Neutral Citation Number: [2019] EWHC 2320 (QB)

Case No: QB/2018/0323

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEALS CENTRE, ROYAL COURTS OF JUSTICE
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
Order of HHJ Baucher dated 26 October 2018
County Court Claim Number: E8QZ95J2

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/09/2019

Before :

THE HONOURABLE MR JUSTICE SWEENEY

BETWEEN

ACQUISITION 395445638 LIMITED
CLAIMANT / APPELLANT

-AND-

MR ANDREJS SICOVS
1ST DEFENDANT

DUNNE & CO SOLICITORS (A FIRM)
(FORMERLY DUNNE & GRAY SOLICITORS)
2ND DEFENDANT / RESPONDENT

- -
- -

Mr Paul Simms (Company Director) for the **Claimant**
No representation or attendance on behalf of the **1st Defendant**
Mr Bayo Randle (instructed by **Keystone Law**) for the **2nd Defendant**

Hearing date: 28 March 2019
- -

Approved Judgment

The Honourable Mr Justice Sweeney:

Introduction

1. On 26 October 2018, in the County Court at Central London, Her Honour Judge Baucher dismissed the application of the Claimant / Appellant (which was formerly known as Euronex Rentals Ltd and is referred to hereafter as "the Appellant") to amend its Particulars of Claim; granted the application of the 2nd Defendant / Respondent (hereafter "the Respondent") to strike out the Appellant's claim as against the Respondent; ordered the Appellant to pay the Respondent's costs in the sum of £5,248.70; and refused the Appellant's application for permission to appeal.

2. The Appellant seeks to appeal against those decisions on two grounds, namely (in short summary) that the judge was wrong to:
   (1) Reject the Appellant's submission that this Claim ought to be heard together with various other Claims against the Respondent made by the Appellant and by companies associated with the Appellant.
   (2) Determine that the Appellant's proposed Amended Particulars of Claim had no real prospect of success.

3. On 8 January 2019, Sir Alistair MacDuff, sitting as a Judge of the High Court, ordered (amongst other things) that the Appellant's application for permission to appeal should be heard before a High Court Judge - with (subject to permission) the hearing of the appeal to follow; and that the costs Order made by HHJ Baucher be stayed pending the determination of the appeal or until further Order.

4. A rolled-up hearing duly took place before me on 28 March 2019 – during which I heard full argument in relation to both permission and the merits, and reserved judgment on both.

5. I must apologise that, because of pressure of other work, the judgment has been long delayed. I propose first to outline the background; then to deal with the hearing before HHJ Baucher; the judgment; subsequent events; the Grounds of Appeal and the arguments in relation to them; the merits; and, finally, my conclusions.

Outline Background

6. On 4 October 2012, an Accident Management Company (AMC) Service Level Agreement ("the Referral Agreement") was concluded, in writing, between Excel Law Limited ("Excel") and St Martins Accident Management Limited ("SM"). In the Referral Agreement it was agreed, amongst other things, that in consideration of SM referring clients of their own, or of their own third party introducers, to Excel as requiring claims handling assistance following a non-fault road traffic accident, Excel would, subject to certain conditions, strictly adhere to the Service Standards set out in the agreement, and would pay specified referral commissions to SM.

7. On 1 April 2013, following the Jackson reforms, the Referral Agreement was replaced by another written agreement ("the Introducer Agreement") between Excel and SM. It was again agreed that in consideration of SM referring clients of their own, or of their own third party introducers, to Excel as requiring claims handling assistance

following a non-fault road traffic accident, Excel would, subject to certain conditions, strictly adhere to the Service Standards set out in the agreement. Further, it was recognised in the Introducer Agreement that, following the introduction of LASPO 2013 (the Referral Fee Ban) Excel would not make any payment for the referral of a client, but could be able to make a payment for the introduction of, or recommendation to, a client - provided that the client was introduced to Excel in one of the ways specified in the Agreement. There were also new arrangements as to the amounts to be paid by Excel for qualifying introductions or recommendations.

8. In the evening of 4 April 2014, the 1st Defendant (then aged 23) was involved in a road traffic accident whilst driving his Mercedes CLS 320 in East London. He suffered a whiplash injury. He instructed SM to deal with the recovery of his car, and its storage pending repair.

9. On 22 April 2014 the 1st Defendant signed a Form of Authority authorising SM (as a Claims Recovery Agent) to appoint a solicitor to act on his behalf in connection with the accident. The Form of Authority stated, amongst other things, that:

> "*I authorise my solicitors to forward any payments received from Defendants Insurers / Solicitors including recovery / storage / hire / repair and pre-accident market value to St Martins Accident Management Ltd……I irrevocably authorise my instructed solicitors to ensure all of my payments received in relation to my accident from the third party or his/hers insurers or from the Motor Insurance Bureau, if applicable, be made payable and/or be paid over to St Martins Accident Management Ltd."*

10. That same day, Excel emailed SM stating:

> "*We understand that you recommended the above client* [the 1st Defendant] *to us. If the client has given you any information regarding their accident, could you please send us this information quoting our reference. We have confirmed with the client that they are happy for you to do this*."

11. In addition, again on 22 April 2014, the 1st Defendant:

(1) As part of completing one of the Respondent's Client Questionnaires, gave signed instructions to the Respondent to act on his behalf in relation to the accident, including the following:

> "*…I irrevocably instruct Dunne and Gray to discharge any my* [sic] *liabilities in relation to any credit repair, credit hire or storage and recovery charges from any damages received, direct to the appropriate party(s)…*"

(3) Signed a Conditional Fee Agreement with the Respondent.

12. On 25 April 2014 and 16 June 2014, the 1st Defendant entered into successive written credit car hire agreements with the Appellant (which, as touched on above, was then trading as Euronex Rentals Limited). Each car hire agreement was accompanied by a Mitigation Statement, which the 1st Defendant signed, which stated that he understood that it was his duty to keep his losses to a minimum. The Terms and Conditions in each of the credit car hire agreements provided that:

> "9. *Except where condition 6* [which referred to the right to defer

> payment in certain circumstances] *applies, the Hirer will pay to the Lessor on demand all charges due under this agreement, plus Value Added Tax (VAT) at the rate appropriate at the time of the hire.*
>
> ……
>
> *28. I irrevocably authorise my solicitors that any payment made in relation to my accident including vehicle damage and General damages by Third Party's Insurer or their representative should be made first payable to Euronex in respect of Hire charges incurred by me and balance paid to myself*."

13. Also on 25 April 2014, SM prepared a report setting out the documents and information provided to it by the 1st Defendant – including the fact that he had been supplied with a replacement vehicle by the Appellant. That same day, SM wrote to the 1st Defendant confirming, amongst other things, that the Respondent had now come on the record to deal with his claim. It appears that the 25 April 2014 report and the associated documentation were forwarded to both Excel and the Respondent on 29 April 2014.

14. On 6 May 2014 the Appellant emailed the Respondent to inform them that the 1st Defendant had hired a BMW 520D from it - commencing on 25 April 2014 and at a daily rate of £344.98 plus VAT.

15. In the event, the hire of the BMW lasted until 30 June 2014 - when the repairs to the 1st Defendant's Mercedes, which were paid for by the Third Party's insurer, were completed. On 2 July 2014 the Appellant formally notified the Respondent in writing that the total amount due for the hire of the BMW by the 1st Defendant was £30,412.39 and enclosed its Payment Pack.

16. On 24 April 2015 the Third Party's insurer made a Part 36 offer in the sum of £4,155.66 to settle the 1st Defendant's claim. On 15 June 2015, having been apprised of the offer by the Respondent, the Appellant wrote to the Respondent rejecting it and proposing (for reasons set out in its letter) a counter offer of £20,434.92 in relation to the car hire, £200 (the Part 36 offer figure) for recovery, and £1,680 in relation to storage (all including VAT), making a total sum of £23,994.92 – but with a reduction to £20,000 for a settlement within 7 days. The writer asked that cheques payable to the Appellant and SM be forwarded in sums reflecting their respective percentage of the settlement.

17. On 22 April 2016 the benefits and liabilities of SM's agreement with the 1st Defendant were transferred by SM to UK Services Group Ltd ("UKSG").

18. On 26 June 2016 the Respondent wrote to the Appellant (the letter is dated on its face 26 May 2016, but that appears to be an error) indicating that the 1st Defendant had authorised acceptance of the Third Party's pre-issue offer of £10,000 plus the interim payment – with the 1st Defendant accepting £2,000 for his personal injury, and the remaining £8,000 being for hire, storage, recovery and treatment charges. The letter further indicated that the 1st Defendant was unwilling to pay the issue fee of £2,000, and that if the Appellant insisted on an increase, the Respondent would be grateful if the Appellant provided a cheque in that sum so that proceedings could be commenced.

19. On 7 November 2016 a settlement, in the sum of £10,000, plus costs of £4,178.49, was reached between the 1st Defendant and the Third Party's Insurer. The 1st Defendant instructed the Respondent to pay the £10,000 to him, which the Respondent did. The Appellant was not informed.

20. On 27 March 2018, in a telephone call (which was confirmed in writing later that day) the Third Party's Insurer informed the Appellant of the settlement, and of the fact that it had paid the £10,000 to the Respondent.

21. On 29 March 2018 the Claim Form in this action was issued. The Particulars of Claim, which were signed by Kevin Morris and dated 27 March 2018, asserted, amongst other things, that:
    (1) The 1st Defendant had used the services of the Appellant for the recovery and storage of his damaged vehicle and had incurred a total charge of £3540.
    (2) The 1st Defendant had also hired a replacement vehicle from the Appellant and had incurred a total charge of £30,412.39.
    (3) The 1st Defendant had appointed the Respondent to recover the charges for hire, recovery and storage from the Third Party's insurance company.
    (4) The 1st Defendant and the Respondent had failed to notify the Appellant regarding the settlement in the sum of £10,000 that was reached on 7 November 2016 and had failed to pay the £10,000 to the Appellant.
    (5) The 1st Defendant and the Respondent had been negligent in that they had entered into an agreement but had failed to adhere to it; had failed to notify the Appellant regarding the settlement; had failed to transfer the funds that were owed to the Appellant; had failed to respond to letters emails and phone calls made by the Appellant; and had failed to give any reasonable explanation for their failure to transfer the funds owed to the Appellant.
    (6) The Appellant claimed damages up to £10,000 from the Respondent.

22. In the Respondent's Defence, which was signed by Oliver Brumby (a solicitor employed by the Respondent) it was asserted, amongst other things, that:
    (1) The Particulars of Claim did not comply with CPR Part 22 and with the Practice Direction 22PD, and that the Respondent reserved the right to apply to strike out the Claim.
    (2) The payment from the insurer was a payment to the 1st Defendant personally and was received by the Respondent on trust for the 1st Defendant. The Respondent had distributed the payment as instructed by the 1st Defendant, and the Appellant had no proprietary claim to any payment received from the insurer.
    (3) The particulars of negligence were denied for the following reasons:
        (i) The Respondent did not owe the Appellant a duty of care. The Respondent was retained by the 1st Defendant and owed the relevant duty solely to him.
        (ii) The Appellant had not provided any particulars of agreement between the Appellant and the Respondent, but for the avoidance of doubt, the Respondent had not entered into any agreement with the Appellant.
        (iii) The Respondent had been under no obligation to transfer funds to the Appellant, had acted on the instructions of the 1st Defendant, and had no obligation to provide explanations to the Appellant.

(iv) There were therefore no grounds in law for bringing the claim against the Respondent, and the claim should be struck out.

23. In its Reply to Defence, served on 11 May 2018, the Appellant asserted, amongst other things, that:

(1) In its Defence the Respondent had raised irrelevant issues, had tried to misrepresent the actual grounds of the Claim, and had remained ambiguous and evasive.
(2) In an unrelated case, the Respondent had been prosecuted before the Solicitors Disciplinary Tribunal and had also been the subject of numerous complaints to the Solicitors Regulation Authority that, in cases similar to the Appellant's, they had siphoned off funds.
(3) Mr Morris was the Appellant's Managing Director and had been appointed to deal with the Appellant's debt recovery.
(4) The Appellant was authorised, via a Form of Authority, to recover and collect all payments due to SM, and there was a signed agreement between the Appellant and the 1st Defendant in relation to the car hire – various of the terms of which, and in particular clause 28, were highlighted.
(5) The Respondent had failed to adhere to the terms and conditions of the hire agreement that the 1st Defendant had signed.
(6) As demonstrated by numerous payments in other cases, there was a working agreement between the Appellant and the Respondent that all payments received by the Respondent for the Appellant would be paid to the Appellant.
(7) The Appellant strongly believed that both the 1st Defendant and the Respondent had colluded and conspired with each other against the Appellant to deny the Appellant its rightful funds.
(8) Given that the Respondent had admitted receiving the £10,000 and had failed to serve their Defence within 28 days, the Defence should be struck out, and judgment should be entered against the Respondent in the sum of £10,000 plus interest.

24. In the meanwhile, on 30 April 2018, the Respondent had filed an Application Notice to strike out the Appellant's Claim as being without merit; for summary judgment to be entered on behalf of the Respondent against the Appellant; for costs; and for a Civil Restraint Order. In the alternative, the Respondent sought security for costs in the sum of £7,000. The application was accompanied by a witness statement made by Oliver Brumby (above). He asserted, amongst other things, that the Claim Form and Statement of Case were not CPR compliant; that the Court should be aware that a virtually identical set of proceedings had been issued against another client of the Respondent (Marcin Kopec – see below) and the Respondent; that the Respondent believed that there would be more Claims; and that the alleged loss in the instant claim had deliberately been reduced to £10,000 to enable the case to be issued as a small claim to avoid the higher issue fee – which was an abuse of process.

25. The Respondent's application to strike out etc was ultimately fixed for hearing in the Clerkenwell and Shoreditch County Court on 8 August 2018.

26. On 6/7 August 2018 the Appellant filed an application in the Clerkenwell and Shoreditch County Court to amend its Particulars of Claim from those in its Claim

Form to the Draft Amended Particulars of Claim ("the first APOC") attached to the application. These were signed by Nataliia Fox and dated 6 August 2018. The application was served on the Respondent on 7 August 2018 - for hearing the following day (prior to the hearing of the Respondent's application to strike out etc).

27. In the first APOC it was asserted, amongst other things, that:

(1) In or about March 2012 SM had been approached by the Respondent and discussions had taken place about the referral of accident claims made by clients of SM, and of other companies (including the Appellant) under the control of Mohammed Kamal Ahmed ("Mr Ahmed").

(2) In the result, a working agreement was reached between SM, the Appellant and Mr Ahmed on the one hand, and the Respondent and Excel (which was owned and managed by The Compensation Company Limited on behalf of the Respondent) on the other hand - whereby SM sent all claims to the Respondent and Excel.

(3) Thereafter, as a result of discussions as to the Respondent's concerns about the legality of referrals direct to the Respondent, and following oral agreement, a written Referral Agreement was made "*between the parties*" on 4 October 2012 to the effect that, on direct referral of a client by SM, or by the Appellant, or other company controlled by Mr Ahmed, or if the client instructed the Respondent direct on the recommendation of SM, the Respondent would:

(i) Pay the referring / recommending party a referral fee of £750 plus VAT.

(ii) Comply with the instructions of the Client contained in his Form of Authority and with the client instructions contained in paragraph 28 of the Hire Agreement, and account to the Appellant for any liability of the client to the Appellant for hire charges, and to SM for any liability of the client to SM for recovery and storage charges.

(4) After the Jackson Reforms of 2013, the Respondent had requested, and SM and the Appellant had agreed that the initial referral fee would be reduced to £500, and that accordingly the written Introducer Agreement had been reached between the Respondent and "*the other company controlled by*" Mr Ahmed, by which it was agreed that the Respondent would:

(i) Pay the referring party a referral fee of £500 plus VAT at the outset of the referral - on the signing by the referred client of the Respondent's CFA.

(ii) The Respondent would pay a "Final Admin Fee" of £250 to the Appellant or other referring company of Mr Khan.

(5) Pursuant to the Referral Agreement / Introducer Agreement, approximately 560 clients had been referred to the Respondent.

(6) After his accident on 4 April 2014 the 1st Defendant had engaged the services of SM to deal with the recovery and storage of his damaged vehicle.

(7) On 22 April 2014 the 1st Defendant had entered into a Form of Authority with SM which provided (see above) that he irrevocably authorised his instructed solicitors to ensure that all of his payments received in relation to his accident from the third party or their insurers, or from the Motor Insurance Bureau (if applicable) were to be made payable, and /or be paid over, to SM.

(8) On 25 April 2014 and 16 June 2014, the 1st Defendant had entered into written hire agreements with the Appellant - each of which provided in Clause 28 (see above) that he irrevocably authorised his solicitors that any payment made in

relation to his accident by the third party insurer or their representative should be made first payable to the Appellant in respect of hire charges incurred by him and the balance paid to himself.

(9) On or about 29 April 2014 SM had sent an initial claim pack (the content of which was specified) to the Respondent and Excel. On 6 May the Appellant had informed the Respondent of the credit hire of a replacement car by the 1st Defendant commencing on 25 April 2014 at a daily rate of £344.98. On 2 July 2014 the Appellant had sent the Respondent a final Hire Invoice totalling £30,412.39 for them to recover from the third party's insurer on behalf of the 1st Defendant.

(10) On 22 April 2016 SM had transferred all liabilities and benefits under the recovery and storage contract with the 1st Defendant to UKSG, and the total charge of £3,540 remained outstanding to UKSG.

(11) The Appellant had rejected offers of £4,155.66 and £10,000 to settle and, under the Referral Agreement, was not liable to pay any court fee.

(12) Without reference to the Appellant, on 7 November 2016 a settlement in the sum of £10,000 had been reached between the first Defendant and the Third Party's insurer.

(13) "19. ..... *The* [Respondent] *pursuant to the Referral Agreement and its knowledge of paragraph 28 of the Hire Agreement was under a contractual obligation to pay the* [Appellant] *the full sum of £10,000. Instead the* [Respondent] *arranged for the full sum to be paid to the First Defendant in the full knowledge that such was in breach of the First Defendant's obligations to the* [Appellant] *under the Hire Agreement and was in breach of the* [Respondent's] *obligations to the* [Appellant] *under the Referral Agreement and its knowledge of the irrevocable instruction to the* [Respondent] *to account to the* [Appellant] *contained in paragraph 28 of the Hire Agreements.*
20. The First Defendant and the {Respondent] *has failed to account to the Claimant the said sum of £10,000 offer that was agreed by the* [Respondent].
21. Accordingly, in the premises:
……..
(ii) The [Respondent] *is liable to the* [Appellant] *for the said sum of £10,000 paid by the Third Party Insurers and in respect of which the* [Respondent] *was liable to account to the* [Appellant] *pursuant to the Referral Agreement and its knowledge and acceptance of the terms of paragraph 28 of the Hire Agreement, and the notification by the* [Appellant] *of the incurring of such hire charges and the daily rate thereof".*

28. On the fixed date of 8 August 2018 there was a hearing in the instant Claim before District Judge Manners in the County Court at Clerkenwell & Shoreditch. Having heard counsel for the Appellant and the Respondent, and upon agreement between the parties, the judge ordered that:

(1) The hearing be vacated, and the case be transferred to the Central London County Court.

(2) The Appellant's application to amend its Particulars of Claim, and the Respondent's application for strike out / summary judgment be listed for the first available date after 3 October 2018 (with a time estimate of 3 hours).

(3) The Appellant to serve any additional evidence or pleadings relating to the applications on or before 4pm on 22 August 2018.

(4) The Respondent to serve any additional evidence or pleadings on or before 13 September 2018.
(5) The Respondent to file and to serve a bundle (which the parties were to endeavour to agree) 7 days before the application hearing.
(6) Skeleton arguments to be exchanged and filed three days before the Application Hearing.
(7) The Appellant to pay the Respondent's costs of that day's hearing in the sum of £1250

29. On 10 August 2018 there was a hearing before District Judge Beckley in the County Court at Clerkenwell & Shoreditch in Claim E1QZ42K9 (which was between UKSG and the Respondent). It was one of four claims brought by UKSG (as indicated above a Service Administration Company under the control of Mr Ahmed, which had taken an assignment of SM's clients) in relation to the alleged non-payment by the Respondent of final administration charges owed in relation to clients of SM. After hearing lawyers on both sides, the judge ordered that:
(1) The four UKSG Claims were to be consolidated, with Claim E1QZ42K9 being the lead case, and all transferred to the County Court at Central London
(2) The remainder of the Respondent's application dated 11 May, and the Appellant's application, were adjourned to be heard by a Circuit Judge on the first open date after 7 days in the County Court at Central London, time estimate one day.
(3) The consolidated UKSG case should be heard, if possible, together with the applications in the instant case, which had been transferred to the County Court at Central London by the Order of District Judge Manners on 8 August 2018.
(4) If Claim number E9QZ0846 (between the Appellant, Marcin Kopec and the Respondent – see above) was transferred from the County Court at Barnet to the County Court at Central London, that case should also, if possible, be listed with the other cases.

30. On 22 August 2018, in the instant Claim (i.e. within the time limit imposed by DJ Manners on 8 August 2018) the Appellant filed, and purported to serve by email, a witness statement signed by Mr Ahmed which was accompanied by a further amended version of the Draft Amended Particulars of Claim.

31. In the witness statement (a copy of which is said to be behind Tab 4 of the Appellant's Supplemental Bundle) Mr Ahmed asserted, amongst other things, that the statement was in support "*of our amended particulars of Claim on 7th August 2018 following legal advice that we had not received previously. I would like our amended application to be heard before the* [Respondent's] *premature and unreasonable application to strike out the claim*."; confirmed the facts upon which the Appellant relied; and continued:

> "*23. ....the* [Respondent] *arranged for the full sum to be paid to the First Defendant or paid the full sum of £10,000 to the First Defendant in the full knowledge that such was in breach of the First Defendant's obligations to the* [Appellant] *under the Hire Agreements and was in breach of the* [Respondent's] *obligations to the* [Appellant] *under the Hire Agreements and was in breach of the* [Respondent's] *obligations to the* [Appellant] *under the Referral Agreement and its knowledge of the irrevocable instruction to the*

> [Respondent] *to account to the* [Appellant] *in paragraph 28 of the Hire Agreements.*
> *24. I can confirm the First Defendant and the* [Respondent] *has failed to account to the* [Appellant] *the said sum of £10,000 offer that was agreed by the* [Respondent] *and the* [Respondent] *was negligent and was in breach of Paragraph 28 of the "Terms and Conditions of Hire" signed by the First Defendant on 25.04.2014. The* [Respondent] *was fully aware of this agreement signed by their client – the First Defendant as the* [Appellant] *had sent this Document to the* [Respondent] *on 2.7.16 (Schedule 1) on the First Defendant's behalf for the* [Respondent] *to recover this head of losses from the First Defendant's Third party insurer. It is further* [the Appellant's] *claim that this formed the basis of the claim by the First Defendant based on which the* [Respondent] had made a claim on their client's behalf for the losses incurred by the First Defendant.
> ……
> *29. Accordingly, in the premises:*
> ……
> *(ii) The* [Respondent] *is liable to the* [Appellant] *for the said sum of £10,000 paid by the Third Party insurers and in respect of which the* [Respondent] *was liable to account to the* [Appellant] *pursuant to the Referral Agreement and its knowledge and acceptance of the terms of Paragraph 28 of the Hire Agreement, and the notification by the* [Appellant] *of the incurring of such hire charges and the daily rate thereof*".

32. Shortly before the hearing before me, there was some controversy as to which of three versions of the Amended Particulars of Claim was the one which accompanied Mr Ahmed's statement. In the end , I have no doubt that it was the version ultimately produced by both the Appellant (in Tab 3 of its Supplemental Bundle) and by Rachel Barber (a Consultant Solicitor with the firm representing the Respondent) in her second witness statement (dated 27 March 2019) at pp.12 – 21 of exhibit RAB2. It is that version to which l shall refer hereafter as "the second APOC".

33. The second APOC was signed by Nataliia Fox and dated 22 August 2018. Comparison with the first APOC shows, amongst other things, that:
(1) Paragraphs 1-4 were the same, but there was a new paragraph 5, as follows: "*The* [Respondent] *failed to comply with the instructions of the client contained in the Form of Authority and with the client instructions contained in paragraph 28 of the Hire Agreement and account to the* [Appellant] *for any liability of the client to the* [Appellant] *for hire charges and to St Martins for any liability of the client to St Martin's for recovery and storage charges*".
(2) Paragraphs 6-8 were the same as paragraphs 5-7 of the first APOC.
(3) The first part of paragraph 8 of the first APOC (dealing with the Referral Agreement) became paragraph 9 in the second APOC, but with the omission of the whole of sub-paragraph (ii) (the assertion that it was part of the Referral Agreement that the Respondent would comply with the instructions of the client contained in the Form of Authority and with the client instructions contained in paragraph 28 of the Hire agreement etc).
(4) The second part of paragraph 8 of the first APOC (dealing with the Introducer Agreement) became paragraph 10 of the second APOC, but now referred to "the Defendant" (rather than "the Second Defendant"), with the addition of the date of the Introducer Agreement (1 April 2013). In addition, the first part of sub-paragraph (ii) (dealing with the Final Admin Fee) was amended to assert:

"*In addition to this "Introducer Agreement" Agreement dated 1 April 2013 (contained within Schedule 4 of this Amended Particulars of Claim) a verbal agreement was reached the Defendant would pay to the Claimant a final payment of £250 plus VAT to St Martin's (The Final Admin Fee), the* [Appellant] *or other referring company of MKA…….*".

(5) There was a new paragraph 11, as follows:
"*This verbal agreement was clearly in place and was working at the beginning of the relationship which was clearly in exitance* (sic). *The communication between the parties made this agreement explicitly confirms this agreement* (sic) *Examples of this communication are contained within Schedule 5* [which was new] *of the amended particulars of claim.*"

(6) Paragraphs 12-21 were the same as paragraphs 9-18 of the first APOC – save for Schedules 5-9 becoming Schedules 6-10.

(7) Paragraph 22 comprised the first sentence from paragraph 19 of the first APOC, after which was added:
"*The* [Appellant] *only became aware of any money outstanding to them when the* [Appellant] *directly approached the Third Party Insurer. The* [Appellant] *was made aware regarding the settlement of the claim by the 3rd Party's Insurer and not the* [Respondent] *or indeed the 1st Defendant. We hereto exhibited an Email enclosed with correspondence letter from the Third Party Insurer as Schedule 11*".

(8) The remainder of paragraph 19 of the first APOC became paragraph 23 of the second APOC. Thus it asserted that pursuant to the Referral Agreement, and to its knowledge of paragraph 28 of the Hire Agreement, the Respondent was under a contractual obligation to pay the Appellant the full sum of £10,000, rather than paying it to the 1st Defendant.

(9) Paragraphs 24-27 were the same as paragraphs 20-23 of the first APOC.

34. On 23/30 August 2018 DJ Stone, sitting in the Barnet County Court ordered, by consent, that the Claim between the Appellant and Marcin Kopec and the Respondent (E9QZ08H6) "*be transferred to Central London County Court to be heard together with claim number E8QZ95J2 and claims E1QZ42K9"* – i.e. the instant Claim and the Claims the subject of the consolidation Order made by DJ Beckley on 10 August 2018.

35. On 29 August 2018, in the County Court at Central London, upon consideration of the file in the instant Claim, HHJ Luba QC ordered that it, and all applications in relation to it, were reserved / docketed to HHJ Baucher until further Order; that the hearing directed in the Order made by DJ Manners on 8 August 2018 would be heard before HHJ Baucher, with a three hour time limit, on the first open day after 3 October 2018; and that the parties should prepare for that hearing in accordance with the DJ Manners' Order.

36. On 24 September 2018 notice was given to the parties that the hearing before HHJ Baucher in the instant Claim was fixed for 26 October 2018 in the County Court at Central London.

37. On 9 October 2018, according to records from Companies House produced by the Respondent, Mr Paul Simms was appointed a Director of the Appellant.

38. On 16 October 2018, in the consolidated Claims between UKSG and the Respondent, UKSG filed an Application Notice, which was signed by Mr Simms, for hearing before HHJ Baucher on 26 October 2018, seeking, amongst other things:
    (1) To add, as Claimants in the Action, Reeds Rentals Limited, the Appellant, Portland Medical Group Limited and Translate My Law London Limited.
    (2) Permission for Amended Particulars of Claim to be served.
    (3) The consolidation of the proceedings in the instant Claim (E8QZ95J2), and in the Kopec Claim ("E9QZ0846") with the UKSG Claim - with the lead UKSG Claim as the lead case going forward.
    (4) The transfer of the thus consolidated action to the Queen's Bench Division of the High Court.

39. The UKSG Application Notice was accompanied by a witness statement from Mr Ahmed, in which he asserted, amongst other things, that:
    (1) In terms of their contracts with the Appellant, clients gave an irrevocable instruction to the Respondent to account to the Appellant for all damages recovered in the client's claim in order to satisfy the hire charges, and any balance was to be paid by the client.
    (2) The Respondent was well aware of the terms of contract of the Appellant, and had concluded an agreement with Mr Ahmed (as detailed in the proposed amendments to the Particulars of Claim) and was provided with copy hire contracts with clients as well as the invoices of SM for recovery and storage charges, and of the Appellant for hire charges.
    (3) SM had also agreed with the Respondent for a referral / initial administration fee and a final administration fee charge to be paid to SM (as also detailed in the proposed amendments to the Particulars of Claim).
    (4) It appeared that the most sensible, cost effective way which complied with the overriding objective, was for all the claims of UKSG and the other four companies to be dealt with at one and the same time and for the Particulars of Claim to be expanded to cover all relevant claims – with the real issues largely being resolved on disclosure in the action.

40. In the proposed Amended Particulars of Claim it was asserted, amongst other things, that:
    (1) SM (which in April 2016 had resolved to change its name to Acquisition 54764574 Limited) had assigned its unresolved claims (for unpaid invoice collections and management of cases to a conclusion) to UKSG. The Appellant was the assignee of outstanding claims from Euronex Rentals Limited.
    (2) As detailed in the proposed Amended Particulars SM and Mr Ahmed had reached agreement with the Respondent for the Respondent to be recommended to victims as solicitors experienced in accident claims willing to represent them on a Conditional Fee Agreement basis and where victims would be able to defer charges in respect of recovery, storage, alternative car hire etc for one year or until the conclusion of a successful claim.
    (3) A procedure was adopted between SM, the Appellant (and the other prospective Claimant companies) and the Respondent under which the victim would sign an agreement giving irrevocable instructions to the Respondent to account to SM for storage and recovery and to the Appellant (or Reeds Rentals Limited) for the cost of hiring an alternative vehicle whilst theirs was being

repaired. The instructions of the victim were then passed to the Respondent so that the Respondent could act upon them and the charges incurred by the victim were notified to the Respondent, so that the Respondent knew what charges to include in their claim on the victim's behalf.

(4) In the instant Claim, the Respondent was liable, pursuant to the Hire Agreement, to ensure that the full amount of the payment from the Third Party's Insurer was paid to the Claimant, and was also under a contractual obligation, pursuant to the Referral Agreement and its knowledge of paragraph 28 of the Hire Agreement, to pay the Appellant the full sum of £10,000.

(5) Similar specific claims were made in relation to other named clients of one or more of the proposed Claimants – namely Marcin Kopec (above), Edward Mongan, Michaela Gordon, Anul Aslam, Gitana Jakutaviciene and Ewalini Bialkowski.

(6) The overall background included the following:

(i) In or about March 2012 SM was approached by the Respondent, after which there were several discussions between Mr Ahmed and Sandeep Jannala on behalf of SM, the Appellant and the other prospective Claimant companies and James Allen, Eamonn Dunne, Damien Brierley and Neil Edmonson on behalf of the Respondent, regarding the potential referral of accident claims of clients of SM to the Respondent.

(ii) In or around April 2012 a working agreement was reached whereby SM, the Appellant and Mr Ahmed on the one hand and the Respondent and Excel (a claims management company which had been formed for the purpose of receiving claims from SM, was managed by Damien Brierley and Neil Edmonson, and was owned by the Compensation Company Limited – which was managed and owned by Damien Brierley on behalf of the Respondent) on the other hand that SM would send all potential claims of their clients to the Respondent and Excel.

(iii) As a result of discussions about the Respondent's concerns about the legality of the payment of referral fees, "*….it was orally agreed, and a Referral Agreement was made between the parties in about March 2012 ('the Referral Agreement)….*" that on referral of a client by SM, the Appellant, or other company controlled by Mr Ahmed directly, or by the client instructing the Respondent direct on the recommendation of SM or other company controlled by, or linked to, Mr Ahmed, the Respondent would pay to the referring party a referral fee of £750 plus VAT; and that the Respondent would comply with the instructions of the client contained in his Form of Authority and account to SM for any liability of the client to SM for recovery and storage charges. (However, no written Referral Agreement was produced in the proposed Amended Particulars). Pursuant to the Referral Agreement approximately 598 clients of SM had been referred to the Respondent and the Respondent or Excel had paid SM in respect of 552 of them – leaving 46 unpaid in the total sum of £27,780.

(iv) After the introduction of the Jackson Reforms of 2013, the Respondent had requested, and SM and Mr Ahmed had agreed, that the initial referral fee would be reduced from £750 plus VAT per referral to £500 plus VAT per referral and would be referred to as an administration

charge. A written Introducer Agreement dated 1 April 2013 (which was produced in the proposed Amended Particulars) was then entered into between Excel and SM. It provided that the Respondent would pay a referral fee of £500 plus VAT on signing by the client of the Respondent's CFA.

(v) In addition to the Introducer Agreement a verbal agreement (demonstrated by written communications between the parties) was reached that the Respondent would pay to the Appellant (or other referring company of Mr Ahmed's) a final Administration Fee of £250 plus VAT – numerous (27) payments of which were made until, without any prior discussion, the Respondent stopped paying them. 462 payments remained outstanding in the total sum of £115,500.

(vi) Although referrals were made mostly to Excel, as it was a claims management company and did not perform any legal services, it did not handle any of the referrals – which were for the purpose of instructing solicitors to act for the clients of SM. All work on such clients' referrals was carried out by the Respondent and not Excel.

(vii) In relation to 98 clients of SM there were recovery charges outstanding in the sum of £34,440, and in respect of 94 of SM's clients there were storage charges outstanding in the sum of £489,590. In relation to 61 clients of the Appellant the Respondent had failed to pay a total of £1,533,576.45 for hire charges Similar non-payments to the other proposed Claimants totalled £2,853,387.51 – making a proposed Claim in the total sum of £5,026,493.96 plus interest.

The hearing before HHJ Baucher

41. The hearing was listed in relation to the Appellant's application to amend its Particulars in the instant Claim and the Respondent's application to strike out etc. The Appellant's wider application dated 16 October 2018 (above) in relation to the UKSG litigation was not listed.

42. As before me, Mr Simms represented the Appellant and Mr Randle represented the Respondent. Mr Simms' skeleton argument (which had been served on the court by email on 17 October 2018) included, at the outset, a summary of the procedural situation – with references to the Kopec and UKSG cases, the Order of DJ Beckley as to consolidation, the application to join and to amend in the UKSG litigation, the content of the proposed Amended Particulars of Claim in that litigation, and the alleged sense in consolidating and dealing with all the Claims at the same time. If the Court was not minded to amend the Particulars of Claim in the UKSG litigation, the skeleton argument also addressed the merits of the applications in the instant Claim.

43. The Respondent's skeleton argument referred to its Application Notice dated 30 April 2018, to the Appellant's Reply served on 11 May 2018, to the fact that no evidence had been served in response to the Respondent's Application Notice, to DJ Manners' vacation of the hearing on 8 August 2018 with costs, and to the fact that the Respondent had "*belatedly sought to bring a further application in respect of Claim No. E1QZ43K4 (which principally involves the company 'UK Services Group Ltd), which [*the Appellant] *has indicated was filed on 16 October 2018.* [The Appellant] *appears to suggest that this application ought to be heard in this matter. However,*

the Court has made it clear that this hearing is to determine the matters in respect of [the Respondent] *only*". The skeleton did not refer to DJ Beckley's Order made on 10 August 2018, nor to DJ Stone's Order made (by consent) on 23/30 August 2018.

44. The transcript of the hearing shows that, having been addressed about the Order made by DJ Beckley on 10 August 2019 in the UKSG litigation, and informed of the Appellant's application dated 16 October 2018 in that litigation, the judge decided to deal only with the applications that had been listed before her.

45. Mr Simms then accepted, as he had done in his skeleton argument for the hearing, that the original pleading did not set out the proper basis of the Appellant's claim. He went on to argue that the Amended Particulars indicated that there was a scheme of working between the UKSG / SM group and the Respondent. The Respondent had put up Excel, which was controlled by the Respondent, to sign the Referral and Introducer Agreements between SM and Excel, because the Respondent had been concerned about the lawfulness of the arrangement. It was therefore necessary to look behind the agreements. Excel, had done nothing for the companies in the UKSG / SM group, including the Appellant, and had simply been a front for the Respondent. Whereas the 1st Defendant's CFA had been with the Respondent, in numerous other cases the Respondent had paid referral fees. Equally, the 1st Defendant had completed the Respondent's Client Questionnaire. Thus, the Court could disregard Excel as being a real party to any of the relevant matters. The arrangement between the Appellant and the Respondent was that the Appellant's client would, via Clause 28 of their Hire Agreement, sign irrevocable instructions that the Appellant's charges would be paid by the Respondent out of monies due to the client. It was not fatal that neither the Referral Agreement nor the Introducer Agreement had been signed between the Respondent and the Appellant because the Respondent had, via a manageable conflict of interests, acted for both the Appellant and its client – as demonstrated by the Respondent seeking the Appellant's approval for the Part 36 offers. The acceptance by the Respondent of irrevocable instructions had resulted in a contractual liability to the Appellant.

46. Mr Simms continued that he also relied upon the following:
    (1) The Respondent had approached the Appellant in relation to the Part 36 offers and had been willing to commence litigation on the instructions of the Appellant – which was only conceivable if there was a contractual arrangement between them.
    (2) There had been several hundred agreements in all.
    (3) There was an established method of working which included the client signing irrevocable instructions to the Respondent and the Respondent accounting to the Appellant for its costs.
    (4) The acceptance of the irrevocable instructions by the Respondent was the contract upon which the Appellant was entitled to rely - and the Respondent knew that because they had paid out to the Appellant in hundreds of other cases.
    (5) The basis of the scheme of operation was that the Respondent had to settle everything together.
    (6) In the instant Claim, no one knew what had happened to the £8,000 which the Third Party's insurer had paid in relation to recovery, storage and hire costs, and therefore it was vital that the proceedings continue.

47. On behalf of the Respondent, Mr Randle pointed out that the proposed Amended Particulars made no reference to a claim of duty in negligence. Rather, they represented a new, purely contractual, case. The Introducer Agreement and the Referral Agreement were not between either of the parties in the instant claim. Equally, it was a basic principle of privity of contract that the Respondent could not be liable for any breach by the 1st Defendant of his contract with the Appellant – which did not bind the Respondent. There was nothing in the Appellant's Part 36 point as the 1st Defendant may have authorised the Respondent to deal with the Appellant – it made no difference as to whether there was a contractual relationship between the Appellant and the Respondent. The law was clear, if the proposed Amended Particulars had, as in the instant case, no real prospect of success, the application to amend should be refused.

48. In reply, Mr Simms argued that the Respondent could, of course, be bound by the 1st Defendant's irrevocable instructions – that was the way that the parties had operated. The 1st Defendant had given irrevocable authority which the Respondent had accepted and had therefore accepted a contractual liability – as evidenced by the referral of the Part 36 offers. It had not been just a matter of seeking the Appellant's opinion via instructions from the 1st Defendant. The Respondent owed a duty to the Appellant via the acceptance of irrevocable authority. It was not a question of the Appellant intervening as a third party. The irrevocable instructions were authority given by the 1st Defendant to the Respondent to pay the Appellant. That was the scheme of working, which involved a direct contractual relationship between the Appellant and the Respondent, which was what the Appellant relied on – not a third party right.

The judgment

49. HHJ Baucher summarised the history of the instant Claim, including Mr Simms' concession that the Appellant's original pleaded case did not set out the basis of its claim against the Respondent with particularity. She observed that, in the original Particulars, the Claim had been pursued in negligence and in contract, but had provided no cause of action - to the extent that the proposed Amended Particulars (in which the entire claim was based in contract) were a replacement for the original proceedings.

50. The judge then considered, by reference to *Su-Ling v Goldman Sachs International* [2015] EWHC 759, CPR 24, *Global Asset Capital Incorporated v Aabar Block SARL and others* [2017] 4 WLR 163 and the White Book, the principles to be applied – recording that an application to amend must be refused if it has no real prospect of success; that the prospect of success must not be false, fanciful or imaginary; and that, rather, if an application to amend is to be allowed, the claim must be one that carries some degree of conviction and is more than merely arguable.

51. The judge then underlined that the parties in the instant Claim were the Appellant and the Respondent whereas, by reference to paragraphs 8 & 19 of the proposed Amended Particulars of Claim (which was plainly a reference to the first APOC, rather than the second APOC) Mr Simms had sought to persuade her, via the Referral Agreement dated 4 October 2012 (which stated that the contracting parties were SM and Excel) and the revised version of that agreement dated 1 April 2013 (which was entitled:

"Introducer Agreement between Excel Law Limited and St Martin's Accident Management Limited"), that the Respondent had acted in breach of contract – arguing that Excel had been used by the Respondent as a vehicle for the purpose of securing referral fees, that SM had referred the 1st Defendant to the Respondent, that the CFA completed by the 1st Defendant had been with the Respondent, and that the Respondent was in breach of its obligations under the Referral Agreement.

52. The judge then recorded that Mr Simms had also referred to Clauses 9 and 28 of the hire agreements dated 25 April 2014 and 16 June 2014 between the Appellant and the 1st Defendant, and to the final part of each agreement which stated: "*I understand if I choose to hire on credit I am personally responsible for paying the hire cost*". The judge went on to summarise the submissions advanced by Mr Randle.

53. Against that background, the judge concluded:

"14. *I bear in mind, if I allow the substituted proceedings in the form of the amended particulars of claim, the case will be proceeding in contract only. So, therefore, what is the cause of action? The cause of action, in accordance with the arguments advanced by Mr Simms, relates to the agreements between Excel Law and St Martin's. Excel Law are not a party to this action. Mr Simms invited me to go behind the company. However, no evidence is before the court to establish that Excel Law Limited are anything other than a separate legal entity. Also, even if Mr Simms is correct in his submissions, I am unable to identify any clause within that agreement which would establish any contractual liability on the part of Excel Law Limited to pay the Claimant the hire costs. Mr Simms also asked me to consider the chain of correspondence from Dunne and Gray who he says were seeking instructions from Euronex in respect of offers. However, the difficulty with that argument is privity of contract. Dunne and Gray may have sought instructions but the provisions in respect of the hire agreement and the obligation to pay the sums due are between the claimant and the first defendant. The fact that the first defendant has not acted in accordance with his contract with the claimant and not authorised his solicitors to make payment over to St Martins is not a matter that establishes a cause of action in contract against the second defendant.*
15. The contractual relationship under the retainer was between the first defendant and the second defendant. That hire agreement owes no contractual obligation to the claimant and then there is this further difficulty, namely that the referral agreement upon which Mr Simms relies is not an agreement which on its face is binding upon the parties to this claim or contains any relevant contractual provisions. It follows, in the light of the guidance given by the High Court in the case of Goldman Sachs and applying the relevant provisions in respect of summary judgment the proposed amendment has no real prospect of success. I refuse to grant the amendment and the proceedings will be struck out".

Subsequent events

54. On 14 November 2018 the Appellant filed Notice of its application for permission to appeal. The Appellant filed an appeal bundle, but it did not contain a copy of the sealed Order of the lower court, nor a transcript of the judgment of HHJ Boucher. Sir

Alistair MacDuff's Order of 8 January 2019 (above) required the Appellant to provide both within 28 days.

55. On 12 February 2019 the Appellant filed and served a new appeal bundle (albeit that, according to the QB Appeals Office, it did not contain a copy of the sealed Order – which was later remedied). The index indicated that, at Tab 6, the file contained the "Application of Claimant to amend Particulars of Claim". Ms Rachel Barber, the solicitor at Keystone Law acting for the Respondent, agreed the index to the bundle but did not otherwise consider the content of the bundle.

56. In fact, there were significant differences between the version of the proposed Amended Particulars of Claim (dated 6 August 2018 and unsigned) which was behind Tab 6 in the Appellant's appeal bundle ("the third APOC") and both the first and second APOCs. There were also significant differences between the third APOC and the proposed Amended Particulars of Claim in the UKSG litigation - not least because, in the third APOC, all references to the written Referral and Introducer Agreements had been removed and instead there was reliance on an alleged oral Referral Agreement between Mr Ahmed (for SM and the Appellant) and Eamonn Dunne (for the Respondent) namely, as relevant to the Appellant and set out in paragraph 8 (iii) of the third APOC, that:

> *"…the* [Respondent] *would comply with the instructions of the Client contained in his Form of Authority and with the client instructions contained in paragraph 28 of the Hire agreement and account to the* [Appellant] *for any liability of the client to the* [Appellant] *for hire charges and to St Martin's for any liability of St Martin's for recovery and storage charges"*.

57. In the Grounds of Appeal, which were clearly, and wrongly, based on the third APOC, it was variously asserted that:
    (1) The Judge had wrongly failed to take into account the fact that Mr Ahmed was the controlling shareholder of SM, of its assignee company UKSG, and also of the Appellant, and that the Referral Agreement referred to in paragraph 8 of the proposed Amended Particulars of Claim was oral and intended to benefit SM and the Appellant. Without hearing the oral evidence of Mr Ahmed and Mr Dunne the court could not make any determination concerning the Referral Agreement.
    (2) The Judge had been wrong not to take into account the modus operandi of the companies controlled by Mr Ahmed on the one hand and of the Respondent on the other hand.
    (3) The Judge failed to take into account the fact that the Referral Agreement referred to in paragraph 8 of the proposed Amended Particulars of Claim was made by Mr Ahmed both on behalf of SM and of the Appellant, with Eamon Dunne (the senior partner of the Respondent) on behalf of the Respondent. As pleaded in paragraph 8 (iii) of the proposed Amended Particulars of Claim, it had been agreed by the Appellant that it would comply with the instructions of each client contained in his / her Form of Authority, and with the client's instructions contained in paragraph 28 of the Hire Agreement.
    (4) The Judge wrongly determined that there was no contractual nexus between the Appellant and the Respondent despite the Respondent's oral acceptance in the Referral Agreement that it would accept and act upon the irrevocable

authorisations contained in paragraph 28 of the Hire Agreement. Further the acceptance of the irrevocable instructions of the client also amounted to a contract on the part of the Respondent to carry the client's instructions into effect, of which the intended beneficiary was the Appellant.

(5) The Judge was wrong to determine that:

(i) The fact that the Respondent had already accounted to the Appellant in respect of 101 clients who had hired replacement vehicles from the Appellant on hire agreements containing paragraph 28 was not material.

(ii) It was not relevant and did not support the Appellant's claim that the Respondent had referred all offers made by Third Party Insurers to the Appellant, for the Appellant to accept or reject.

(iii) It was not relevant to and did not support the Appellant's Claim that the Respondent had offered to commence proceedings against the Third Party in the instant Claim, if the Appellant did not accept the offer made by insurers in respect of hire charges.

58. Consequent on that, in the Appellant's skeleton argument (which was drafted before the transcript of the proceedings below became available) Mr Simms variously argued, amongst other things, that:

(1) What had been agreed between the Appellant and the Respondent was that the Respondent would comply with the irrevocable instructions of the client and account to the Appellant for any liability of the client to the Appellant for hire charges, and that in order to substantiate the (oral) Referral Agreement oral evidence would be required at trial, together with evidence that the Respondent had accounted to the Appellant in 103 other cases.

(2) If the (oral) Referral Agreement was upheld at trial there was very good prospect of success for the Appellant – whereas the judge had focused on the fact that SM was not a Claimant and had wrongly concluded that the Referral Agreement was only an agreement between SM and the Respondent, and had failed to take into account that Mr Ahmed was the controlling shareholder and director of both SM and the Appellant and had been negotiating the Referral Agreement for both companies.

(3) In any event, the acceptance by the Respondent of the irrevocable instructions of the client would entitle the Appellant to enforce the contract under the Contracts (Rights of Third Parties) Act.

(4) The Judge had been pre-occupied with finding a written contract between the Appellant and the Respondent, had been told that there was a written agreement between a "front company" (namely Excel) and SM, and had appeared to then have taken that example of a written contract as being the contract upon which the Appellant was relying – whereas "…*This was clearly not the case as the contract with Excel Law Limited is not referred to in the Amended PoC……In the submission of the* [Appellant], *the manner in which* [the Respondent] *conducted the claim process demonstrates that the Referral Agreement was as pleaded in the Amended PoC and included a direct contract as between* [the Respondent] *and the* [Appellant] *as set out in paragraph 8 (iii)* [of the Amended PoC]…..*the Amended PoC set out a clear right of action and claim by* [the Appellant] *against* [the Respondent] *and the Judge should not have struck out the Amended PoC*".

59. The skeleton argument went on to underline authorities to the effect that a strike out claim should be considered very carefully and that if oral evidence was required to test the contentions of the Claimant then a strike out would be inappropriate as oral evidence cannot be given at a strike out stage. As to the criteria for allowing an amendment to a pleading, reliance was placed on the judgment of Hamblen J (as he then was) in *Brown v Innovatorone PLC* [2011] EWHC 3221 (Comm) to the effect that:

> "*As the authorities make clear, it is a question of striking a fair balance. The factors relevant to doing so cannot be exhaustively listed since much will depend on the facts of each case. However, they are likely to include:*
> *(1) the history as regards the amendment and the explanation as to why it is being made late;*
> *(2) the prejudice which will be caused to the applicant if the amendment is refused;*
> *(3) the prejudice which will be caused to the residing party if the amendment is allowed:*
> *(4) whether the text of the amendment is satisfactory in terms of clarity and particularity".*

60. Against that background it was submitted that the proposed amendments were not late, as the case had not even reached the Case Management Conference stage, and that the need for the Respondent to amend its Defence could be compensated in costs. It was underlined that the Judge had refused the amendment on the basis that there was no realistic prospect of success at trial on the basis of the amended pleading, and that it was difficult to understand how she had reached that conclusion as she had not addressed the detail of the (oral) Referral Agreement pleaded in paragraph 8 of the Amended Particulars. If the Judge had considered that pleading an oral agreement was not convincing to her (which she did not state) she should have allowed the amendment because it would be unfair to shut out the Appellant on the basis of a conclusion reached by the Judge on an alleged oral agreement without allowing the issue to be tested at trial on oral evidence.

61. In the Appellant's supplemental skeleton argument, which was drafted after the provision of transcripts in relation to the hearing on 26 October 2018, reliance continued to be placed on the third APOC and it was asserted (amongst other things) that, without the contractual structure for which the Appellant contended SM and its sister companies would not have been prepared to provide services without payment from the client. Further, it was submitted that the fact that the arrangements contended for by the Appellant were operative was demonstrated in documents that had been put before the court, and that the court could not resolve any contest about the oral Referral Agreement without hearing the oral evidence of the parties.

62. When Ms Barber later came to consider the document behind Tab 6 in the appeal bundle, she realised that it was significantly different to the version which had been before HHJ Baucher at the hearing on 26 October 2018. Thus, on 25 March 2019, she wrote to Mr Simms requiring a full explanation.

63. Mr Simms replied to the effect that, at the hearing on 26 October 2018, he had been anticipating working from the Appellant's bundle, only to find that the lodged version had been lost. He had not seen the Respondent's bundles prior to the hearing and, in using them at the hearing, he had been trying to find relevant documents and had not focused on any differences between what had been in the Respondent's bundle and what had been in the Appellant's bundle. He had believed that the version of the proposed Amended Particulars in the appeal bundle was the version that had been filed for the hearing below but had yet to hear from someone on the Appellant's side who could explain what had happened. If the proposed Amended Particulars served on 7 August 2018 was the document before the Court, he would paginate a new Tab 6 and include the application and exhibits from the Respondent's bundle that was used at that hearing.

64. On 26 March 2019 the Respondent filed and served Ms Barber's first witness statement, in which she explained that the third APOC was different to the first APOC (which had been served on 7 August 2018 and which she exhibited). She also produced, amongst other things, an accurate schedule of all the differences between the first and third APOCs, and continued that she had also reviewed the second APOC (which had been served on 22 August 2018) and had noted that whilst it had a number of differences when compared to the first APOC, it had retained reference to the written Referral and Introducer Agreements and had exhibited them.

65. In the afternoon of 27 March 2019, a fourth version of the Amended Particulars of Claim ("the fourth APOC") was emailed to the Respondent by the Appellant. It was unsigned and was dated 6 August 2018. In this version it was asserted, amongst other things, that:

> "8.…*it was orally agreed, and a Referral Agreement was signed between the parties in March 2012 ("the Referral Agreement") that on the referral of a client by St Martin's or* [the Appellant] *or other company controlled by MKA directly, or by the client instructing the* [Appellant] *directly, or by the client instructing the* [Appellant] *direct on the recommendation of St Martin's, the* [Appellant] *or other company controlled by KMA,(sic) to the* [Respondent]*:*
>
> *(i) the* [Respondent] *would pay the referring party a referral fee of £750 plus VAT.*
> *(ii) the* [Respondent] *would pay to the* [Appellant] *a final payment of £250 plus VAT per client to St Martin's, the* [Appellant] *or other referring company of MKA;*
> *(iii) The* [Appellant] *would comply with the instructions of the client contained in his form of authority and with the client instructions contained in paragraph 28 of the Hire Agreement and account to the Claimant for any liability of the client to the* [Appellant*] for hire charges and to St Martin's for any liability of the client to St Martin's for recovery and storage charges.*
>
> *9. After the introduction of the Jackson Reforms of 2013, the* [Respondent] *requested and St Martin's and the* [Appellant] *agreed that the initial referral fee would be reduced from £750 plus VAT per referral to £500 plus VAT per referral.*

> *10. Pursuant to the Referral Agreement approximately 300 clients were referred to the* [Respondent].
>
> ……
>
> *21. Accordingly in the premises:*
>
> ……
>
> *(ii) The* [Respondent] *is liable to the* [Appellant] *for the said sum of £10,000 paid by the Third Party Insurers and in respect of which the* [Respondent] *was liable to account to the* [Appellant] *pursuant to the Referral Agreement and its knowledge and acceptance of paragraph 28 of the Hire Agreement, and the notification by the Claimant of the incurring of such hire charges and the daily rate thereof.*
>
> ……"

66. Thereafter, a witness statement by Mr Simms dated 27 March 2019 was forwarded to the Court and the Respondent "*to clarify the position of the actual proposed Amended Particulars of Claim….which were operative…as served on the court and on* [the Respondent]…". The statement was to the effect that:

(1) At the beginning of August 2018 Mr Simms had been requested by Mr Ahmed to consider the then existing Particulars of Claim, and (based on the instructions that he had received) had advised on wholesale changes, and had drafted Amended Particulars of Claim which had been signed by Nataliia Fox and which had been filed and served on 7 August 2018.

(2) At the hearing before DJ Manners on 8 August 2018 it had been agreed between counsel on both sides that the Respondent had not had time to consider the Amended Particulars that had been served by the Appellant the day before, and that the Appellant wanted more time to consider whether those Particulars were adequate and correct as they had been prepared in a hurry. Thus it was by agreement (as reflected in the Order) that the DJ had ordered that the case be transferred to the Central London County Court, and paragraph 2 of the Order had provided that the Appellant serve any additional evidence or pleadings in this Claim on or before 4pm on 22 August 2018.

(3) On 22 August 2018 the Appellant had emailed to the Court, with a copy to the Respondent, a revised version of the Amended Particulars of Claim and of all the exhibits referred to therein together with a witness statement by Mr Ahmed (summarised in [31] above). Mr Simms identified (as part of exhibit PS/1) the "final version" of the Amended Particulars of Claim "*submitted in accordance with the Order of DJ Manners*". The "final version", thus identified, was in fact a copy of the second APOC. Mr Ahmed's statement was also identified as part of Exhibit PS/1.

(4) In [7] & [8] of the second APOC there was reference to a "working agreement" having been reached in March 2012 between SM, the Appellant and Mr Ahmed on the one hand and the Respondent and Excel on the other hand, and [9] referred to the Service Level (Referral) Agreement dated 4 October 2012 (which was produced in Schedule 3). The Introducer Agreement entered into on 1 April 2013 was referred to in [10], and an agreement was reached for the Respondent to pay £500 plus VAT as an Initial Admin Fee, plus a final payment of £250 plus VAT at the end of each successful claim. In [11] it was asserted that the working agreement had

existed before the Referral and Introducer agreements, and that the direct relationship between the Respondent, SM and the Appellant was well illustrated by the communications produced in Schedule 5, and by Respondent's consultations with the Appellant in relation to the offers made by the Third Party's Insurers to the 1st Defendant. Further, [12] made clear that approximately 560 clients had been referred to the Respondent, and that the parties had operated under the working agreement – which included an obligation on the part of the Respondent to honour the irrevocable instructions of its client to pay the Appellant.

(5) Indeed, the signed agreement between the 1st Defendant and the Respondent had contained another irrevocable instruction on behalf of the 1st Defendant to "*discharge my liabilities in relation to any credit repair, credit hire or storage and recovery charges from any damages received, direct to the appropriate party(s)*" – which clearly established an additional right of the Appellant under s.1(1)(b) & (3) of the Contract (Rights of Third Parties) Act 1999 - as interpreted in *Chudley v Clydesdale Bank PLC* (2019) EWCA 344.

67. In response, in a second witness statement (which was dated 27 March 2019) Ms Barber explained that there now appeared to be four different versions of the proposed Amended Particulars of Claim – namely the first APOC (her "Version 1") which had been attached to the Appellant's application to amend dated 6 August 2018; the second APOC (her "Version 4") which was filed and purportedly served by email on 22 August 2018; the third APOC (her "Version 2") which was behind Tab 6 in the Appellant's appeal bundle; and the fourth APOC (her "Version 3") which had been forwarded to the Respondent by email on 27 March 2019.

68. Ms Barber continued that it was now anticipated (given that it had been produced in the Appellant's Supplemental Bundle) that the Appellant would seek to rely on the second APOC and observed, amongst other things, that:

(1) [8] of the second APOC, which referred to a "working agreement", was identical to [7] of the first APOC (which was before HHJ Baucher).

(2) The reference to an alleged verbal agreement in [11] of the second APOC was a reference to the agreement alleged in [10(ii)], namely a verbal agreement that the Respondent would pay a final payment of £250 plus VAT per client to SM, the Appellant, or other referring company of Mr Ahmed.

(3) Save for a reference in [23], the second APOC did not appear to assert that there was a written or oral agreement between the parties to account to the Appellant for sums received in relation to the 1st Defendant. Unlike other versions, including the first APOC, it was not alleged that the Respondent had agreed, in the Referral Agreement, to "*comply with the instructions of the client contained in the Form of Authority and with the client instructions contained in paragraph 28 of the Hire Agreement and account to the* [Appellant] *for hire charges*".

(4) For the avoidance of doubt the Client Questionnaire (produced at pp.69-73 of the exhibits to the second APOC) was the Respondent's standard form Client Questionnaire (which appeared to be signed by the 1st Defendant, but not otherwise) and was not a contract between the 1st Defendant and the Respondent. The contract between them was the Conditional Fee Agreement (produced at pp.67-68 of the of the exhibits to the second APOC).

Grounds & Arguments

Ground 1 – procedural irregularity

69. Mr Simms submitted that, when directions were given, as they had been in relation to the instant Claim, litigants were entitled to expect that they would be followed. At all events, he argued, directions should not be changed without allowing argument, but nothing of that sort had happened at the hearing on 26 October 2018. Procedural irregularity had occurred in two ways, namely:

    (1) The Court had failed to follow the Beckley Order and had thereby rendered consolidation ineffective - when the Order had been made to effect efficiency in the six cases.
    (2) The judge did not consider the Appellant's skeleton argument, the documents referred to in the skeleton, and would not adjourn for 20 minutes to receive a clean copy of the Appellant's bundle – with the result that the bundle was never before the Court.

70. Mr Simms then summarised the procedural history in the instant claim, the UKSG litigation and the Kopec case, and submitted that the Order made by DJ Beckley on 10 August 2018 in the UKSG litigation had superseded the Order made by DJ Manners in the instant Claim on 8 August 2018), and that the Order made (by consent) by DJ Stone on 23/30 August 2018 in the Kopec case had been ignored in the listing of this Claim, along with the Appellant's Application Notice and the accompanying explanatory witness statement by Mr Ahmed which had been filed on 16 October 2018 in the UKSG litigation, and which had stated that it should be listed before HHJ Baucher on 26 October 2018. In addition, the Order which had been made in the instant Claim by HHJ Luba QC on 29 August 2018 without a hearing, had apparently been made in ignorance of DJ Beckley's Order.

71. The Appellant had lodged its bundle (which had contained the relevant Orders, the Application Notice filed on 16 October 2018, and Mr Ahmed's witness statement in connection with it) in good time prior to the hearing on 26 October 2018, and it was not its fault that its bundle had thereafter been lost. Nor was it the Appellant's fault that its skeleton argument, which had been lodged with the Court nine days prior to the hearing, and which (at pp.1-5) had set out the procedural history making clear that the procedural situation was a muddle, had been unavailable to HHJ Baucher until just before the hearing, and could not have been fully absorbed by her. Nor did the bundles provided by the Respondent for the hearing on 26 October 2018 contain the Orders relied upon by the Appellant, or the Application Notices and witness statements filed on 22 August 2018 and 16 October 2018. Further, as was made clear to the judge, it would only have taken 20 minutes to provide her with another copy of the Appellant's bundle. In the result, the judge had only considered the first APOC.

72. In any event, there were good reasons (particularly in relation to the overall scheme of working between the two sides, as set out in Mr Ahmed's witness statement) for the consolidation of all the Claims via the proposed Amended Particulars of Claim in the UKSG litigation. Instead the judge had been persuaded by the Respondent's counsel to ignore the Beckley Order and to proceed solely with the applications in the instant Claim. The judge should have adjourned for 20 minutes to allow the Appellant to obtain another copy of its bundle so as to ensure that she was able to be fully apprised

of the merits of its arguments in this regard, or should have just taken the opportunity (having been fully informed) to give directions in the overall litigation. Dealing with the instant Claim alone had produced an unfair result devoid of consideration of the wider picture.

73. Mr Simms also referred to five authorities, as follows: - *Frey v Labrouche* [2012] EWCA Civ at [21], [24] & [43] (it is a fundamental feature that a party should be able to bring his application to court, and that he should be able to make out his case orally); *Dunbar Assets PLC v Dorcass Holdings Ltd* [2013] EWCA Civ 864 at [12] & [14] (a procedural irregularity as the judge had decided that the claim for possession could be dealt with summarily without a trial); *Alpha Rocks Solicitors v Alade* [2015] EWCA Civ at [25] & [31} (not appropriate to make findings of fraud on a strike out application); *Richards v Vivendi* [2017] EWHC 1581 (Ch) at [32] & [52-53] (judge gave no real opportunity to the Appellant to explain himself); and *Clarke v Abertawe Bro Morgannwg University Health Board* UKEAT/0312/15/RN – May 2017 (which left open the possibility of there being cases where the irregularity or want of natural justice was such as to compel, without more, a remission and re-hearing).

74. Against that background, Mr Simms submitted that if HHJ Baucher had been aware of the full picture, including the detail in relation to the Application Notice filed on 16 October 2018 then, rather than proceeding as she did, she would have brought everything together via directions at the hearing on 26 October 2018.

75. In the combination of the Respondent's skeleton argument and his oral submissions, Mr Randle argued that this Ground was utterly misconceived - as it rested on the assumption that the judge was required to hear the instant Claim alongside the consolidated UKSG Claims (and the Kopec Claim). He underlined that the Beckley Order did not make it compulsory for the instant Claim to be heard alongside the other Claims, only that it should be "if possible". The assertion that the Luba Order was made in ignorance of the Beckley Order appeared to be based on assumption, and only the applications in the instant Claim had been listed on 26 October 2018. HHJ Baucher had been "*fully aware*" of that procedural background as the transcript showed that it had been explained by Mr Simms. In the result it had been fully within the judge's case management powers to decide to hear only the applications in the instant Claim. In particular, CPR 3.1 provided the power to decide the order in which the issues were to be tried (3.1 (2)(j)); the power to exclude an issue from consideration (3.1 (2)(k)); and the power to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective (3.1 (2)(m)). Further, the Appellant had decided to file Application Notice dated 16 October in the different UKSG litigation, not in the instant Claim. In addition, documentation from Companies House suggested that the various companies were not under the control of Mr Ahmed. Rather, although not a test case as such, there was obvious sense in hearing the applications in the instant Claim in order to decide whether, based on the case then advanced, there was a contractual relationship between the Appellant and the Respondent in relation to vehicle recovery, storage, and credit hire.

76. Mr Randle further submitted that the authorities that Mr Simms had cited were different to the instant case and did not assist the Appellant – e.g. there was no mini trial in this case; Mr Simms had had the opportunity to make all the submissions that

he had wanted to; the judge had heard oral argument; and had all the material that was really needed. In addition, it would have made no difference if the second APOC had been before the Court – as it too failed to reveal the existence of a relevant contract between the Appellant and the Respondent.

77. In reply, Mr Simms submitted that it could not be said that his attempt to explain the Orders in the other Claims to the judge was the equivalent of having the Orders available in hard copy. Verbal explanation alone had not been enough. It was nonsense to suggest that the Application Notice of 26 October 2018 had been filed in the wrong Claim – rather, it had been filed in the designated lead Claim. It would have been inappropriate to make it in the instant Claim.

Ground 2 – no real prospect of success

78. In [54] – [68] above, I have summarised the history of the Appellant's inappropriate reliance on the third APOC in its Grounds and skeleton arguments, how that was eventually realised by the Respondent, and how it was acknowledged by Mr Simms in his witness statement dated 27 March 2019.

79. In oral argument, Mr Simms indicated that he did not contest the principles set out in the cases cited by the Judge. This was not, he submitted, a late amendment – the case had just started, there had been no CMC and no disclosure. The question was whether it was a case in which the Appellant was advancing more than fanciful contentions. It was now clear, he submitted, that the Judge had considered the first APOC when she should have considered the second APOC, which had been served on 22 August 2018 - in compliance with the agreed Manners Order of 8 August 2018. The Judge had therefore ruled on the wrong APOC.

80. Mr Simms continued that in [5] of the second APOC it was asserted that the Appellant had failed to comply with the instructions of the 1st Defendant contained in his Form of Authority and with the instructions contained in paragraph 28 of the Hire Agreement to account to the Appellant for any liability of the 1st Defendant to the Appellant for hire charges and to SM for recovery and storage charges. In [7] & [8] of the second APOC there was reference to an approach by the Respondent in or about March 2012, and to discussions thereafter between named representatives of the Respondent, on the one hand, and of the Appellant and SM on the other hand. In [9] there was reference to both an oral agreement and a written Referral Agreement, and in [10] to both a written Introducer Agreement and an additional verbal agreement (in relation to Final Admin fees). Mr Simms further submitted that if the Judge had considered the second APOC and greater details about the working arrangements involved (as demonstrated on the face of the papers), including the fact that all relevant working communications by SM and the Appellant were with the Respondent, not Excel, she would necessarily have concluded that the Appellant's case should not be struck out.

81. Mr Randle submitted that the first APOC, which had been before HHJ Baucher, was (as demonstrated by the transcript of that hearing and the differences in the alleged schemes of working) more favourable to the Appellant than the second APOC, which was not before the Judge. No relevant working / contractual relationship was pleaded in the second APOC. In particular, [8] - [12] said nothing about irrevocable instructions; the Client Questionnaire relied upon was only a unilateral statement by

the 1st Defendant, it was not alleged to be a contract, and even if it was, the inference was that it was between the 1st Defendant and the Respondent. The only pleaded matters relied upon were the Hire Agreement and the general scheme of work – but it was not obvious how that demonstrated a contractual relationship between the parties. Rather, it was just a co-operative relationship, with the Respondent acting as agent for the 1st Defendant. The third and fourth versions of the APOC could now be ignored.

82. In reply Mr Simms asserted, amongst other things, that it was astonishing to submit that the Client Questionnaire was anything other than a scheme of working.

The merits

83. In accordance with CPR Part 52.21(3):

"*The appeal court will allow an appeal where the decision of the lower court was:*

(a) wrong, or

(b) unjust because of serious procedural or other irregularity in the proceedings in the lower court".

84. It is, to say the least, unfortunate that, in seeking to advance its proposed appeal, the Appellant sought, until eventually challenged by the Respondent, to rely upon the third APOC and (based upon it) to advance strong criticism of the judge - when it had never sought, by any route, to rely upon that version of the APOC before the Judge. It is the more unfortunate that reliance was placed on the third APOC even after the transcripts were to hand and it was, or should have been, obvious that the first APOC was the only version about which both sides had advanced argument at the hearing on 26 October 2018. To state the obvious, reliance should never have been placed on the third APOC in this appeal. Nor, for that matter, was the fourth APOC relevant either.

85. As set out in detail above, the Appellant and its associate companies chose to start the litigation outlined above in piecemeal fashion. In the instant Claim, begun on 29 March 2018, the Appellant accepts that its original Particulars (which alleged negligence) failed to disclose a viable case. On 30 April 2018 the Respondent filed an Application Notice seeking, amongst other things, and unsurprisingly, to strike out the Claim. The hearing was fixed for 8 August 2018. Just a day or two before the hearing, the Appellant filed an Application Notice to amend its Particulars to those in the first APOC (which alleged that, pursuant to the Referral Agreement, and to its knowledge of paragraph 28 of the Hire Agreement, the Respondent was under a contractual obligation to pay the Appellant the full sum of £10,000). At the hearing before DJ Manners on 8 August 2018 it was ordered, by agreement, that the hearing be vacated, and the case transferred for hearing in the Central London County on the first available date after 3 October – with the Appellant to serve any additional pleadings by 4pm on 22 August 2018.

86. On 10 August 2018, DJ Beckley ordered that the UKSG cases should be consolidated, all transferred to the Central London County Court and heard, if possible, with the applications in the instant case, and if possible with the Kopec case (if it had been transferred from Barnet to the Central London County Court). On 22 August 2018

(and thus within the time limit imposed by DJ Beckley on 10 August 2018) the Appellant filed and purported to serve the second APOC (which alleged that the Respondent had failed to comply with the instructions of the 1st Defendant contained in the Form of Authority and in paragraph 28 of the Hire Agreement and, pursuant to the Referral Agreement and its knowledge of paragraph 28 of the Hire Agreement, was under a contractual obligation to pay the Appellant the full sum of £10,000). On 23 / 30 August 2018 DJ Stone ordered, by consent, that the Kopec case be transferred to Central London County Court to be heard together with the instant Claim and the consolidated UKSG claims. On 29 August 2018 HHJ Luba QC reserved the instant Claim to HHJ Baucher for hearing the outstanding applications on the first available date after 3 October 2018. On 24 September 2018 the parties were notified that the hearing before HHJ Baucher had been fixed for 26 October 2018.

87. On 16 October 2018, in the consolidated UKSG litigation, UKSG filed an Application Notice seeking, amongst other things, the consolidation of the instant Claim and the Kopec Claim with the consolidated UKSG claims, permission for Amended Particulars of Claim to be served, and that the application be heard by HHJ Baucher on 26 October 2018. Those Amended Particulars asserted that, in the instant Claim, the Respondent was liable, pursuant to the Hire Agreement, to ensure that the full amount of the payment from the Third Party's insurer was paid to the Appellant, and was also under a contractual obligation, pursuant to the Referral Agreement and its knowledge of paragraph 28 of the Hire Agreement, to pay the Appellant the full sum of £10,000.

88. The Appellant lodged its bundle, and its skeleton argument, in good time for the hearing before HHJ Baucher on 26 October 2018. Unfortunately, however, both were thereafter mislaid – although Mr Simms must have had his own copy of each. In the end, a copy of Appellant's skeleton argument was provided to the Judge on the day of the hearing, and bundles provided by the Respondent were used (albeit that Mr Simms had indicated that the judge could be provided with a copy of the Appellant's bundle within 20 minutes). The submissions made during the hearing and the judgment thereafter are summarised in [42] – [52] above.

89. Although referred to in the combination of the Appellant's skeleton argument and the submissions of Mr Simms and Mr Randle, it appears that the judge did not have actual sight of the Order made by DJ Beckley, the Consent Order made by DJ Stone, or the Application Notice dated 16 October 2018 and its accompanying proposed Amended Particulars of Claim.

90. Equally, albeit that the Court's copy of the appellant's bundle had been mislaid, and surprisingly if it was intended to rely upon the second APOC (given that Mr Simms must or should have had a copy of it in his own bundle or otherwise to hand , that it was signed and dated 22 August 2018 and was thus easily identifiable, and that it had been "served" on the Respondent by email) the arguments advanced on both sides in relation to the listed applications were confined to the first APOC, and thus the Judge was never asked to consider the second APOC. It is also clear from the transcript of the hearing that Mr Simms made clear that the Appellant was not intervening as a third party, and / or relying on a third party right (which, notwithstanding that, was floated in his witness statement of 27 March 2019, but not thereafter pursued).

91. As indicated above, the procedural irregularities ultimately relied upon by the Appellant in Ground 1 are that:

    (1) The Court failed to follow the Beckley Order and thereby rendered consolidation ineffective, when the Order was made to effect efficiency.
    (2) The Court did not consider the Appellant's skeleton argument, and documents referred to in the skeleton argument, and would not adjourn for 20 minutes to receive a clean copy of the Appellant's bundle – thus the Appellant's bundle was never before the Court.

92. I have summarised the arguments on both sides at [70] – [77] above.

93. I observe that:

    (1) The joinder application made on 16 October 2018 was in the UKSG litigation, not in the instant Claim – albeit that it mentioned the then forthcoming hearing in the instant Claim.
    (2) Unsurprisingly, the only matters listed before HHJ Boucher on 28 October 2018 were the applications in the instant Claim.
    (3) The Appellant's skeleton argument for that hearing set out (at pp.1-5) a summary of the various strands of litigation.
    (4) The decisions the subject of this Ground involved the exercise of the Judge's case management discretion.
    (5) The Beckley Order, which was made in the UKSG litigation, was not expressed in compulsory terms, rather the Order was that the UKSG Claims should "if possible" be heard with the instant Claim and the Kopec Claim. It did not supersede the agreed Manners Order, nor was there anything wrong with the Luba Order.
    (6) The transcript of the hearing variously shows that:
        (i) It was not the Appellant's fault that the court copies of both its bundle and its skeleton argument had been mislaid.
        (ii) Nevertheless, and although only provided with it on the day of the hearing, the judge must have read the Appellant's skeleton argument in detail – see her reference to p. 13 (of 15) of it at Transcript p.6.
        (iii) Mr Simms explained, in clear terms, both the Beckley Order and the application made in the UKSG litigation on 16 October. Although he did not refer to the Stone Consent Order in oral argument it was referred to in paragraph 1 of the Appellant's skeleton argument.
        (iv) In declining to deal with anything other than the listed applications in the instant Claim, the Judge implicitly accepted the arguments advanced by Mr Randle – including that dealing with the listed applications would (in so far as the Appellant suggested that other claims were identical) be in compliance with the overriding objective.

94. Further, in my view:

    (1) Having considered the documents that are said to have been in the mislaid bundle, it is not arguable that sight of them should have caused the judge to take a different view.

(2) The judge's decisions were not in breach of any of the principles identified in the cases cited by the Appellant in argument before me.

95. Against that background, and in light of the submissions of the Respondent, Ground 1 is not, in my view arguable. The impugned decisions made by the judge were within the reasonable scope of the exercise of her discretion, and notwithstanding the unfortunate loss of the Appellant's bundle and (until the day of the hearing) the loss of the Appellant's skeleton argument, it is not arguable that the decisions were either wrong or unjust.

96. As indicated above, in Ground 2 it is asserted that the Judge was wrong to determine that the Appellant's proposed Amended Particulars of Claim had no real prospect of success. I have summarised the arguments in relation to this Ground at [79] – [82] above.

97. Only the first APOC was relied upon by the Appellant in argument on 26 October 2018. To state the obvious, it was incumbent on the Appellant to rely upon what it regarded as the relevant version. Notwithstanding the loss of the court copy of the Appellant's bundle, and the fact that the second APOC was not in the Respondent's bundles, it must have (or should have) been in Mr Simms's copy of the Appellant's bundle, or otherwise to hand, if it was being relied upon. Accordingly, the principal responsibility for the failure (if that is what it was) to rely on the second APOC at the hearing on 26 October 2018 is the Appellant's. The judge cannot be criticised for not considering a document that she was not asked to consider.

98. In any event, and for the reasons that she gave, in my view the judge was plainly right (rather than arguably wrong) to conclude that the first APOC had no realistic prospect of success. The essential thrust of the first APOC was that the relevant contractual relationship was to be found in documents that were before the Court. The Appellant's procedure / scheme of working arguments did not assist it. Nor, in any event, for much the same reasons (combined with those advanced in argument by the Respondent in the hearing before me) is it arguable that there was any realistic prospect of success in the second APOC; nor (for that matter, in my view) in the proposed Amended Particulars that accompanied the Application Notice dated 16 October 2018. Finally, for the reasons explained above, it is not necessary to consider the prospects of success of the third and fourth APOCs. Hence Ground 2 is not, in my view, arguable either.

Conclusion

99. For the reasons set out above, in the particular circumstances of this Claim, I refuse permission to appeal on both Grounds. I propose (unless a hearing is requested) to deal with consequential applications on paper, with the Respondent providing (after liaison with the Appellant) a draft Order for my consideration.