

## THE ESSENTIAL FACTS

### Start-up of CCR and CCLS

14. CCR was formed in around 1997 and at all times the sole shareholder has been Mr Wright. It changed its name from Cartel Mortgage Corporation Limited to CCR on 9 August 2007. This coincided with a move away from the business of selling mortgage products and to claims management instead. Its primary business here was the investigation of mis-selling by banks, in particular in relation to payment protection insurance. In 1998 Mr Wright also set up Cartel Group Holdings Plc, originally under the name (until 27 November 2008) Cartel Marketing and Consultancy Limited ("Holdings"). He owns 99% of the shares in Holdings. It provides services and accommodation to CCR which pays substantial management charges as a result. At all times until 10 March 2010 CCR has operated its claims management business with the requisite authorisation from the Ministry of Justice.

15. After CCR's inception, Mr Wright began to look for a firm of solicitors who would take on cases referred to it by CCR in respect of, among other things, claims relating to credit agreements said to be unenforceable by reason of non-compliance with the 1974 Act ("CCA claims"). This was another area in which Mr Wright was interested, apart from claims concerning PPI. He was introduced to Mr Burley whose sole practice at that time was in Newark. Mr Burley had done bulk contentious work in respect of personal injury but not CCA claims. He agreed to act in respect of such claims as were referred to him by CCR, and did so from about April 2008. His

practice, or that part of it which dealt with CCA claims, was rebranded as CCLS. The work grew very quickly. As an indication of that, before CCLS started Mr Burley's practice consisted of himself, a fee-earner and an administrator. By early 2010 there were about 80 staff including 20 solicitors. By December 2008 CCLS had received about 15,000 claims to deal with. After that the level of incoming claims was between 3,000 and 5,000 per month. After about July 2009 the frequency began to reduce.

16. In the Summer of 2008 CCLS opened an office in Exchange Quay in Salford in the same building as CCR. Later CCR and CCLS both moved to Universal Square in Manchester. Initially they were both on the fifth floor but later CCLS was able to move to the fourth floor. It has been suggested that this proximity indicates that CCR was in truth controlling CCLS. I reject that suggestion. Given that very large numbers of claims that were forthcoming from CCR, all of which produced files for consideration by CCLS if the case went forward, it made obvious sense for CCLS to be near to CCR. Until the Summer of 2009, Mr Burley remained based in Newark. He would come to visit Manchester once a week or perhaps every two or three weeks. The practice manager of CCLS was George Whalley who joined it from CCR in July 2008. He recruited a salaried partner for Mr Burley, a lawyer called Karl Berry. Both Mr Whalley and Mr Berry worked full-time in Manchester. Mr Burley moved to Manchester full-time in the Summer of 2009.

**CCR's marketing materials**

17. An example of how CCR promoted its service can be found in the website extract at pp246-248 of the Bundle, dealing specifically with CCA claims. It states:

> " **Credit Card Claims – Write Off Your Debts**
>
> Would you like your credit card debt to be written off?...We analyse whether your credit card balance is unenforceable. If this is found to be the case, your balance could be cleared, written off or cancelled. ..If you have a credit card where the contract was issued before the 1st of April 2007 you will want to know about our credit card claims service...If a credit card is held to be unenforceable then the lender may have no legal basis on which to enforce the contract and pursue for the outstanding balance. The balance may therefore be completely written off...
>
> **Solicitor**
>
> ...a further assessment of your case will be made and if the decision is still "yes" a specialist solicitor will be assigned.....your solicitor will purchase, at their cost, a legal expenses insurance policy and obtain expert barrister's opinion where required..."

18. The website also states that if a claim led to an amount being recovered or written off, 30% was payable to CCR as a success fee.

19. If a client was attracted to CCR's service, there would be an initial questionnaire to fill in about the credit card agreement which would be evaluated free of charge by CCR. If CCR thought that there was a possibility or a good chance of a successful claim it would inform the client. If the client wished to pursue it through CCR it would have to sign a client agreement whose terms are at pp569-572 of the Bundle. Under that agreement the client would have to pay a fee to CCR for a more extensive review of his case. This was stated to be £495 or £175 if the client had used CCR before. In practice, according to Mr Wright, only about 50% of the fees paid were at £495 and

the others were at £150 - £175. If, after that review, CCR considered that there was no reasonable prospect of a successful claim it would cancel the contract and the client would get a refund. If it thought that there were reasonable prospects the claim would be referred to solicitors, in practice CCLS. If the claim failed then the client was also entitled to a refund. When CCR referred a case to CCLS, the latter was obliged to pay it a referral fee. So the whole scheme was on the basis that even if a client did not win, he would not lose anything.

20. CCR also had a network of referrers who marketed its services to potential clients. They were paid a commission for their introduction of a client to CCR but had to pay initial fees to CCR for the right to be an agent and for software and other support.

21. Thus the potential income stream to CCR was from (a) initial fees from clients (b) fees from referrers (c) fees from CCLS and (d) if a claim succeeded, 30% of the sum awarded or written off.

**CCLS's modus operandi**

22. When it took over a file from CCR, CCLS became responsible for the claim. In order for the operation to work in terms of issuing and progressing claims it needed funding for its own considerable administrative costs and disbursements such as court fees and counsel's fees. This was provided in the form of loans from CCR. They totalled £3.6m between 22 September 2008 and 9 March 2010, of which just over £180,000 has been repaid. The lending was unsecured and formalised by a written Facility Agreement dated 17 June 2009 which provided for a facility of up to £4m, repayable within 12 months of a demand and attracting interest at 2% above base p.a.

23. By a further written Referrer Agreement of the same date, the referral arrangements between CCR and CCLS were formalised. It was expressed to have commenced as at 1 January 2008. By Clause 2.2 CCR undertook to supply CCLS (referred to here as Burleys) with claims from time to time. CCLS was entitled to reject any claim within 7 business days of receipt if it did not pass CCLS's initial vetting. In the absence of a rejection CCLS was deemed to have accepted the claim. In the next 90 days, CCLS had a further right to reject the claim provided that "Unwind Criteria" were met. These included a material change of fact which detrimentally affected the chances of success of a claim such as a change in the law or insufficient evidence from a client. By Clause 7.7 CCLS agreed to progress all claims. If it obtained profit costs of more than £750 from a claim, the referral fee of £500 was payable to CCR and this reduced if the profit costs were less. The services to be provided by CCLS were set out in some detail in the Schedule and they included the appointment and payment of all appropriate experts. Paragraph 3 set out the Service Levels which included extensive reporting obligations on CCLS towards CCR.

24. It was put to Mr Burley that such provisions in effect gave real or substantial control over the claims to CCR and that he was in breach of Rule 9.02 (d) of the Solicitors' Code of Conduct 2007 (introducer influencing or constraining the solicitor's professional judgment in relation to the advice given to the client) as a result. Mr Burley rejected this on the basis that whatever may have been the terms of the Referrer Agreement, in practice, CCLS was free to reject any claim whenever it wished and it

frequently did so without any comeback from CCR, which simply took the file back. The strict terms of the Service Level provisions were not actually observed or called for. CCLS also took Counsel's advice on specific and generic issues. Mr Burley also said that it was CCLS, and CCLS alone, which decided (subject to client approval) whether any given case should be discontinued or settled. He said that while he would not wish to upset his funder ie CCR he still had to be true to his firm which retained control of all the cases. Mr Wright said much the same thing. I accept Mr Burley's and Mr Wright's evidence on this point and do not find that the actual day-to-day operations between CCR and CCLS meant that CCR was in effect controlling, or even influencing, the course of the claims.

**ATE insurance**

25. The "cost-free" nature of these claims meant that ATE would be required for most if not all of them, if proceedings were commenced. CCR's literature said that this would be purchased by the solicitor. Mr Burley's evidence was very clear on this point: the obtaining of such insurance was usually the responsibility of the solicitor and it was CCLS's responsibility here and not, for example, that of CCR. He said that everyone else would assume that CCLS would put such insurance in place. In practice he left the task of obtaining ATE insurance to Mr Whalley and another non-lawyer called Kim Fenton. In fact, it was never obtained. The absence of this insurance was not confirmed to the Defendant banks until after the first application for an NPCO against CCLS had been made. CCLS had previously failed to answer letters from RBS's solicitors, DLA Piper, enquiring about the position in January 2010, following the handing-down of the judgment in *Carey*.

26. Mr Burley never discussed the question of ATE, or its absence, with Mr Wright. He himself never spoke to any client informing them that they had no insurance. He was not in a position to say that anyone else at CCLS had so informed the clients. In reality he must have appreciated that they did not know. He also accepted that CCLS never explained to any client the costs consequences for them (having no insurance) if they lost.

27. The failure to tell clients that they had no ATE insurance when they would have expected it, or some other means to protect them from costs orders, and that they were exposed to adverse costs orders should they lose was, in my judgment, a gross breach of duty on the part of Mr Burley towards those clients. It also meant that when cases were taken forward by CCLS on behalf of those clients, Mr Burley was effectively acting without instructions since the clients were prevented from giving instructions on anything like an informed view of the case. It is even more regrettable that Mr Burley saw fit to delegate the critical task of obtaining insurance to two others, neither of whom was a lawyer, and without, as it seemed to me, any real active involvement in the process himself at least until the end of 2009.

28. I deal with Mr Wright's knowledge of the lack of insurance below.

**Funding by Mr Wright**

29. Mr Wright's drawings from the business done by CCR came effectively through Holdings. In the year ended 30 September 2008 he drew some £795,000 by way of emoluments from Holdings, excluding pension contributions. Further sums were paid into the Cartel Pension Scheme of which he was sole beneficiary and one of two trustees, the other being MJF SSAS Trustees Limited. At least some of the £795,000 would have been used to purchase Mr Wright's former family home at the Old Rectory in Warrington, purchased by him in March 2009 for £735,000.

30. By August 2009 CCR needed more funding if it was going to be able to continue to support CCLS. As a result of the comparative lack of claims being brought to a successful conclusion by then, CCLS, for its part, was bringing in little by way of revenue from costs orders to meet disbursements and, in practice, to repay in any meaningful way, the monies advanced to it by CCR. So the only way that the claims now could keep on being funded was if CCR injected more money into CCLS. Mr Wright, as director and shareholder of CCR resolved that it should do so but this required a capital injection effectively from him. The upshot was that in August 2009 the pension scheme lent a total of £600,000 to CCR and Mr Wright personally lent £350,000. The loans from the pension scheme were required by the trustees to be secured and they were in particular by way of fixed and floating charges over the assets of CCR and over its income stream. Mr Wright's loan was secured by a fixed and floating charge also. The payment schedule at pp636-637 shows that after 28 August 2009 a net sum of around £820,000 was lent by CCR to CCLS and it must be the case that all, or virtually all of this came from the loans from the pension scheme and Mr Wright.

**The Meetings in November 2009**

31. The hearing which led to my judgment in *Carey* was due to start on 30 November 2009. There seems little doubt that there was a meeting between CCLS and Counsel on Friday 27 November, although this was not attended by Mr Burley who left in charge a trainee solicitor, Ms Kara Britton. She had been dealing with much of the active litigation certainly in the Manchester area, in late 2009.

32. Mr Wright's evidence was that he attended the conference on 27 November and this was when he was actually told that there was no ATE insurance in place. However the two barristers present also gave an optimistic view of the prospects of success at the forthcoming hearing but also said that it was now too late to withdraw any of the cases. Mr Burley also said that the barristers were confident. There was no challenge to his evidence about the barrister's advice and I proceed, for the purposes of the applications before me, on the basis that it was optimistic. He also said that he attended a further conference on Sunday 29 November with the same people.

33. Mr Wright has produced his own handwritten notes in relation to this meeting or these meetings – see pp630-633 of the Bundle. It was suggested to Mr Wright that the meeting must have been earlier. In part this was because the notes at p633 refer to a judgment on "multiple agreements" "Thursday". That must be a reference to the decision of the Court of Appeal in *Heath v Southern Pacific* [2010] 1 All ER 748 (on a

PPI unenforceability point) which was given on Thursday 5 November. In addition the notes refer to the case of *Cuthbertson* but this was withdrawn as a case for the hearing on 30 November on the morning of 27 November and replaced by *Atkinson* which the notes do not mention. That does not necessarily mean that the notes must all have been referring to an earlier meeting because in his WS at p229 (C) of the Bundle, Mr Wright noted that he was told that costs were agreed to go to a hearing because of documents submitted "during the week" by Tesco. That did indeed happen as a result of the application to strike out made by Tesco on 20 November – see paragraph 51 of my judgment in *Teasdale*. In addition, that there was a meeting on 27 November is corroborated by Mr Burley.

34. In my judgment there was certainly a meeting on 27 November attended by Mr Wright. It is likely that he attended an earlier meeting, around 2 November, as well.

35. I do not accept that his attendance at such meetings meant that he was making decisions about the litigation in any real way or otherwise controlling or influencing it. First, I accept his evidence that these were matters for the lawyers not him. That is reflected in the evidence of Mr Burley who said that CCLS elected to proceed with the cases and the hearing on 30 November because the merits appeared to be good and if they dropped the cases at that stage the presumption would be that the relevant clients would have to pay the costs. He agreed that CCR and Mr Wright would have relied on the advice of CCLS or the barristers. He also said that the matter had gone "well beyond the knowledge of CCR". He thought that it was in the client's best interests to proceed, even without insurance, as opposed to discontinuing. Second, in his capacity as director of and shareholder in CCR, the claims management company, Mr Wright had an obvious interest in what was going to happen, and what the lawyers had to say. But that is as far as it goes. Finally, the fact that Mr Burley was not present on 27 November (though he should have been) does not mean that CCR or Mr Wright made the decision to proceed with the cases. The person at CCLS who had day to day control of these cases, Ms Britton, was there, as were Counsel who were advising her.

36. I should add here that it is not clear to me that each of the clients in the CCLS cases ultimately litigated in the hearing commencing on 30 November 2009 actually gave specific instructions that they should be, but even if they did, the only inference is that they did so not knowing that they had no insurance.

37. There remains the question of when in fact Mr Wright became aware that no insurance had been procured. His evidence was that he knew that it would generally be required if claims had to be issued and that he understood that CCLS, principally through Mr Whalley would arrange it. He would ask from time to time since April 2008 whether it was now in place and was told that it was being dealt with and he should not worry. He was told this again in around September 2009 and assumed it would be sorted out. He was very busy in the period from then until the meetings but was genuinely shocked when he was told just before the hearings that there was no insurance. Obviously, at that point, the question of the lack of insurance assumed much greater importance because CCLS had by now committed to a lengthy hearing. I see no reason to doubt the general thrust of this evidence, because it is plausible and it is supported by what Mr Burley said. It may be that Mr Wright should, on behalf of the clients of CCLS and because it could impact upon CCR, have expressed more concern to CCLS

about the need to finalise the insurance but in truth this remained their responsibility. I do not accept the suggestion that Mr Wright simply did not care whether insurance could or would be obtained or the costs position of any losing Claimant because he had the advance fees "in the bag" as it were and his only interest thereafter was in success fees and publicity for CCR. That makes no commercial sense. It is obvious that if Claimants who had been promised costs protection, lost and found themselves exposed, the adverse publicity thereby generated would surely put paid to CCR's operation or at least seriously damage it. The fact is that CCR, through Mr Wright, left the question of insurance to CCLS as it was entitled to do.

38. The postscript on insurance is that Mr Burley became involved subsequent to the hearing on 30 November in trying to find insurance, right up to March 2010. But in the event it was to no avail.

**The events of early 2010**

39. By January 2010, as it now emerges, CCLS was having difficulties in paying its staff and overheads. There were continuing loans from CCR but not in very large amounts and not enough to prevent the crisis at CCLS. Ms Britton left CCLS in February because she had not been paid. In March 2010 Mr Burley identified serious problems with his practice's solvency so that it was unlikely that the wages would be paid on 10 March. This was two days after he had appeared in Court and stated that representation had not been arranged for those of his clients whose cases on discontinuance were to be heard by me – see paragraph 39 of my judgment in *Teasdale*. On 10 March, the SRA intervened in the practice.

40. CCR was also having cash-flow difficulties in early 2010. It had by then not been able to pay commission due to all of its referrers and could not now pay certain salaries.

41. On 9 March 2010 CCR agreed to make an interim payment on account of costs of £75,000. In the event this was not paid. On 18 March 2010 the Ministry of Justice suspended CCR's authorisation. According to Mr Wright this was inevitable once CCLS had been intervened because there was no way that CCR could take on new business with the prospect of generating further income, and so no way to keep on paying staff. Once CCR had decided that it could no longer trade, suspension was inevitable. There has, however, been publicity as to whether CCR has provided all of its customers with refunds of fees paid in respect of claims which were unsuccessful or did not proceed and an investigation by the MOJ into such complaints. That is not an issue which it is either necessary or appropriate for me to decide. The financial position of CCR is such that it is most unlikely that there will be any funds available to discharge the NPCO it has already submitted to.

**Other factual matters**

42. I deal with these in the context of the discussion of the actual claims made against CCLS and Mr Wright.

## THE CLAIM FOR COSTS AGAINST CCLS

43. In my judgment, an NPCO against CCLS is clearly justified for the following simple reason. As already explained above, it was the responsibility of CCLS to obtained ATE insurance for its clients. Not only did it fail to do so, it failed to tell them and was effectively acting without instructions. It is obvious that if the clients had been told the true position they are likely to have instructed CCLS not to progress the claims. As no insurance was ever obtained for any client the overwhelming likelihood is that if CCLS had acted as it should have done these cases would not have been issued or progressed and the costs then incurred by the Defendants would not have been incurred. There is a direct causal link between the defaults of CCLS (ie Mr Burley) and the costs generated by those cases. Indeed, while maintaining also that CCR should pay the Defendant's costs, Mr Burley accepted in evidence that "our conduct was such that it is unavoidable that CCLS takes responsibility [for costs]." It must also follow that Mr Burley through CCLS was in a very real sense controlling the litigation since decisions were being taken without proper instructions from the clients and I do not accept that anyone else was controlling it. That said, within CCLS, Mr Burley clearly failed to supervise his own staff sufficiently, for example by leaving the question of insurance essentially to Mr Whalley and the running of the cases for the 30 November hearing to Ms Britton. And his failure to attend the important meeting on 27 November is itself remarkable. It also seems likely to me that although the staff at CCLS greatly increased over 2008 and 2009 so as to include some 20 solicitors, the firm was having some difficulty in coping with the sheer quantity of the cases coming through.

44. It is also the case that Mr Burley funded the litigation in the sense that he borrowed £3.6m from CCR and still owes £3.4m. None of that funding was specific to any individual case. Obviously, the hope and expectation was that the costs incurred by CCLS would be recovered from settlements and adverse costs orders against Defendants. This did not materialise to any significant degree by the time that CCLS was intervened. That Mr Burley funded the litigation in this way is, however, of limited significance here. The actual source of the funds was CCR, and while it is likely that the growing outstanding debt to CCR must have put pressure on Mr Burley, I do not accept the contention that CCLS's financial dependence on CCR because of the loan meant that he did in fact cede control to CCR. Nor is this a case where, to the extent that Mr Burley was the funder can it be said that he was the "real party" to this litigation. The "real parties" here were the individual Claimants themselves, a matter to which I return in paragraph 47 below. And as for benefits to Mr Burley from the litigation, these would be the same as in any CFA-funded case. But that by itself does not lead to a personal exposure to costs.

45. Another reason prayed in aid of an NPCO against CCLS is the fact that it issued flawed claims. Certainly, to the extent set out in my judgments in *Carey* and *Teasdale*, many of them turned out to be so. And some were struck out as being an abuse of process because they were speculative. But I do not think that this feature is sufficient to lead to an NPCO, especially where CCLS instructed Counsel to advise and draft. Indeed the more appropriate forum for an argument of that kind would be the wasted costs jurisdiction of the Court, but this was never invoked against Mr Burley here.

46. The focus of Mr Burley's liability for costs thus remains on his central failing, which relates to the absence of insurance.

## THE CLAIM FOR COSTS AGAINST MR WRIGHT

### Mr Wright as "the Real Party"

47. It needs to be stated at the outset that this is not one of those cases where the formal party which has lost (ie the actual Claimant or Defendant) cannot be described as the "real party" who is in truth the party against whom the NPCO is sought. The principal and direct "real parties" here are the Claimants themselves. At the end of the day they agreed to have their potential claims reviewed and taken forward. And if they succeeded they would recover in the usual way as with any litigant. The only difference is that CCR as a claims management company would also benefit in the event of success, from its entitlement to 30% of any sum awarded or written off and the retention of the upfront fee. But the notion of success and other fees payable to claims management companies is not in itself improper and CCR was at all material times authorised to carry on business according to its terms. Of course, it is possible for there to be more than one "real party". But the very important fact that all the actual Claimants here are genuine Claimants who decided to make these claims has been somewhat overlooked in the submissions made before me. On any view, therefore, it cannot be said that Mr Wright was "the" real party. Moreover, for the reasons set out in paragraphs 48 - 52 below, I do not find that Mr Wright was even "a" real party to these claims.

### Control

48. I do not accept that Mr Wright in truth controlled this litigation. This is a factual matter and I have explained why I take this view in paragraphs 22-24 and 35-37 above.

### Funding

49. Until August 2009, it is unquestionably the case that in general terms, the true funder of this litigation was CCR although some of the income it used to provide that funding will have come from the fees paid by Claimants and a small part of CCLS's funding needs will have come from a recovery of its costs on settled claims. Thereafter, there was a vital injection of funds from Mr Wright and his pension fund. Even here, however the matter is not entirely clear-cut because £600,000 came from the pension fund which had received it from CCR only the year before. And it seems likely that at least some part of the personal loan from Mr Wright itself was derived from emoluments he had only recently taken. Nonetheless it remains the case that the actual lenders here were Mr Wright and his pension scheme. It is true that there was a causal connection between the lending of those sums and the continuing of cases afterwards. Absent that funding it is hard to see how those cases could have been progressed without which there would not have been the additional incurring of costs by the Defendants. The major costs here, it seems to me, are likely to be the costs of the hearing on 30 November and later, costs-related hearings because the other cases in Manchester at least were stayed and as a consequence so were many cases elsewhere.

But such a causal connection is not sufficient here, in the absence of some other factor. I have already ruled out Mr Wright as the "real party" in paragraph 47 and his alleged control in paragraph 48 above. I deal with other factors below.

**Personal benefit and the corporate veil**

50. Obviously, if the litigation succeeded, CCR would benefit from success and other fees and as its sole shareholder Mr Wright would benefit in turn from dividends or emoluments of the kind he took from Holdings in 2008. But that is true wherever there is a claims management company whose shareholders will no doubt benefit. I take the point that in this case, the interests of the company and those of Mr Wright effectively coincide as there are no other shareholders. But there is nothing *per se* improper in Mr Wright having taken the decision to trade through a limited company and for my part I do not regard his use of the word "vehicle" to describe the company as having the pejorative connotation urged upon me. Reliance is placed by RBS (in paragraphs 30 and 33 of Ms Smith's closing submissions) in particular on *Dymocks* at para. 29. But as para. 29 and para. 25, both quoted in paragraph 7 above, make clear, the context of the discussion there is the liability of directors and in particular the liability of a non-party who has promoted and funded proceedings by an insolvent company solely or substantially for his own financial benefit. But here, it cannot be said that Mr Wright funded or promoted proceedings by a claimant which was an insolvent company, nor can it be said that the proceedings were solely or substantially for his own financial benefit. Nor was this a situation where, to take another example, he was also trading under his own name and the distinction between the personal and corporate businesses was blurred (cf *Philips v Dowling* [2007] EWCA 64 at paras. 24 and 25 of the judgment of Chadwick LJ).

51. Moreover, unlike the usual run of cases where an NPCO is sought against the director of and/or shareholder in the company concerned, CCR was not itself the relevant Claimant or Defendant, but a third party. So the claim against Mr Wright is at one remove beyond that.

52. In all those circumstances, the Court should remain very slow to pierce the corporate veil here.

**Insurance**

53. The failure to obtain this but not inform clients was a real causative factor in the incurring of costs by the Defendants for the reasons given above. But that was essentially the responsibility of CCLS, not CCR or Mr Wright.

**Marketing**

54. Much time was spent at the hearing considering CCR's various marketing materials and interviews given to the Press by Mr Wright. I agree that in relation to articles or materials published about the effect of the decisions in *MBNA v Thorius* 21 September 2009 and my judgment in *Carey* there were certainly respects in which Mr Wright appeared to me to "spin" those decisions in favour of Claimants or potential Claimants or suggest that they established propositions in fact already established in *McGuffick v*

*RBS* [2010] 1 All ER 634. I also have little doubt that the reason for this was to try and keep the business coming in. But these were at a relatively late stage and cannot have been responsible for bringing in the cases in question. Moreover, despite Mr Wright's personal involvement it remains the case that this was marketing done on behalf of CCR. This was the entity which would take on any claims, not Mr Wright personally.

55. I also bear in mind that the Advertising Standards Authority made a determination that a radio advertisement by CCR on 14 January 2009 was misleading in certain respects – see pp408-409 of the Bundle. But I do not consider that this is sufficient to form the basis for an NPCO against Mr Wright personally.

**Flawed Claims**

56. As with CCLS, the flawed and in some cases speculative nature of the claims is levelled against Mr Wright. But, absent actual control of such claims when being litigated, this cannot constitute a basis for an NPCO. First, and crucially, in all these cases, solicitors were instructed, in order to issue and progress the claims and they in turn had the assistance of Counsel. And secondly, the entity sending such claims to CCLS, and directly funding them, was CCR and not Mr Wright. And I have accepted the evidence of Mr Wright (not itself challenged in any event) that he understood the lawyers to be giving a positive assessment of the merits. See paragraphs 32 - 35 above.

57. I accept that in some cases (usually where it is clearly established that the relevant party is indeed the "real party") he may not be saved from an NPCO simply because he had taken legal advice which was encouraging. See *Dymocks* at para. 33. But in other cases, the taking of such advice is highly material – see, for example, *Landare Investments v WDA* [2004] All ER (D) 04. And for the reasons already given, Mr Wright was plainly not the real party here.

**Two further points**

58. It is further suggested that the activities of CCR amounted to debt-counselling which required a separate licence under the 1974 Act which it did not have, and CCR thereby was committing a criminal offence. Mr Wright denies that the claims management business operated by CCR amounted to debt-counselling and certainly it does not appear that the OFT ever investigated CCR on the basis that it was. In any event I am not in a position to determine this issue and do not do so.

59. Mr Wright was also asked about a company called Grass Roots (Financial) Limited ("Grass Roots") in which he and his pension fund (he possibly *qua* trustee of the fund) held a 25% interest. From about February 2010 CCR's website directed potential Claimants to Grass Roots' website. Grass Roots had the advantage that it undertook debt-adjusting and debt-counselling as well and held the relevant licence. It operated from the same building as CCR although Mr Wright denied that he controlled it. The suggestion here was that Mr Wright had in some way resolved in late 2009 to deprive CCR of its goodwill by moving all potential claims to Grass Roots if it appeared that CCR could not overcome its cashflow problems. Mr Wright denied this and said that the introduction of Grass Roots had been planned for some time. On any view if he had decided to take this course in late 2009, it seems odd that he was at the same time,

together with the pension fund, prepared to inject very significant sums into CCR for onward transmission to CCLS. The question of Grass Roots is tangential at best to the issues before me, in my view, and I am not in a position to make any final determination as to how it fits in to the business of CCR or Mr Wright's activities. Moreover, by February 2010, when the website entry appeared, virtually all of the costs of the Defendants in relation to these claims will have been incurred save in respect of costs applications.

60. I do not consider that either of these two points is of any real assistance in deciding whether Mr Wright is liable for costs.

**Conclusions in respect of Mr Wright**

61. In my judgment, whether one takes the points made in support of an NPCO against Mr Wright separately or cumulatively, they fall far short of justifying such an order.

## OVERALL CONCLUSION

62. Accordingly, the NPCO applications against Mr Wright must be dismissed, but those against Mr Burley succeed. CCR has already accepted its liability to an NPCO. In my judgment there is no reason why CCR and Mr Burley should not be liable for costs on a joint and several basis, with each other, and with the Claimants against whom adverse costs orders have been, or will be made.