



Neutral Citation Number: [2023] EWHC 1150 (Ch)

Case No: BL-2023-LDS-000001

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN LEEDS**  
**BUSINESS LIST (ChD)**

Oxford Row  
Leeds  
LS1 4DG

15 May 2023

**Before :**

**MR JUSTICE FANCOURT**  
**Vice-Chancellor of the County Palatine of Lancaster**

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**Between :**

**DEBORAH ANNE FORSTER**  
**- and -**  
**REYNOLDS PORTER CHAMBERLAIN LLP**

**Claimant**

**Defendant**

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**Steven Fennell and Jodie Wildridge (instructed by Blacks Solicitors LLP) for the Claimant**  
**Glenn Campbell (instructed by Reynolds Porter Chamberlain LLP) for the Defendant**

Hearing dates: 20-24, 27-29 March 2023  
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**APPROVED JUDGMENT**

**This judgment was handed down remotely at 09.00 am on 15 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.**



## The Vice-Chancellor :

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### Introduction

1. In this claim, Ms Forster claims damages against the Defendant (a well-known law firm, which I will refer to as “RPC”) for loss caused by alleged breaches of duty when RPC acted for Ms Forster in litigation and following an agreed settlement. Ms Forster was defending a claim for fraudulent misrepresentation brought by a Ms Kate Bleasdale and a Mr John Cariss (together, “the Opponents”, or “Bleasdale and Cariss”), and pursuing relief against them and a limited company controlled by them in a petition under s.994 of the Companies Act 2006.
2. The trial against the Opponents started on 30 March 2011 before Mann J and was settled in the form of a Tomlin Order on 31 March 2011 (“the First Tomlin Order”). The schedule to the First Tomlin Order contained terms including payment to Ms Forster of £350,000 compensation and 80% of her costs of the claim and the petition. Only £50,000 of this was paid by the Opponents, who were eventually made bankrupt on Ms Forster’s petition in 2016. Nothing more was recovered from them.
3. The claim for damages is essentially for loss of the opportunity to enforce the First Tomlin Order in October 2011 and thereby recover more of the agreed sums, by first converting the Tomlin agreed terms into a judgment debt and then

promptly enforcing it and the costs order against the Opponents' assets in late 2011 and 2012.

4. At all times, RPC acted for Ms Forster on a conditional fee agreement ("CFA") with a 100% uplift on their fees, as did the three Counsel who represented her at trial. Under the terms of the CFAs, all sums recovered from the Opponents were payable to RPC and Counsel in priority to Ms Forster. Ms Forster had the benefit of an "after the event" insurance policy written by ARAG ("the ATE Policy") insuring limited adverse costs and any non-lawyer disbursements payable by RPC. This also covered repayment of a loan taken out by Ms Forster at a late stage of the proceedings ("the Deacon Loan Agreement") to fund the fees of her expert witness.
5. The principal issues in this claim concern the way that conflicts of interest that arose under the terms of the CFAs and the Deacon Loan Agreement were managed by RPC. It is Ms Forster's case that RPC became hopelessly conflicted in continuing to act for her, and that they preferred their own and Mr Deacon's interests to hers in delaying enforcement. As a result of this, she contends, the terms of the First Tomlin Order were not enforced when they should have been, to her detriment. Ms Forster contends that, had these terms been enforced in late 2011 and early 2012, a much more substantial recovery, including at least £350,000 of compensation, would have been made.
6. Ms Forster contends that she would have been entitled to retain £350,000 of compensation paid by the Opponents in priority to RPC as a result of agreement reached with, or an assurance given by, Mr Ballinger of RPC before the First Tomlin Order was made. RPC dispute that any such agreement varying the terms of the CFAs was made or that Ms Forster was assured by them that she would be paid out in priority if she agreed the proposed settlement.
7. RPC disputed until the penultimate day of the trial that Ms Forster had any entitlement to bring this claim against them, on the basis that her rights of action were assigned to Mr Deacon as security for the money advanced under the Deacon Funding Agreement. However, that defence was abandoned.

## **Background**

8. Ms Forster is an inventor but not really a businesswoman, and she lacked capital with which to exploit her inventions.
9. Inspired by seeing her elderly mother in a care home sadly wearing another resident's clothes, she invented a small electronic tag to attach to clothing so that it could readily identified as belonging to a particular person – called a "Stayput Tag". She hoped that all kinds of institution that carry out laundry in bulk would find the Stayput Tag useful.
10. Ms Forster found two potential investors for a company that she formed, Stayput Solutions Limited ("the Company"), to try to exploit her invention. Their relationship foundered at an early stage. She then looked for replacement investors and, on recommendation, found Kate Bleasdale as a possible investor. Ms Bleasdale, who had apparently had a high profile and successful career as a

businesswoman, was interested in Stayput, and she acquired a holding in the Company in early 2007.

11. In late 2007, Ms Bleasdale transferred half her shares to Mr Cariss, whom she described to Ms Forster as a business associate but who was in fact her longstanding partner, by whom she had had children. Through the means of a convertible loan, Ms Bleasdale and Mr Cariss acquired overall majority control of the Company and then caused it to sack Ms Forster on 15 March 2008.
12. Ms Forster brought unfair dismissal claims against the Company and the Opponents, which provoked a rival High Court claim by them alleging that Ms Forster had made a fraudulent misrepresentation to induce Ms Bleasdale to invest in the Company. The High Court claim resulted in the Employment Tribunal proceedings being stayed to await its outcome, as no doubt it was intended to do, and Ms Forster defended the fraud claim. She was initially represented by Harrowells Solicitors in the Employment Tribunal and by Brooke North in the High Court proceedings. Brooke North instructed Paul Marshall of Counsel and Mr Marshall and Ms Forster had a good understanding and worked well together.
13. The s.994 petition was prepared and the fraud claim defended. There were separate proceedings brought by Ms Forster in the County Court in relation to alleged infringements of the Data Protection Act.
14. To assist with the unfair prejudice petition, Brooke North instructed Linda Cheung, from a small firm, Mall & Co, a forensic accountant who had trained with Deloitte. The compensation that Ms Forster sought in the petition depended on placing a value on the Company's shares – not likely to be a straightforward matter when its main asset was a suite of untested inventions with patents pending. It appears that Brooke North, Mr Marshall and Ms Cheung had all agreed in principle to defer charging fees to Ms Forster, as she was impecunious. Both Ms Forster and Mr Marshall had confidence in Ms Cheung.
15. Mr Marshall and Brooke North then had a disagreement, and at that stage (December 2009) Mr Marshall introduced Ms Forster to Michael Ballinger, a legal director at RPC, with whom he had previously worked on a CFA basis. Mr Marshall considered the merits of the defence to be strongly in Ms Forster's favour and that there were reasonably good prospects of success on the proposed petition. In due course, Mr Ballinger and Mr Tim Brown, who was Mr Ballinger's supervising partner, shared his view and they wrote a risk assessment and recommended the case to RPC's CFA committee.
16. At that time, RPC operated a CFA scheme that Mr Ballinger had created, called the "Alchemy Scheme". This was at a time, prior to the Jackson LASPO reforms, when paying parties could be made liable for the receiving party's success fees of up to 100% mark up on the base fees and an ATE premium. RPC were apparently keen on the Scheme – which had potential to earn substantial profit fees for the firm – though doubtless the skill in using it depended on selecting the right type of case to take on. The first two cases in which the product had been used were in an insolvency context, where the firm's client was a professional officeholder. Ms Forster was a very different kind of client.

17. While they were assessing the suitability of the Alchemy Scheme for Ms Forster's claims, RPC agreed to work for her on the basis of reduced fees and to defer any charge for their work. In due course, the CFA committee accepted the recommendation to take on Ms Forster's claims. At that stage, Mr Ballinger, as he said, "would have explained to Ms Forster the way that the Scheme worked". She signed up to the CFA under the terms of the Scheme on 23 March 2010, the same day on which the s.994 petition was issued. RPC then made CFAs with Mr Marshall on the terms of the Chancery Bar Association Conditional Fee Conditions 2008 the following week, and with Ms Emerson, his junior, in July 2010.
18. I shall refer in due course to the key terms of those important agreements. It is necessary at this stage to set out the essential facts, from the retainer to the settlement and the First Tomlin Order.

### **Summary of events from the retainer to settlement on 31 March 2011**

19. Mr Ballinger discussed with Ms Forster whether and if so on what terms she should take out insurance against liability for fees in the event that her defence (and so in all likelihood her petition too) failed. A decision was taken that it was pointless to obtain costly insurance against all the costs of the action when failure in the defence of the fraud claim would leave Ms Forster liable to bankruptcy in any event, as she had no assets. However, insurance was advised to cover any costs, as Ms Forster would otherwise be unable to pay them. Accordingly, a modest policy to cover £15,000 of accrued fees and £50,000 of possible adverse costs was taken out – the ATE Policy – for a premium that ARAG was content to defer.
20. At the date of the ATE proposal, RPC indicated to ARAG (but not to Ms Forster) that its fees were £285,000 up to 19 July 2010, with maximum expected total costs of £700,000 and disbursements of £100,000. Ms Forster saw these figures in the ATE proposal in August 2010 and expressed concern. It is common ground that she was reassured that in view of the "no win no fee" basis of the CFA she did not need to worry about the amount of RPC's fees. On 15 September 2010, Mr Ballinger reported to RPC's CFA committee that base costs at Alchemy Scheme rates were by then £487,000 (without the 100% mark up), with further costs of about £600,000 (base rate) to trial. A trial window of the last week of March 2011 had by then been set.
21. By mid-September 2010, therefore, RPC's incurred and expected fees were significantly increasing. They were by then looking at total profit costs, with mark up, in excess of £2 million. It is common ground that Ms Forster was not told about this level of costs, or anything further about the amount of costs being incurred, until a mediation took place on 10 December 2010.
22. On 15 October 2010, Ms Forster arranged to attend a conference with Counsel in London, and Ms Cheung also attended. It was on that day that Mr Ballinger and Mr Brown told Ms Forster and Ms Cheung that RPC considered that a forensic accountant from Deloitte would be needed to be the expert witness at trial. Ms Forster had not been told this in advance. Two days before the conference, Mr Ballinger had emailed ARAG to propose a £200,000 increase in cover on the ATE

Policy, to allow for the instruction of Deloitte. It is common ground that Ms Forster was initially very unhappy about this proposed change, but she was later persuaded by RPC to agree it and did so, very reluctantly.

23. Following the conference, RPC instructed Deloitte and ARAG confirmed willingness to increase cover, for a further premium of £90,000 + tax. When Mr Ballinger informed Ms Forster of this by email dated 2 November 2010, he also told her that it was recommended that she take out a limited recourse loan with Giltspur Capital LLP, to fund the disbursements, in particular the fees of Deloitte, as the case proceeded. Deloitte expected to be paid on a monthly basis. Deloitte's engagement letter was signed by RPC on 12 November 2010, but nothing was done then about the loan.
24. Giltspur Capital LLP was a firm controlled by a Mr John Deacon. Mr Deacon was someone that Mr Ballinger had previously met and with whom he had enjoyed discussion about litigation funding in general, and disbursement funding in particular. RPC and Giltspur had operated together on previous cases and Mr Ballinger had assisted Mr Deacon to pitch for funding business. At about this time, RPC agreed in principle to invest £500,000 in a Giltspur fund. Giltspur was, in effect, an "in house" resource for funding arrangements under RPC's Alchemy Scheme in which RPC had an interest. This connection between Giltspur, Mr Deacon and RPC was not disclosed to Ms Forster at any time and only emerged in the evidence of Mr Ballinger at trial.
25. At the mediation on 10 December 2010, RPC valued Ms Forster's compensation claim at £810,000 plus interest of £89,000. (One can assume that was at the upper limit of what was credible.) At that stage, RPC's costs (including 100% uplift) were stated to be £2,451,644. The mediation was a failure and Ms Bleasdale behaved very badly. At about the same time, it had become apparent to RPC, from repeated disclosure applications against the Opponents, that "this lot can't be trusted and nor can their solicitors" (email of Mr Ballinger dated 30 November 2010). RPC therefore knew that Bleasdale and Cariss were slippery and untrustworthy.
26. At the mediation, RPC offered to settle all Ms Forster's claims for £450,000 and her costs on the standard basis. This offer was rejected. It was followed by a Part 36 offer by Ms Forster to settle the fraud claim and the petition for a payment of £400,000.
27. At that stage, RPC carried out an updated risk assessment, on which Mr Brown commented (in an internal email only):

*"We will likely in any settlement have to take a haircut on our success uplift as will counsel and the ATE insurers will have to agree a lower premium recovery. We don't envisage a problem in that respect and at the mediation were willing to settle for a success uplift of 50%*

*The amount of damages is likely no greater than £500k so costs dwarf them. We have looked at the proportionality argument which could be used against us (and it was relied on by Goodman Derrick at the*

*mediation) but we are comfortable we can deal with it in view of the fraud allegations being made.*

*I think the other side are way past the stage of being able to look sensibly at the risk/reward benefit of taking the case to trial.”*

At this point it was therefore understood by RPC that Ms Forster was dependent on RPC agreeing to forgo its fees entitlement if she was to recover any compensation.

28. On 20 January 2011, Deloitte sent RPC a first monthly bill for their services in the sum of £36,810. Mr Brown agreed in evidence that RPC was liable for Deloitte’s fees by virtue of the terms of the engagement letter.
29. In late January 2011, only two months before the scheduled trial, Ms Bleasdale was suspended from her employment as CEO of Healthcare Locums PLC (“HCL”) for financial irregularities, and the trading of HCL shares on AIM was also suspended. Ms Bleasdale was then earning in excess of £500,000 per annum. Ms Forster was concerned (and had a tip off) that the Opponents might now seek to hide their assets. Mr Ballinger recognised the concern and instructed inquiry agents to report on their assts (“the Kaparo Report”). This showed that they still had substantial capital assets.
30. On 4 February 2011, Mr Ballinger sent Ms Forster a draft funding agreement to be made with Mr Deacon. The email said that provided Ms Forster “behaved” there was nothing in the agreement for her to worry about. She was persuaded to sign the Deacon Funding Agreement. It was signed on 21 February 2011. RPC recently confirmed, in a witness statement made by Mr Wyles, a legal director of RPC, that it started to act on behalf of Mr Deacon on 21 February 2011. This fact was not disclosed to Ms Forster at any time. Both Mr Brown and Mr Ballinger were reluctant to accept that RPC were acting for Mr Deacon, no doubt because it created an undisclosed conflict of interests for RPC in acting for Ms Forster. However, the evidence of Mr Wyles and the later conduct of RPC in seeking injunctive relief against Ms Forster on behalf of Mr Deacon clearly establishes that they were so acting from 21 February 2011.
31. On 22 February 2011, RPC signed a CFA with Jonathan Nash QC, retaining him to lead Mr Marshall and Ms Emmerson on behalf of Ms Forster at the trial.
32. On 11 March 2011, the Opponents made an offer to settle all claims for a costs inclusive sum of £1.2 million. RPC wished to counteroffer £3 million ‘all in’. Mr Ballinger told RPC’s CFA committee that he proposed that £400,000 should go to Ms Forster and £150,000 to pay disbursements, leaving £2.05 million to be shared out between the legal team, which meant that all would receive 57% of their full, uplifted entitlement. The committee was told that ARAG and Mr Marshall had agreed this, and that no difficulty was expected in getting Ms Forster’s agreement in view of the Part 36 offer that had already been made. Mr Nash QC later agreed too.



33. Ms Forster did not initially agree. She was convinced that her claim would succeed, and she wanted £1.2 million plus costs. That was on any view overly optimistic, but it was her instruction in an email to Mr Ballinger. There were heated telephone discussions on 11 March, in part while Ms Forster and her partner, Mark Wilson, were in their car. Those discussions are an important part of the background to the settlement agreed at the trial.
34. In an email later on the same day, Mr Ballinger reminded Ms Forster that there was a Part 36 offer to settle for £400,000 and told her that:
- “The £3 million counteroffer has been negotiated with the three counsel, the ATE insurer and RPC’s management to ensure that, if the offer was accepted, you would still walk away with £400,000. Each of the lawyers and the ATE insurers would take a significant cut in the fees they are contractually entitled to in order to put this package together and leave you with £400,000.” (emphasis added)*
35. RPC was therefore offering to waive its strict contractual entitlement to all the proceeds to persuade Ms Forster to agree to make the counteroffer. Following that, Ms Forster reluctantly did agree, and the counteroffer was made on 11 March 2011.
36. But it was not accepted, and the parties arrived at court on 30 March 2011 to start the trial. Ms Forster was at that stage attended by Mr Ballinger and Mr Westwood and at least one trainee solicitor.
37. Mann J heard the start of the opening of the claim, by Mr Leech QC on behalf of the Opponents, and questioned why the Opponents were suing an impecunious defendant and how much value there was in the claim advanced in the petition. Mr Leech QC told the Judge that the claim was really about costs and was unable to be settled because the costs were so high. Despite that, the parties agreed to discuss the matter further outside court. Mr Brown was asked by Mr Ballinger to attend court and did so.
38. An offer of £300,000 plus half of her costs was eventually made to Ms Forster by the Opponents. The offer was regarded as wholly unsatisfactory by both Ms Forster and RPC, though RPC (but not Ms Forster) considered that negotiations should continue. Ms Forster wanted to go back into court and continue with the trial. Eventually, in circumstances that are a matter of dispute, an offer of £350,000 plus costs was made on behalf of Ms Forster, which led to agreement with the Opponents on £350,000 plus 80% of costs in settlement of all the litigation.
39. Not all the detail of the Tomlin schedule had been agreed by the end of the day and the parties resumed negotiations at court the following morning. By shortly before noon, detailed terms were agreed and were set out in the First Tomlin Order.
40. By that stage, the aggregate of the costs claimed by RPC and Counsel, including the 100% uplift, was £5,330,000. Ms Forster had not been given any update on the amount of her costs since the mediation in December 2010.

41. The First Tomlin Order provided that the £350,000, with £400,000 on account of costs, would be paid by 30 September 2011. The remaining costs were to be paid as to 50% by 30 March 2012 and the balance by 30 September 2012. Interest on costs was to run at 5% from 31 March 2011. A third legal charge was to be granted by the Opponents over their home, The Cedars, by 6 April 2012. They warranted that borrowing already secured on The Cedars did not exceed £5.25 million and undertook not to increase that indebtedness. Ms Forster agreed to discontinue her unfair dismissal and DPA claims.
42. The third charge was duly granted and registered over the Cedars. The prior charges were in favour of Coutts Finance Co and Goodman Derrick LLP, the Opponents' solicitors.
43. At this stage, therefore, it was understood that £750,000 would be paid by 30 September 2011. What is keenly disputed is who was to have priority on receipt of those monies, when paid. Ms Forster understood that she was to have priority as to £350,000 less some interest payable to Mr Deacon that was to come out of her settlement money. RPC understood that all those monies would be received by them, with Mr Deacon's capital and interest to be paid first, then their and Counsel's fees and the ATE premium, and that Ms Forster would only receive compensation later if RPC chose to allow her to have some (given that the irrecoverable costs far exceeded the £350,000 of compensation).
44. That factual issue is important because Ms Forster's claim is for damages representing the value of the lost opportunity to enforce the First Tomlin Order and recover her £350,000 (less interest). If RPC had the right under the CFA to recover their fees and 100% uplift, pay the ATE premium and repay Mr Deacon's loan in priority to Ms Forster, Ms Forster had no right to any money and so her claim for loss caused by breach of duty would fail.
45. I will therefore decide the variation and estoppel issue, after dealing with the terms of the contracts between Ms Forster, RPC, ARAG and Mr Deacon and making some observations about the quality of the oral evidence that I heard.

### **The CFAs**

46. The CFA with RPC was signed by Ms Forster on 23 March 2010. The documents comprise: a letter to Ms Forster signed by Mr Ballinger dated 17 March 2010; a CFA risk assessment signed on behalf of RPC on 17 March 2010, and a conditional fee agreement with two schedules.
47. The letter explains the basis on which RPC would act for Ms Forster, with Mr Ballinger and Mr. Brown, assisted by Martin Westwood, doing the work. The letter states:

“I will review the case regularly and keep you informed about progress. In particular, I will advise you of any changed circumstances which will, or are likely to, affect the amount of costs

to be incurred, the degree of risk involved or the cost-effectiveness of continuing the case.”

Under the heading “conflicts of interest”, the letter states:

“We are not aware of any potential conflict of interest arising with another client in relation to this matter. However, if in the course of the matter, we did anticipate any conflict of interest arising, we would immediately appraise you and address the conflict to ensure that the interests of all clients concerned are adequately protected at all times.”

48. In relation to the CFA, the letter states:

“If you win the case, you will usually be entitled to recover some or all of your costs (including any ATE insurance premium and any success fee paid to us or any barrister) from the defendant. The level of costs recoverable from the defendant is subject to assessment by the court, and it is rare for the court to award a full recovery. The irrecoverable costs will effectively be paid out of any damages or other monies recovered.”

49. The CFA risk assessment identifies “some very substantial risks involved in taking this case on a CFA”, including that the quantum of Mrs Foster's claim is very uncertain and that the Opponents are extremely well resourced. On that basis, it concluded that RPC were undertaking a substantial risk and put the prospects of success “including making sufficient recovery to pay our fees” at 50%.

50. The conditional fee agreement itself explains its basic terms. The CFA was said to cover the claim itself and any steps taken to enforce a judgement, order or agreement arising out of the claim. The success fee was stated to be 100% of RPC's basic charges, for work done before and after the date of the CFA.

51. Schedule 2 sets out the conditions, including the following:

**“1. Our responsibilities**

We must:

- always act in your best interests, subject allowed duty to the court;
- explain to you the risks and benefits of taking legal action;
- give you our best advice about whether to accept any offer of settlement; and
- give you the best information possible about the likely costs of your claim for damages.

**2. Your responsibilities**

You must:

- Give us instructions that allow us to do our work properly;
- not ask us to work in an improper or unreasonable way;

- not deliberately mislead us;
- cooperate with us; and
- use reasonable endeavours to procure the assistance of any relevant witness.

.....

#### **4. Our disbursements**

You are liable to pay our disbursements (except the fees of barristers who have a conditional fee agreement with us) whether you win your claim or not, and whether or not you win an interim matter. These are payable by you as and when they are incurred by us, and they are payable in addition to any other charges which we are entitled under this agreement to make. If you have taken out a Funding Agreement we will draw down the disbursements against the loan under that agreement.”

.....

#### **6. What happens if you win?**

If you win your claim:

- You are then liable to pay all our basic charges, success fee and disbursements...
- Normally, you will be entitled to recover part or all of our basic charges, success fee, disbursements and the insurance premium from the defendant.
- If you and the defendant cannot agree the amount, the court will decide how much you can recover. If the amount agreed or allowed by the court for our basic charges, disbursements, success fee and insurance premium does not cover all those basic charges, disbursements, success fee and insurance premium, then, subject to condition 13, you pay the difference.

.....

#### **7. What happens if the Defendant fails to pay?**

If the defendant fails to make any payment or pay legal costs including interest due to you, we have the right to take recovery action in your name to enforce a judgement, order or agreement. The charges of this action become part of the basic charges and subject to our success fee.

.....

#### **10. What happens if we disagree about a settlement offer?**

In the event that the defendant makes a settlement offer which:

- (i) we recommend that you accept;
- (ii) if accepted, would entitle us to a success fee; and
- (iii) you do not wish to accept,

then you will be entitled to choose between the following options.  
You may:

- (i) at your expense, refer the reasonableness of our advice to accept the settlement offer for a second opinion to any barrister practising at 4-5 Grays Inn Square or 3 Verulam Buildings, or to any other barrister agreed by us, acting as expert and not arbitrator, and we each agreed to accept that barrister's opinion in relation to the reasonableness of our advice to accept the settlement offer; or
- (ii) pay our basic charges and disbursements to date together with our success fee (on the same basis as if the settlement offer were to be accepted) and then either enter into a new retainer with us entitling us to be paid our basic charges and disbursements whether you win or lose the claim or instruct another firm.

.....

**13. Limitation of your liability to pay our basic charges and success fee and that of any barrister working under a conditional fee agreement**

If and to the extent that the amount of any Actual Recovery (see Condition 3(k)) is insufficient to cover our entitlement to basic charges and success fee and the fees and success fee of any barrister working under a conditional fee agreement after payment of the insurance premium and any repayments due under any funding agreement from you (see Condition 3(d)), we will waive our right to further payment from you.”

- 52. Condition 11 sets out detailed terms governing termination of the CFA before resolution of the claim. It includes provision for Ms Forster to end the CFA at any time, and that if she does so she must immediately pay RPC's basic charges and any outstanding disbursements (including the basic fees of any barrister with a CFA), and pay the success fee (and that of any barrister) if, but only if, she goes on to win the claim. Condition 11 also provides that RPC can end the CFA if Ms Forster does not keep to her responsibilities in condition 2.
- 53. Ms Forster did not at the time that the CFA was made, or at any time in 2010, enter into a Funding Agreement, as defined.
- 54. The CFAs with Counsel (Mr Nash QC, Mr Marshall and Ms Emmerson) were made in terms incorporating the Chancery Bar Association Conditional Fee Conditions 2010, subject to specific variations in the CFAs. These provided for a 100% uplift on fees in the event of “success”. Mr Nash QC's CFAs recorded that junior counsel had previously advised that the chances of success were estimated at 50%. There were separate CFAs for the defence of the fraudulent misrepresentation claim and the petition.
- 55. Clause 14 of the Counsel CFAs provided that:

“... the solicitor shall be obliged to pay counsel's fees ... including the uplifted rate if the client or the solicitor receives any payment from or on behalf of the opposing party (or third party) whether by order of the court or without order of the court in settlement of the action and in either case whether or not including payment of costs unless the failure to recover payment is caused by the fault of the solicitor. In the event that the solicitor recovers payment insufficient to pay the fees payable under this agreement and the fees of the solicitor then the proceeds of the action shall be shared proportionately as between council and the solicitor such that each shall receive and forego the same percentage of their total fees.”

### **The ATE Policy**

56. The ATE Policy was signed on 30 July 2010 with a limit of indemnity of £65,000, for a premium of £20,475. It provided that ARAG would pay reasonable disbursements, properly incurred by RPC, following a judgement against Ms Forster by a court. It provided that in those circumstances the opponent's legal costs and Ms Forster's disbursements would be paid first out of any damages awarded, and only if those were insufficient under the policy.
57. Condition 3 states that ARAG will pay Ms Forster's reasonable disbursements and her insurance premium if a court makes a final judgement in her favour but the opponent cannot pay, or if the court makes no order as to costs. Any payments made under the policy were to be applied first to pay liabilities to any funder whose interest was noted on the schedule to the policy, in priority to any payment to an opponent's legal costs. No such interest was in fact endorsed on the policy schedule.
58. On 9 November 2010, the ATE policy was reissued with a limit of indemnity of £265,000 for a total premium of £114,975. No funder's interest was noted on the schedule.

### **The Deacon Funding Agreement**

59. This is undated but is agreed to have been made between Ms Forster and Mr Deacon on 21 February 2011. It obliged Mr Deacon to pay to RPC, or as they directed, upon receipt of their instructions, an amount that qualified as identified costs of bringing or defending “the Claim”, up to the maximum amount of £225,000. “Claim”, for these purposes, was defined as the petition, the defence of the fraudulent misrepresentation claim, and the DPA claim.
60. Clause 3.1 provides:

“The Claimant hereby assigns absolutely with full title guarantee by way of first fixed security to the Funder for the payment and discharge of all amounts due to the funder under this Agreement all the Claimant's right, title, interest and benefit present and future in and to each of the following:

- (a) the Compensation;

- (b) the Policy Proceeds; and
- (c) the benefit of the Claimant's rights against the Claimant's solicitor (in respect of negligence, breach of contract or otherwise arising out of or incidental to the solicitors conduct of the claim or otherwise)."

"Compensation" is defined as including any sums payable to Ms Forster in respect of the claim, including damages, costs and monies recovered under any settlement of the claim. "Policy Proceeds" is defined as any amount payable under the policy, itself defined as the ATE insurance "subscribed by Brit Insurance Limited in respect of this action".

61. Clause 3.4 provides:

"The Claimant by way of security for the performance of the Claimant's obligations under this agreement irrevocably appoints the Funder as its attorney with full power to delegate, and in the Claimant's name and otherwise on its behalf to do all things which the Funder considers necessary or desirable to carry out any obligation imposed on the Claimant under this Agreement, to perfect or enforce the rights of the Funder under this agreement, to get in and dispose of or realise any assets and to give all proper receipts and discharges provided that the Funder acknowledges that it is not seeking or attempting to run the claim."

62. The consideration payable to Mr Deacon was specified in clause 4.1:

"The Claimant shall be liable to repay to the Funder within seven days of any date on which any Compensation or Policy Proceeds are paid unconditionally to the Claimant or any representative of the Claimant (including the Claimant's solicitors) any Funded Amounts, together with the greater of: (a) an amount of interest calculated from the date of advance of each Funded Amount to the date of repayment at a rate of 24% per annum calculated on a daily basis and compounded annually; or (b) an amount of interest calculated from the date of this Agreement to the date of final repayment at a rate of 5% per annum of the Maximum Amount calculated on a daily basis and compounded annually...."

63. By clause 4.2, Ms Forster irrevocably authorised and instructed payment to Mr Deacon of the full amount of any Compensation or Policy Proceeds, for distribution in accordance with clause 4.3, until payment had been made to Mr Deacon of all sums outstanding under the Agreement. Clause 4.3 specified priority as follows: first, in discharge of interest payable under clause 4.1; second, in discharge of Funded Amounts; third, in discharge of any other sums due under the Agreement, and fourth, any balance to Ms Forster.

64. Clause 5 provided that the maximum liability of Ms Forster to Mr Deacon was limited to the amount of Compensation and Policy Proceeds actually paid, unless

the Agreement was terminated under any of the default provisions specified in clause 9.1.

65. On the same day as the Deacon Funding Agreement was signed, Mr Deacon and RPC entered into a supplementary written agreement. In it, RPC undertook within 7 days of payment of Compensation in the claim or any payment under the ATE Policy to pay all sums to Mr Deacon. RPC agreed to seek from the Opponents by way of the claim or any settlement a sum at least equal to the outstanding Funded Amounts, and not to settle for less without Mr Deacon's approval in writing.

### **Effect of the contracts**

66. The effect of these contracts was that Ms Forster was not liable to pay RPC's fees, the ATE premium or repay Mr Deacon's loan in the event that her claim failed. She was liable in those circumstances to pay RPC for the disbursements (other than Counsel's fees), but these were insured.
67. In the event of success on the claim, Ms Forster would be obliged to pay RPC's fees, including the 100% uplift, and the disbursements (including Counsel's fees and 100% uplift). To the extent that these fees and disbursements were not covered by recoveries from the Opponents, Ms Forster was liable to pay the shortfall out of any 'damages' awarded to her. However, her liability to pay the shortfall was capped at the amount of 'damages' recovered by her (it being understood that she had no other assets).
68. If the claim succeeded but Ms Forster could not recover the ATE premium from the Opponents, she was not liable to pay ARAG.
69. As for Mr Deacon's rights, his loan was repayable by Ms Forster with interest out of any sums received by her or RPC from the Opponents, whether received as compensation or in respect of costs; but no sum beyond what was received from the Opponents would be payable by Ms Forster to Mr Deacon. Any shortfall would be paid under the ATE Policy.
70. Thus, the position as to priority was that Ms Forster was obliged to pay any recoveries to RPC and at the same time obliged to pay Mr Deacon within 7 days of receipt. RPC would, in practice, use the monies paid and any policy proceeds to pay Mr Deacon first, on her behalf, and the rest of the money would be shared between RPC and Counsel. Any remaining money would be payable to Ms Forster. However, if there was a shortfall, as there would inevitably have been, even by the date of the mediation, Ms Forster would be entitled to nothing.
71. Accordingly, if there was any shortfall in repaying RPC and Counsel out of the recoveries, Ms Forster was dependent on the goodwill of RPC's CFA committee if she was to receive any part of the compensation awarded to her by the court or agreed in a settlement. Counsel were obliged under their CFAs to accept the same proportionate shortfall in payment as RPC, if attributable to insufficient recovery from the Opponents. As between Counsel and RPC, Counsel were not obliged to accept a proportionate shortfall attributable to an *ex gratia* payment by RPC to Ms Forster. Any such payment therefore in practice required the agreement of Counsel too.



## The witnesses

72. I heard evidence in support of the claim from Ms Forster and from Ms Milner, the former joint trustee in bankruptcy of each of the Opponents, and from Mr Ballinger, Mr Brown and Mr Nash KC for the defence.
73. The events with which I am particularly concerned took place in 2011 and 2012. The witnesses were therefore trying to remember events that happened up to 12 years previously. As usual in such a case, I cannot safely rely on the accuracy of the memories of the witnesses alone as to detail of events or conversations at that time.
74. Ms Forster had an impressive command of the facts and details of the case and seemed to know every document in the bundle. She was an intelligent and articulate witness, and very clear in explaining what she says happened. By her own account, she has done little but re-live the facts of the litigation against the Opponents and the retainer of RPC for the last 10 years. She was said (and acknowledged by her Counsel) to be a somewhat highly-strung and emotional person, which would have made her a difficult client for Mr Ballinger and Mr Brown to handle at times, which they both agreed.
75. Ms Forster is a details person. She gives careful thought to everything that is said to her and does not overlook or lose interest in the smaller details of events or communications. It is evident that she raised with RPC or others, on a regular basis, any concern that she had, and that she questioned any matter that she did not fully understand. I consider that she was normally keen to understand exactly what was being proposed. She was certainly not shy to disagree with the views of her lawyers about what she should do. She also had the advantage of Mr Mark Wilson, who was a more experienced man of business, to assist her to cope with the complexities of the litigation and to advise her on the meaning of documents. It may be that in some cases it was his rather than her questions that were raised with Mr Ballinger or Mr Westwood (Ms Forster had very little day-to-day contact with Mr Brown).
76. I am confident that Ms Forster did her best to recall accurately and truthfully what happened during the period 2010-2015. I have no doubt at all about her honesty. The events about which she gave evidence must have been highly significant to her at the time. She was very closely involved in them. On the one hand, it is therefore likely that she will have a better recollection of the critical disputed events than the lawyers, though on her own admission she was excluded from a significant amount of the negotiations that took place outside court on 30 March 2011 and from meetings that RPC had with the Opponents. On the other hand, it is inevitable that Ms Forster will have gone over these events innumerable times in her head, which – as is now recognised and accepted – is likely to have affected the reliability and accuracy of some of what she now says that she remembers.
77. I therefore must approach her evidence with a degree of caution, particularly where she claims to have a clear recollection of exactly what was said. Unless something said was very remarkable (and there are some statements in this case that fall into that category), it is highly unlikely that anyone could remember it accurately 12 years after the event.

78. Ms Milner was a good and impartial witness, who gave straightforward answers to questions and said when she could not remember things. She undoubtedly was doing her best to assist the court. She was first involved in 2015, when appointed a joint trustee in bankruptcy of Bleasdale and Cariss, and she ceased to be a trustee in 2019. What she was asked to remember was therefore more recent than the central events of 2011. I have no hesitation in accepting her evidence, save where it is demonstrated by a contemporaneous document to be wrong.
79. I found both Mr Brown and Mr Ballinger, particularly the latter, to be somewhat defensive in the evidence that they gave. That is perhaps understandable, as the claim against RPC raises some serious allegations about the discharge of their duties to Ms Forster and, more generally, the way that RPC operated its Alchemy Scheme. Both Mr Brown and Mr Ballinger at times looked distinctly uncomfortable with questions that they were being asked.
80. As with Ms Forster, I have real doubt about the accuracy of what they say that they recall about discussions in March and April 2011. Very surprisingly, there appear to have been very few attendance or file notes made by Mr Ballinger or Mr Brown of the important meetings, conversations or events in this case. Not one of the large legal team appears to have been taking notes of the settlement negotiations at court on 30 and 31 March 2011, or to have produced a file note on the evening or the day afterwards. While accepting the point that by 2011 it was common for solicitors to record events or meetings in an email rather than a document headed "File Note", there were in many cases no emails that purported to record or relate what happened, and that is so as regards the events on 30 and 31 March 2011.
81. Ms Forster on the other hand made contemporaneous notes of the important events, some in considerable detail. Realistically, Mr Campbell for RPC did not seek to challenge the content of the greater part of these notes, given that RPC had no rival documentary record. When he did challenge, he was met with robust and detailed disagreement from Ms Forster.
82. I was surprised by the approach of Mr Brown and Mr Ballinger to what they claimed to remember. Both their witness statements contained the same formulation to the effect that they had no reason, at such a length of time, to remember anything other than what they did remember, such matters being contained in their statements; yet some of the content was remarkably detailed. Mr Ballinger in particular was resistant to saying, when questioned, that he did not recall something that happened or something that was said, despite appearing to be struggling to remember and despite having been reminded by the Court that he should say if he was unable to remember.
83. Both Mr Ballinger and Mr Brown were, unsurprisingly, very well prepared to give their evidence and had reviewed all the relevant documents. I was not persuaded, however, that either of them had an accurate, independent recollection of the detail of events that took place, particularly Mr Brown, who was not involved on a day-to-day basis in Ms Forster's case. I find that they have both, to a significant degree, reconstructed what they consider must have happened. That is not meant as a criticism of them: it is what witnesses do when they attempt to recall what happened a long time ago.

84. I am therefore cautious about accepting their evidence of the detail of events, where it is not supported by a contemporaneous document or by inherent likelihood. I consider that they were both truthful in the evidence that they gave, but on occasions unwilling to accept clear inferences from documents that were adverse to RPC's case. For example, Mr Brown was initially unwilling to accept that RPC's email advice to Mr Deacon dated 14 February 2011 was the giving of advice, and would not accept that Mr Deacon had a very generous return that was close to risk-free; and Mr Ballinger would not accept that RPC was advising Mr Deacon at all, or that RPC had an interest in Giltspur's business affairs. (Although Mr Ballinger left RPC in October 2012, he still runs his business as a solicitor using almost exclusively the Alchemy Scheme model, so he remains close to some of the issues in this action.)
85. Mr Nash KC was a careful and straightforward witness, who readily accepted that in many respects he did not have a good recollection of the events on 30 March 2011 about which he was questioned.
86. There were some notable absentees from the witness box. Mr Marshall was the barrister who was most closely involved with Ms Forster's case over its whole duration. His evidence would have been of importance. Mr Fennell told me that those instructing him had tried to engage Mr Marshall's assistance but found him resistant and unlikely to be a supportive witness. He also said that there were health issues that made engaging with Mr Marshall more difficult and that he did not respond to issues about which he was contacted by RPC..
87. Ms Emmerson was at the time a very junior barrister and the second junior in the case, so it is unsurprising that she was not called as a witness.
88. Mr Martin Westwood was a legal executive at RPC with whom Ms Forster had the closest relationship throughout. He sadly died before the start of this litigation.
89. Mr Deacon was not called by RPC. Given the live issues about whether the right of action against RPC was vested in him by assignment (or in ARAG, by subrogation, if Mr Deacon's debt had been fully repaid), and about RPC having acted under a conflict of interests, with Mr Deacon also being its client from 21 February 2011, the relationship between RPC and Mr Deacon needed to be explained. So too did the circumstances in which Mr Deacon sought injunctive relief against Ms Forster in December 2011 and again in July 2012. Much of this was obscure until Mr Ballinger went much further in cross-examination than in his witness statement in explaining the background to the relationship between RPC, Giltspur and Mr Deacon, and how the Deacon Funding Agreement came into existence. Given the potential importance of Mr Deacon's rights, he should have been called as a witness. Although Mr Brown said that Mr Deacon lived abroad at the time of events in 2011, there was no suggestion that his whereabouts prevented his making a witness statement or giving evidence, whether in person or remotely.

**The CFA priorities: variation or estoppel**The rival cases

90. Ms Forster's case is that the priorities of the CFA were varied by agreement reached outside court on 30 March 2011; alternatively, that RPC is estopped from relying on the terms of the CFA in asserting in this action that Ms Forster would have been entitled to nothing even if the First Tomlin Order had been successfully enforced in late 2011 and 2012.
91. Her pleaded case is (in summary):
- i) Mr Ballinger advised her to accept £350,000 plus interest and that if she agreed to accept this in settlement that sum would be paid to her by 30 September 2011 in priority to any payment of costs to RPC or anyone else, save that the interest on the Deacon Funding Agreement from 31 March 2011 to 30 September 2011 would be payable by her out of that sum;
  - ii) RPC would discharge the remainder of the Deacon debt out of the £400,000 advance payment of costs payable by the Opponents on 30 September 2011;
  - iii) She accepted Mr Ballinger's offer, which had the effect of varying clauses 6 and 13 of the CFA conditions and clause 4 of the Deacon Funding Agreement;
  - iv) Alternatively, her reliance on Mr Ballinger's promises as to the effect of settlement on these terms gave rise to a promissory estoppel preventing RPC from asserting its priority over her under the CFA or recovering costs out of any 'damages' recovered.

(The Amended Particulars of Claim refer throughout to 'damages' being recovered from the Opponents, though what Ms Forster stood to gain in the High Court was compensation for the value of her position in the Company prior to the wrongful dilution of her shareholding.)

92. RPC's case is that:
- i) no such advice as to priorities was given by Mr Ballinger;
  - ii) Mr Ballinger had no authority from RPC to vary the CFA;
  - iii) no oral variation of a CFA would be effective in law;
  - iv) there was no sufficiently clear promise made by Mr Ballinger that the priorities would be changed
  - v) nothing that Mr Ballinger said was inconsistent with the scheme of priorities in the CFA and the understanding that RPC would nonetheless be generous to Ms Forster to ensure that she came out of the litigation with something.

93. In his closing submissions, Mr Campbell disclaimed any reliance by RPC on fine distinctions between promissory estoppel and estoppel by representation or by convention, and advanced no case on detrimental reliance by Ms Forster. RPC's position was simply that no sufficiently clear assurance had been made to Ms Forster that she would be entitled to receive £350,000 (less interest) in priority to RPC, and that Mr Ballinger had no authority to give any assurance.

Analysis of the evidence up to March 2011

94. Ms Forster frankly accepted that she understood the terms of her CFA and how it worked, and in particular that if there was a shortfall on costs recovery, she would have to pay that shortfall up to a maximum of what was recovered from the Opponents. She said that she understood that she was "at the back of the queue" under the terms of the contracts and might be entitled to nothing.
95. Mr Ballinger said that he "would have explained to Ms Forster", as he does with every CFA client, how the priorities work, and that regardless of strict entitlement RPC will ensure that the client leaves with some recovery, so that they are happy with the overall experience. Ms Forster said she had no distinct recollection of Mr Ballinger advising her that it was up to RPC whether she recovered anything. I accept both accounts. I consider that it is likely that Mr Ballinger did explain the basic functioning of the CFA in general terms and make reassuring noises about client recovery. I consider that it is unlikely that at any stage before the trial he said that Ms Forster was in RPC's hands as to whether she recovered anything. However, by December 2010 if not before, it became obvious to RPC and Ms Forster that RPC would have a contractual entitlement to all that was likely to be recovered under any settlement with the Opponents.
96. Having received the ATE proposal in July 2010, which referred to the substantial amount of costs estimated, Ms Forster queried this with Mr Ballinger in August 2010 and was told that she did not need to worry about costs, which were nothing to do with her, on the basis that either the Opponents would be paying or the ATE Policy would, and the risk was with RPC not her. I accept this evidence and find that Mr Ballinger did throughout treat the level of costs incurred as nothing much to do with his client, and told her so on several occasions. For reasons that I will give later, this was wrong in principle, as Mr Brown accepted in cross-examination.
97. Ms Forster relied on those exchanges as the origin of her understanding that 'damages' was a matter for her and costs was a matter for RPC. She said that that was why she firmly understood that the sum to be accepted as damages was up to her, whereas the costs were a matter exclusively for RPC. I accept that this was the reason for her understanding that questions about the amount of costs recoverable were not a matter for her, whereas she did have an interest in the amount of compensation payable. But that did not amount to RPC saying that Ms Forster had a prior right to be paid the compensation. Ms Forster tended to confuse the two distinct points.
98. By the time of the mediation in December 2010, only an award of compensation of at least £600,000 would have left Ms Forster with any recovery under the terms of the CFA, even assuming a high proportion of incurred costs were awarded on

detailed assessment and a full recovery of compensation and costs from the Opponents. But Mr Brown's internal risk assessment considered that the claim was worth no more than £500,000. Offers of settlement of £450,000 for all four claims, and then £400,000 as a Part 36 offer for the fraud claim and s.994 petition, were made. Ms Forster was by that stage therefore "out of the money". I find that both RPC and she were aware of this. That explains why Ms Forster was holding out for a settlement of £1.2 million in compensation in March 2011.

#### The 11 March 2011 discussions

99. On 11 March 2011, Mr Ballinger wished to revert to Goodman Derrick with an all-inclusive counteroffer of £3 million. He had obtained approval to make this offer from RPC's CFA committee, having already obtained approval from Mr Marshall. This was expressly on the basis that £400,000 would go to Ms Forster. He thought that getting Ms Forster's agreement should not be a problem.
100. However, Ms Forster was not happy. She did not want to be pushed into making that counteroffer and did not understand why she could not offer a much higher sum by way of settlement. Mr Ballinger was right to say that the offer that Ms Forster had in mind lacked commercial credibility, however it was in principle a matter for Ms Forster, not RPC, whether any counteroffer was made, and if so in what amount.
101. RPC has no record of these conversations, but Ms Forster took a detailed note. It records that Mr Ballinger was angry that Ms Forster did not immediately agree and wanted time to think about what offer to make. He wanted to revert immediately with a £3 million counteroffer. Her note records that Mr Ballinger again asserted that she was only concerned with the 'damages' and that costs were for RPC. Ms Forster's later email to Mr Ballinger said that she would settle all her claims for £1.2 million exclusive of costs. Her notes record that Mr Ballinger telephoned her in the car to say that her proposed counteroffer was "not acceptable whatsoever" and that the RPC team felt that she was being completely unreasonable; that RPC would be sending a counteroffer, that she had no choice in the matter, and that offers had to remain consistent.
102. Ms Forster's note records:

"DF's response to MB/RPC was that she wanted her offer amount to be submitted – she felt that it was NOT up to RPC/team as to what amount they felt – it was DF's Damages NOT RPC Costs consideration/opinion

MB replied by saying "You would walk away with £400k (excluding other 2 claims and expenses) & DF should now accept this amount."

The note records that Mr Ballinger thereupon became angry and Ms Forster became upset and suffered a panic attack, such that Mr Wilson had to continue the telephone call. It records that Mr Ballinger explained to Mr Wilson (who told Ms Forster) that RPC could override the settlement process under the terms of the

CFA and that £400,000 in hand for Ms Forster to walk away from the High Court litigation was very good for her.

103. I find that Ms Forster's note of these conversations is likely to be an accurate record.
104. Mr Ballinger explained in cross-examination that what he was saying to Ms Forster was that it was up to RPC what they settled for on costs, if she was getting a sum for damages, and that any offer on damages had to be consistent with the existing Part 36 offer to settle for £400,000.
105. The exchange appears to have ended with Mr Wilson agreeing that Mr Ballinger should make the counteroffer he proposed. Mr Ballinger had Mr Marshall and Ms Emmerson on standby, to use their "Debbie handling skills" (as Mr Ballinger called it) to persuade her, if needed; but he reported to them at 6pm that he had finally obtained Ms Forster's instructions. At about the same time, he sent an email to Ms Forster attaching a copy of the counteroffer as sent to Goodman Derrick, explaining that:

"Each of the lawyers and the ATE insurers would take a significant cut in the fees they are contractually entitled to in order to put this package together and leave you with £400,000."

106. I find that on this occasion Mr Ballinger assured Ms Forster that she would walk away with £400,000 if his suggested counteroffer was made and accepted. By that was meant (and Ms Forster correctly understood) that she would have the right as against the lawyers and other interested parties to receive £400,000 out of the recoveries. Mr Ballinger's explanation that RPC had the right to decide the overall quantum of recovery for costs only made sense if Ms Forster's damages (which she decided) were treated separately and not as part of RPC's costs. Importantly, I find that Mr Ballinger already had RPC's and Counsel's approval to the overall quantum and the ring-fencing of £400,000 to be paid to Ms Forster. It is highly improbable that, in seeking to persuade Ms Forster to agree to make the proposed counteroffer, he would have said that payment to her was conditional on what RPC later decided. I find that nothing was said expressly then about priority, if something less than £3 million was recovered, but it was made clear to Ms Forster that she would receive £400,000.

#### The settlement agreed at trial

107. The negotiations outside court took place largely without the involvement of Ms Forster. That is because the main variable was the amount of costs to be paid by the Opponents, not the amount of compensation; and Mr Ballinger considered that RPC was primarily concerned with the terms to be agreed with them. I accept Ms Forster's recollection of this. Mr Ballinger was conducting the negotiations with the Opponents' team, assisted by Counsel; Mr Brown was not directly involved, until the question was what Ms Forster would agree, and Mr Westwood spent rather more time with Ms Forster.
108. In due course, Ms Forster was consulted about the amount of compensation. She did not want to settle for less than the amount stated in her mediation statement,

namely £899,100. She said that that was ridiculed by Mr Ballinger, who wanted to agree a sensible 'all-in' figure for all the claims. She gave instructions to Mr Ballinger to continue with the trial but he continued to negotiate.

109. Eventually Ms Forster was told that the Opponents' best offer was £350,000 for all claims, payable in 6 months' time. Ms Forster was profoundly unattracted to that but was told by Mr Ballinger that she was required by the terms of the CFA to accept a reasonable offer, and that her entire team considered and advised her that it was a reasonable offer.
110. I accept the evidence of Mr Nash and Ms Forster in preference to that of Mr Ballinger and Mr Brown that Mr Nash was concerned about the disagreement between RPC and Ms Forster, and that he wanted to know who had the final say on settlement and was told by Mr Ballinger that it was RPC. I also accept Ms Forster's evidence – even though Mr Nash had no distinct recollection – that he went to speak to her alone and asked what the position was between her and RPC as regards the terms of settlement, and that she told him that costs was understood to be a matter for RPC to decide. Any careful and responsible Counsel would have done that in those circumstances, given the apparent conflict between RPC and their client, and I am therefore confident that Mr Nash did so, and that it was triggered by Mr Ballinger's assertion that RPC had the final say on settlement.
111. In her witness statement, Ms Forster says that:

“Mr Ballinger then stated that the only proviso to this settlement offer was an additional, small amount of interest payable by me under the Funding Agreement to Mr Deacon to cover the period from this date, 30 March 2011, to the payment of my £350,000 damages on 30 September 2011. Mr Ballinger explicitly explained to me that this amount of interest was estimated to be no more than £15,000, which would have to come out of my agreed £350,000 damages paid to me on 30 September 2011. Mr Ballinger ensured that I fully understood that if accepted, I would get my money of £350,000, less the small amount of interest payable to Mr Deacon, on 30 September 2011 and that it was completely separate from any costs negotiation RPC were currently negotiating. Mr Ballinger then explained that I didn't need to concern myself about Mr Deacon's Funding Agreement accruing loan interest above what he had stated as this would stop as of 30 September 2011.”

112. Ms Forster said that she was very unhappy with the idea of giving the Opponents six months to pay, as she did not trust them at all; but that, after some time with Mr Wilson to reflect on the matter, she went to tell the legal team that she would reluctantly accept £350,000 on the terms suggested.
113. Ms Forster's note, which she made on 31 March 2011, records that she agreed with Mr Ballinger that Mr Deacon's interest would come out of the £350,000 on 30 September 2011, and that RPC would pay off the Deacon loan out of their £400,000 monies on 30 September 2011. It also records that she would need to work out what to pay to her creditors on 30 September 2011. That note, and the evidence that Ms Forster gave in cross-examination, support her account of the



assurance that was made by Mr Ballinger about receipt of £350,000 less interest on 30 September 2011.

114. Mr Brown, Mr Ballinger and Counsel telephoned the senior partner of RPC from court to get authority to settle. Mr Brown said that he considered that, after the First Tomlin Order was agreed, RPC was entitled to use the £350,000 payable to Ms Forster as costs, but that it would not have done so. He accepted that no advice to this effect was given to Ms Forster, and said that he disagreed that Ms Forster thought when she left court that she would receive £350,000 in September 2011. He said that if priority was to be conferred on Ms Forster he would need to have obtained informed agreement from all other interested parties, but that no suggestion to that effect was made at court.
115. Mr Ballinger's account of the negotiations in his witness statement is, essentially, that it was explained to Ms Forster that the task for the day was to get as much as possible in total out of Bleasdale and Cariss, in settlement, and that the question of who got what was for another day; but that it was reiterated to Ms Forster (as it had been explained at the outset and on previous occasions) that RPC wanted to have happy clients and so they would ensure that a client received a "reasonable share of their damages", and what was a reasonable share would be decided later by RPC's management in consultation with other stakeholders. He said that he also pointed out to Ms Forster that enforcement of any settlement could not be regarded as a certainty, in view of what was known about Ms Bleasdale's and the Company's difficulties. Ms Forster was fully involved in discussion at all stages and so she agreed to settle on a fully informed basis. There was no discussion about £350,000 being paid to Ms Forster in priority to the lawyers, and he would not have agreed to that.
116. In cross-examination, Mr Ballinger was asked whether he told Ms Forster that if she agreed the terms on offer at court she would walk away with £350,000, subject only to Bleasdale and Cariss paying and subject to a deduction for interest on the Deacon loan. His answer was evasive: he said that he called in Mr Brown and later they called the senior partner of RPC, and he was not unilaterally varying the CFA. When pressed, he said that he told Ms Forster that she would have his support for that outcome and that he would have fought her case to get that result with the rest of the team. Then he said that he definitely told Ms Forster on the same day that the settlement sum of £350,000 could well go to meet the substantial shortfall on costs, but that he did not envisage a difficulty in persuading others that she should get a large proportion of the settlement sum in due course. He accepted that he agreed with Ms Forster that she would be paying the Deacon interest out of the £350,000 ("She certainly will be paying Mr Deacon's interest out of that amount, yes"). But he then disagreed that Mr Deacon's capital was to be paid out of the £400,000 payment on account of costs, and said that it would be paid out of Ms Forster's share.
117. RPC has no file note whatsoever of the events of 30 or 31 March 2011 that supports Mr Ballinger's account. Nor is there any email sent to Ms Forster explaining the proposed settlement or its effect for her.

### Conclusions on variation and estoppel

118. My conclusion, based on all the evidence that I heard, is that there was no agreed variation of the terms of the CFA, but that there was a clear assurance given to Ms Forster by Mr Ballinger and endorsed by Mr Brown, after discussion with the senior partner of RPC, that if Ms Forster agreed to settle on the terms that became the schedule to the First Tomlin Order she would receive £350,000 (less Mr Deacon's interest) out of the £750,000 that was due to be paid on 30 September 2011. That assurance was made to induce Ms Forster to agree a settlement because RPC wanted the case to settle. Without that assurance, Ms Forster would not have settled but would have insisted on fighting the case. She relied on the assurance in agreeing to settle and forgo her right to continue and achieve a better result at trial. As such, RPC is estopped from relying on its contractual right to deny that Ms Forster was entitled to receive £350,000 out of the first £750,000 paid by Bleasdale and Cariss. My reasons are the following.
119. As to the contractual variation, the evidence of Ms Forster does not prove that any offer was made on behalf of RPC, with their authority, to vary the terms of the CFA for all purposes going forward, which she then accepted. The question of varying the CFA did not arise as such. Rather, the question was whether a settlement could be negotiated that was satisfactory to Ms Forster and that would dissuade her from continuing with the trial – a preference that RPC and Counsel did not share, for financial reasons. The position was that Mr Nash was inclined to recommend acceptance of Bleasdale and Cariss's initial offer; Mr Ballinger thought that it was inadequate in terms of the costs offered, though not the compensation of £300,000, and that a counteroffer should be made; and Ms Forster thought the compensation was far below what she wanted to receive and that no further negotiations should take place. The only real question was whether RPC could persuade Ms Forster to agree to settle for compensation in the bracket of £300,000 (just offered by the Opponents) and the £400,000 in the Part 36 offer, as costs recovery was – as RPC had long since been maintaining – not a matter for her. Beyond that, no question of varying the CFA arose, and the evidence does not support a case that an offer to vary the CFA was made.
120. In any event, Ms Forster's case on contractual variation appears to face an insuperable obstacle in that a conditional fee agreement is an agreement that by law is required to be made in writing: s.58(3)(a) Courts and Legal Services Act 1990. As Andrew Burrows QC succinctly said in Greenhouse v Paysafe Financial Services Ltd [2018] EWHC 3296 (Comm):

“A contract may be varied by the agreement of the parties. It is trite law that the formation requirements for an agreement to count as a valid enforceable contract apply equally in deciding whether there has been a variation by agreement: see generally Chitty on Contracts (ed Beale) (33rd edn, 2018) paras 22-032 – 22-039. There must therefore be an agreement to vary, which can almost always be broken down into offer and acceptance, supported by consideration. Again, as shown in the leading case of *Goss v Lord Nugent* (1833) 5 B & Ad 58, which concerned a contract for the sale of land, if the contract is one that is required to be in writing, a variation of the contract will also need to be in writing.”

The relevant paragraphs in the current (34<sup>th</sup>) edition of *Chitty on Contracts* are 25-034 – 25-039, to the same general effect as the 33<sup>rd</sup> edition.

121. The case for an oral variation of the CFA therefore fails.
122. As to estoppel, the matter in issue is whether a sufficiently clear assurance was made on behalf of RPC, not just that RPC would be likely to be generous to her beyond her strict entitlement but that she would be paid her compensation (less interest) out of the first tranche of monies paid by the Opponents.
123. I have no real doubt that such an assurance was made by Mr Ballinger, with the support of Mr Brown. I reject their evidence to the contrary. It is, frankly, wholly implausible that Ms Forster would have been persuaded to accede to RPC's proposed settlement offer, thereby reducing her compensation from £400,000 for two actions to £350,000 for all four actions, and deducting Mr Deacon's interest, in return for a place at the end of the queue, with only a hope that RPC, ARAG and Mr Deacon would be generous to her if and when full recovery had been made. As Mr Ballinger accepted in cross-examination, if Ms Forster thought that she was at risk of getting nothing herself, she would have insisted on continuing to fight the case. Ms Forster did not want to settle, but RPC and Counsel did, for understandable reasons.
124. The reality was that, on this occasion as previously, RPC had to battle to persuade Ms Forster to do what they wished to do, and it is obvious that something was needed to persuade her to do so. (It was, as Mr Brown and Mr Nash both recognised, impossible for the lawyers to walk away, or immediately activate the dispute resolution provisions of the CFA while the trial was going on, to apply pressure to Ms Forster in that way. It was also unattractive for them to seek to rely on Mr Deacon's power of attorney and go over Ms Forster's head when the case was before the judge). An assurance of receipt of settlement monies due on 30 September 2011 is therefore inherently plausible, and supported by Mr Ballinger's evidence that he would strongly have been in favour of that outcome. Whatever Mr Ballinger did was clearly done to the knowledge of Mr Brown – he was there for the purpose of authorising a settlement – and as Mr Brown said, he reported to RPC by telephone during the negotiations. Mr Ballinger had authority on behalf of RPC to give the assurance in order to achieve the settlement.
125. It is not likely, in my judgment, that Mr Ballinger did no more than reiterate that it was the intention of the lawyers to look favourably on Ms Forster, on an *ex gratia* basis, if and when full recovery was made. Ms Forster was already aware of the terms of the CFA and knew that she was out of the money, as well as impecunious. If Mr Ballinger had said that, all being well and if full recovery was made, he would support RPC being generous to her in 18 months' time but could offer no promises, I have no doubt that Ms Forster would have insisted on continuing with the trial.
126. I have considered whether it was said or was implicit that payment would be made to Ms Forster only if the Opponents made payment of the first tranche of monies on or before 30 September 2011. However, there was no evidence of such limitation having been discussed or agreed, and in my view it is not implicit that Ms Forster was to go to the back of the queue if the monies were paid a few days

or weeks late, or if there was a modest shortfall in the sums paid on 30 September 2011.

127. I have also considered whether Counsel were aware at the time of the assurance that was given to Ms Forster by Mr Ballinger. Mr Nash said nothing about the course of the negotiations in his witness statement, doubtless because he does not recall them. In cross-examination, he said that he could not recall a discussion about the lawyers “taking a haircut” on fees, and did not think that would have been discussed directly. He said that he was aware that Mr Ballinger’s attitude was that the client had to take something out of the case, and that he would not have held RPC to the terms of the CFA. There was no evidence from Mr Marshall or Ms Emmerson.
128. I think it is very likely that, with the exception of the one occasion on which Mr Nash spoke privately to Ms Forster and Mr Wilson about who had the final say on settlement, Mr Nash left the detail of agreement with Ms Forster to RPC’s representatives. There was a general understanding between the lawyers that they needed to be flexible about their entitlement to fees, in order to achieve a settlement and a satisfactory outcome for Ms Forster. Mr Ballinger, who said he had a close and good working relationship with Mr Nash’s clerk, was confident that such matters would be sorted out after the event. Mr Brown was very supportive of Mr Ballinger’s approach. Neither of them would have considered that they needed Counsel’s express approval before assuring Ms Forster that she would receive her compensation out of the first tranche paid by the Opponents. Given what Mr Nash said to Ms Forster about priorities later in the year, I consider it unlikely that he was privy to the assurance that Mr Ballinger gave.
129. The conclusion that I have reached is also supported by the events of 11 March 2011, the terms agreed between RPC and Ms Forster on 30 March 2011 and in the First Tomlin Order, and what was then said and done between 31 March 2011 and late October 2011. I deal with these points in turn.
130. First, on 11 March 2011, Ms Forster/Mr Wilson and Mr Ballinger had agreed on a settlement proposal being put to the Opponents, which specifically allocated £400,000 of the total figure to be paid to Ms Forster. That allocation was expressly agreed by all stakeholders, so that an all-in counteroffer of £3 million could be made to Goodman Derrick. Ms Forster was the last to agree, reluctantly. The understanding between RPC and Ms Forster was therefore already at a point where a specific sum was earmarked for her to receive, not where it would be a matter for the other stakeholders on another day to decide how much she might get, if they were still feeling generous. It had also been agreed between RPC and the other stakeholders (Counsel, ARAG and Mr Deacon) at that stage that Ms Forster would be dealt with in that way, effectively at their expense. It is therefore implausible that Ms Forster would have been persuaded to accept significantly less three weeks later, on terms that prevented any enforcement for six months and left the question of what she might receive (and when) up in the air. It is also implausible that, as Mr Ballinger suggested, he could not effect a similar agreement (that was less favourable to Ms Forster) on 30 March 2011 without specific authority from the other stakeholders.

131. Second, it is common ground that Mr Ballinger required Ms Forster to agree (and that she did reluctantly agree) to fund interest under the Deacon Funding Agreement out of her £350,000. As between Ms Forster, RPC and Mr Deacon, Mr Deacon had the prior right to repayment of capital and interest. His total debt was in the region of £200,000, assuming interest was payable at the elevated rate of 24% per annum. If, as RPC contends, Ms Forster was not to have priority for her compensation and what she was to receive (if anything) was up to RPC, it was meaningless for RPC to stipulate that Deacon interest was to be paid out of the £350,000 (potentially risking her consent to settlement). RPC would have paid off Mr Deacon in full and decided later what amount out of further recoveries they would give to Ms Forster. The interest deduction stipulation only makes sense if the the £350,000 was otherwise earmarked for receipt by Ms Forster, since Mr Deacon was to be repaid first, not when Ms Forster was given an *ex gratia* payment at the end of the queue.
132. Further, RPC negotiated £400,000 to be paid on account of costs at the same time as the £350,000. There was no evidence to explain why this particular sum was included in the First Tomlin Order for early payment. The obvious inference is that it was negotiated by RPC principally to enable them to pay off those with a prior claim, namely Mr Deacon and ARAG (together over £300,000) and other smaller disbursements and fees that were outstanding. As Ms Forster's contemporaneous note records, Mr Deacon was to be repaid out of the £400,000. It was not said to be for payment of an early dividend to the lawyers. That supports the conclusion that the £350,000 was to go to Ms Forster, not RPC.
133. Third, it is evident from the few documents between March and October 2011 that Ms Forster was anticipating receipt of £350,000 less interest in September 2011. She was being pressed hard by various creditors, including previous solicitors and Ms Cheung. She had no other funds, as RPC well knew. Ms Forster wrote a number of emails to creditors explaining that the settlement terms were confidential but that she expected to be able to settle her debts in about September 2011. Some of these, relating to litigation debts, were copied to members of the legal team, including Mr Ballinger, Mr Westwood and Mr Marshall. On 21 May 2011, she wrote to Mr Westwood, copied to Mr Brown and Mr Ballinger, primarily about recovering expenses incurred in the course of the litigation, but saying that she was glad that she only had to survive on £59 a week for another 4 months or so. No RPC recipient of these emails corrected her misapprehension, if such it was.
134. On 22 September 2011, in connection with concerns about a bankruptcy petition having been presented against Bleasdale and Cariss and how the First Tomlin Order might be enforced, Mr Ballinger wrote to Ms Forster referring to a meeting with them:

“We had a sensible and business-like discussion. Obviously the biggest issue facing them is costs rather than the damages payable to you .....

On 3 October 2011, Mr Ballinger emailed Ms Forster stating:

“The vast majority of the money we are seeking from KB/JC is for costs rather than damages, and the risk is therefore with the lawyers rather than with you.”

I do not consider that Mr Ballinger would have written in these terms if RPC’s position was that all monies received were to be used to pay Mr Deacon, ARAG, RPC and Counsel, subject to any discretionary payment of part of the compensation amount to Ms Forster.

135. Fourth, on 27 October 2011, Mr Marshall sent an email to Ms Forster explaining the efforts that RPC were making to enable Bleasdale and Cariss to realise their assets at full value. He said:

“The advantage for you under the present scheme (the details of which are yet to be finalised and will be explained to you for you to agree to) is that the position that you achieved under the Tomlin Order in April will be preserved, namely, once money is released by the disposition of assets, you will be ahead of the queue (after mortgagees/charges etc.) As you know, strictly under the express terms of the CFA, your claim ... is at the back of the queue.”

At the end of the email, Mr Marshall summarised the key points for Ms Forster as including “(3) your claim remains ahead in the queue”.

136. In my judgment, in context, this email is confirming to Ms Forster the priority that her claim was given when the First Tomlin Order was made. There was no general priority conferred over Bleasdale and Cariss’s other creditors (save to the extent that a third charge over the Cedars was granted). Mr Marshall was contrasting what the strict position under the terms of the CFA was with the position that Ms Forster achieved – being ahead in the queue – in the negotiations that resulted in the First Tomlin Order. This email therefore supports the estoppel case.
137. Against those points, there are two points that are made by RPC in support of their case that no assurance of prior payment was made. First, that when the Opponents did pay £50,000 in early October 2011 this went to Mr Deacon, not Ms Forster. Mr Ballinger reminded Mr Westwood, by email of 30 September 2011 copied to Ms Forster, that the lender had to be paid first. Ms Forster did not dissent. Second, Mr Brown gave evidence that, after a celebratory lunch on 1 April 2011, Ms Forster had asked him whether RPC might be willing to advance her some of her compensation early upon receipt in September 2011, rather than wait for RPC to be paid first.
138. As to the first, this is not inconsistent with the assurance given to Ms Forster. The assurance was that of the £750,000 due by 30 September 2011 Ms Forster would receive £350,000, less the Deacon interest. There was no assurance that Ms Forster would receive the first £350,000 to be paid. Indeed, it was understood that Mr Deacon had priority, under the Deacon Funding Agreement. The sums due by 30 September 2011 were intended to repay those with a prior claim and Ms Forster. So, materially, if there was only a partial payment of the £750,000 due, RPC was entitled to say that others were to be paid first, as in the event it did. If

the balance of the £750,000 was paid late, Ms Forster had to wait. For this reason, Mr Ballinger did not need ARAG's or Mr Deacon's approval of the assurance that he gave Ms Forster: their priority was protected.

139. Mr Brown's evidence in his witness statement was that at the celebratory lunch Ms Forster was happy but concerned about whether Bleasdale and Cariss would pay on time. He said that she asked him whether it would be possible to release some money to her out of the receipts in September 2011, to enable her to pay creditors, and that he replied saying that he hoped so, but it would depend on agreement of all those affected. In cross-examination, he gave a slightly different account, which he said that he remembered "very, very clearly". He said that as they walked outside, after the lunch, Ms Forster took him aside and said "I have an awful lot of creditors, is there any prospect of money being released to me early?" and he responded: "Let me know who your creditors are and I will see what I can do", but reminded her that she could not rely on payment being made in September.
140. In answer to my question, Mr Brown said that he sat next to Ms Forster at the lunch and various matters relating to the case were discussed, but that they did not discuss what the judgment meant for Ms Forster at all, except for a hope that Bleasdale and Cariss would pay when they were supposed to pay. He said that what was said outside the restaurant was not a request for a pre-September advance and added that he said to Ms Forster: "It would help me if you could give me details of exactly what debts are outstanding and which are the worst ones".
141. This quasi-confidential discussion that Mr Brown said that he recalls is not borne out by events. Ms Forster did not write to Mr Brown or any other person at RPC setting out a list of creditors and amounts of debt, so that Mr Brown could seek to obtain agreement to an advance. All she did was to copy in members of the legal team to some emails sent to creditors explaining when she hoped to be able to pay them (which said nothing about the amount of the debts). Those emails assumed receipt of the settlement monies in September 2011.
142. I am unable to accept Mr Brown's evidence about the conversation outside the restaurant. I think he is mistaken. In the first place, I find it improbable that he can remember inconsequential conversations from April 2011 with such accuracy as he claims. It is also odd that, having sat next to Ms Forster for two hours or so and discussed all aspects of the case, the one matter that was of such importance to Ms Forster was not discussed at all, except as an aside on the way out of the restaurant. If Mr Brown and Mr Ballinger were right about what was agreed at court, and Ms Forster understood that there was to be a later stage of deciding what if anything the stakeholders would permit Ms Forster to receive, Ms Forster would not have been able to help herself asking questions about when and how that would happen. It is, however, clear from the evidence that Ms Forster understood that she was to be receiving £350,000 (less Deacon interest) in September 2011, subject to Bleasdale and Cariss making payment of what was then due. She would not therefore have asked Mr Brown for an advance in the terms that he says he recalls.
143. RPC is therefore estopped from contending that, because of the terms of the CFA, Ms Forster lost nothing of value as a result of any breach of its duties. Whether

there was such a breach of duty and it otherwise caused loss, in particular loss of an opportunity to enforce and recover the settlement monies, are questions to which I now turn. First, I must summarise the important events following the settlement.

### **Summary of Events after the First Tomlin Order**

144. On 8 July 2011, RPC served on Goodman Derrick Ms Forster's bill of costs in the total sum of £5,337,842.18.
145. By early September 2011, there were growing concerns about the Opponents' financial position. HCL had undergone a restructuring, diluting the 12 million shares owned or controlled by them, which were now worth only about £840,000 (at 7p per share, but again trading on AIM). RPC produced a "Note on Enforcement Options" dated 15 September 2011, against the eventuality that the Opponents did not pay on 30 September 2011. It listed the known (and still substantial assets) and concluded that there was no attempt by the Opponents to hide their assets. However, a company called Xchangeteam Ltd had served a statutory demand on Bleasdale and Cariss by that time.
146. Under a heading "Proposed strategy in the event of default on 30 September 2011", the Note stated:

"We would propose applications to the Court for:

- A charging order over the Debtors' interests in Healthcare UK LLP. We would need to consider the exact mechanism by which this can be done in relation to interests in an LLP.
- A charging order against [The Pines] in respect of (i) the equity in the property and (ii) the rent receivable, and
- An oral examination of the Debtors."

Healthmark UK LLP (Mr Ballinger's Note misspelt its name) was a vehicle owned and controlled by Bleasdale and Cariss and held most of the HCL shares. RPC already had a charge over The Cedars.

147. RPC then had the first of several meetings with the Opponents (without Ms Forster), on 22 September 2011, and were told that they had cash flow problems that would make payment on 30 September 2011 a problem.
148. On 27 September 2011, Ms Bleasdale offered monthly payments to Ms Forster of £50,000 and security over the interests of the Opponents in an LLC called Cedars Investments, which owned property in Colorado. Ms Forster was informed of this – and that RPC had already rejected the offer – on 3 October 2011. By then, Ms Bleasdale had paid £50,000 to RPC and Ms Forster was told that this had been paid to Mr Deacon.
149. RPC had formed the view that the Opponents had sufficient assets to be good for the final judgment amount (once costs were assessed or agreed) but that the assets were illiquid. On Ms Forster's instructions, RPC issued an application for an order for Bleasdale and Cariss to pay £750,000 based on the terms of the Tomlin schedule. It was listed to be heard on 14 October 2011.



150. On 10 October 2011, Messrs Brown and Ballinger had another meeting with the Opponents, who had served points of dispute to the bill of costs. Mr Ballinger then made an offer to them, which had not been discussed first with Ms Forster. This involved settling the quantum of costs at £3.5 million and the grant of security over The Pines and shares in Cedars Investments LLC, with more time to pay the costs and payment of Ms Forster's compensation at the rate of £50,000 per month, starting on 30 November 2011. Ms Forster was later told about this and was strongly opposed to it, as giving too much leeway to untrustworthy debtors. She suggested a different offer – a payment of £200,000 immediately and the balance of the £350,000 and interest in monthly instalments – which, if not accepted, should lead to enforcement of the First Tomlin Order, as previously planned.
151. There was then a tense conference with Counsel on 13 October 2011, as a result of which the hearing of the application was agreed to be adjourned for 14 days, to enable further consideration and discussion to take place.
152. Mr Ballinger then sent Ms Forster a draft second Tomlin Order, incorporating broadly the terms previously offered to the Opponents, but with a much less favourable payment schedule for the balance of the £350,000, which would depend on the sale of a capital asset. He told Ms Forster that “this represents the best deal that could be achieved in the circumstances, and I strongly recommend acceptance of it”. Ms Forster refused to agree the terms suggested and instructed RPC to proceed to enforce the First Tomlin Order. This was on 17 October 2011. That instruction was reinforced by Ms Forster on 20 October. RPC did not do so.
153. At this stage, Ms Forster and RPC disagreed about what should be done, but agreed to obtain a second opinion from Mr Coppel QC, who had been acting for Ms Forster on the DPA claim. Each of Ms Forster and Mr Ballinger spoke to Mr Coppel about the dispute and some documents were provided. This was not pursuant to condition 10 of the CFA conditions: RPC proposed not to enforce the settlement that had been agreed and instead to give Bleasdale and Cariss further time to pay.
154. Mr Coppel considered that it was reasonable for Ms Forster to seek to convert the First Tomlin Order into an enforceable judgment and that she should not be “held up” in getting that judgment. On 25 October 2011, Ms Forster once more instructed RPC to do so.
155. At this stage, RPC responded by informing Ms Forster that Bleasdale and Cariss had agreed in principle to consent to judgment, but wanted it to be delayed, to enable them to raise more funds. They also told Ms Forster that a sale of The Pines was being negotiated. RPC said that they would stand down the application to enter judgment that was listed for Friday that week “and will deal with the agreement for us to enter judgment in the future as and when we choose”. She was told that her only option was to get an independent barrister opinion at her expense. Ms Forster strongly disagreed. She sought comfort from Mr Marshall, questioning whether RPC had the right to ignore her instructions. She told RPC that she felt that her interests were being put second to RPC's, and explained that the CFA did not require her to obtain a further barrister opinion in these circumstances.

156. Ms Marshall sought to persuade Ms Forster of the advantages of not entering judgment. Mr Brown wrote a long email asserting the priorities under the CFA and that the “goodwill” arrangement to pay the compensation when received to her “does not replace the strict terms of the Conditional Fee Agreement”. Ms Forster eventually acquiesced, reluctantly, and the application to enter judgment, due to be heard on 28 October 2011, was adjourned generally with liberty to restore. The Opponents’ solicitors agreed not to oppose any future application for judgment if any of the £700,000 remained outstanding. I find that, as it became obvious that there were likely to be problems recovering the full debt, Mr Brown and Mr Ballinger wanted to protect RPC’s position and asserted the terms of the CFA, so as to align Ms Forster’s interests with their own. They needed much more substantial recoveries to be made from the Opponents.
157. Throughout November 2011, Mr Ballinger and Mr Westwood continued to negotiate the terms of a new Tomlin Order with Bleasdale and Cariss, but these discussions were not shared with Ms Forster. She required a meeting with them, to obtain an explanation. She expressed concern in writing, at length, that RPC were being taken in by Bleasdale and Cariss and that her interests were being prejudiced by not enforcing the First Tomlin Order. She indicated that she would not agree a second Tomlin Order.
158. On 14 November 2011, Ms Forster criticised Mr Brown for sending a draft second Tomlin Order to the Opponents before it had been sent to her or she had approved it. Mr Brown expressed concern to Mr Marshall about unfortunate consequences that could arise if Ms Forster would not give instructions to agree the order. At the same time, concern was expressed to the Opponents’ new lawyers that the Opponents had not been frank with RPC at all times, with reference to HCL shares having been sold – as a result, only 6 million of the shares were believed to remain uncharged, and by then the trading price was only 5p each (value £300,000).
159. On 23 November 2011, Mr Ballinger confirmed to the legal team that negotiations with Bleasdale and Cariss had broken down and that there appeared to have been a dissipation of assets, with other creditors having been paid in priority, which had not been explained. About 7.2 million HCL shares had been sold, and payments had apparently been made to Xchangeteam, lawyers and HMRC. At this stage, therefore, there was still no security against The Pines, which was in the course of being sold by the Opponents. Bleasdale and Cariss had sold or charged most of the HCL shares, but none of the proceeds other than £50,000 had been paid to RPC.
160. The negotiations with Bleasdale and Cariss nevertheless resumed and a further version of a proposed second Tomlin Order was sent to Ms Forster. This was to provide further security over The Pines and other assets. It provided that payment would only be made when an asset was realised, but with a share of any realisations being retained by Bleasdale and Cariss, to keep them afloat.
161. The legal team held a conference call with Ms Forster on 28 November 2011. She refused to agree the proposed new Tomlin Order. She insisted on proceeding with enforcement unless a substantial upfront payment of her compensation was included in the agreed terms. There is a short attendance note of the call, with Mr Brown’s name appended to it and an incorrect date at the head. The call lasted

nearly 2 hours. The note is obviously a note written after the event and a summary: no contemporaneous notes were disclosed. The note records surprise that Ms Forster appeared to be under a misconception as to how the CFA worked. However, it must have been obvious to RPC for several months that Ms Forster understood that she was to receive her compensation at an early stage. Mr Ballinger's witness statement, which like Mr Brown's was clearly based on the terms of the note, similarly states that Ms Forster appeared to be under a misapprehension.

162. The note records that Ms Forster had said "things had changed post 30/9 but was not able to point to any agreement to that effect". The change to which Ms Forster was probably alluding was not an agreement reached after 30 September 2011, which there was not, but a change in RPC's attitude to her early payment after the default of Bleasdale and Cariss on that date.
163. Ms Forster suffered a panic attack when confronted with the legal team's implacable opposition to her proposal, and the conference came to a sudden end with Ms Forster putting down the telephone.
164. Following the conference, a Joint Advice of Mr Nash QC and Mr Marshall was sent to Ms Forster, advising her that her interests were aligned with RPC's, that the extra security (over property in Colorado) offered under the terms of the proposed second Tomlin Order was important, and that enforcing the First Tomlin Order would have the foreseeable consequence that she would recover nothing. The Advice says that the sensible course was to take more security because there was otherwise no realistic prospect of recovering enough to cover the costs. It reiterates that the legal team had considerable goodwill towards Ms Forster and its view was that she should be paid out from recoveries at the earliest opportunity. It states that Ms Forster was at liberty to disregard the advice, but that if she did so it was likely to have the consequence that the CFA would be enforced accordingly to its terms. An ultimatum of midday on 1 December 2011 was given for Ms Forster to tell RPC what her instructions were.
165. Ms Forster did not authorise the proposed new Tomlin Order. She learned on about 7 December 2011 that Bleasdale and Cariss had defaulted on a payment plan with Xchangeteam and that bankruptcy petitions were likely to be presented. However, Mr Ballinger believed – on the say so of Bleasdale and Cariss – that the debt had been paid. Whichever was true, this had serious implications.
166. Mr Brown then emailed Ms Forster telling her that if she did not sign up to the new Tomlin Order she was in breach of the terms of the CFA and in breach of the terms of the Deacon Funding Agreement. He told her that Mr Deacon would have the right to sign the new Tomlin Order as her attorney and had confirmed to RPC that he would do so, and would wish to exercise his right to demand immediate repayment of the loan in those circumstances. Ms Forster was told in terms that if she did not authorise the signature of the new Tomlin Order, Mr Deacon would do so.
167. By reply, Ms Forster said that Mr Brown's letter was "quite threatening to say the least" and correctly pointed out that his reliance on clauses concerned with failure to accept a reasonable settlement were not in point, because "the claim" had been

settled by the First Tomlin Order, and the dispute now concerned its enforcement (which she advocated and RPC opposed).

168. On 7 December 2011, Mr Ballinger received from the Opponents a statement of their assets and some bank statements. By this time only 2.3 million HCL shares remained, worth 3p per share. Mr Ballinger challenged Mr Kushner of the Opponents' lawyers:

“It is clear that your clients have been nothing like full and frank with us, and that the statement of assets and liabilities (the truth of which your clients were proposing to warrant) is nowhere near accurate”.

Mr Marshall, who was copied in, replied to Mr Ballinger: “Egg on our face if Debbie is correct in her apprehension and we have been misled”.

169. At that point, Ms Forster had had enough and gave Messrs Brown and Ballinger, the rest of the legal team, ARAG and Mr Deacon notice at 11.22 am on 9 December 2011 that she was standing them down and would act in person. She gave as reasons that she had very little trust in their advice about the new Tomlin Order, they had been deceived by Bleasdale and Cariss, they had been negligent in allowing other creditors to be paid first, and she felt bullied by them.

170. At 11.49 am, Mr Brown responded (copying in Mr Deacon and others) alleging breach of the Deacon Funding Agreement and saying that RPC would apply to the court that afternoon to prevent RPC being removed from the record so that they could continue to act, instructed by Mr Deacon. Mr Brown accepted that he would only have had time before responding to speak to Mr Ballinger and discuss what to do.

171. Ms Forster sent an email to Mr Deacon and Mr Buss of ARAG at 12.48 pm explaining her concerns and why she had acted as she did. Mr Deacon forwarded that to Mr Ballinger at 13.14 pm and sent a second email stating:

“I confirm that I am authorising Reynolds Porter Chamberlain LLP to act on my behalf, pursuant to the power of attorney granted to me by Debbie Forster in the loan agreement dated 21 February 2011, and to apply to the court to prevent Debbie Forster from taking any steps prejudicial to my interests under the loan agreement.”

172. At 2.12 pm, Mr Ballinger emailed Ms Forster stating that RPC had made an application to be heard at 3pm in the Rolls Building and attached his witness statement. The witness statement contended that Ms Forster had no economic interest whatever in the enforcement or renegotiation of the First Tomlin Order. HHJ Judge Purle QC granted an interim injunction until a return date on 13 December 2011, restraining Ms Forster from acting otherwise than through RPC, but expressed concern about the propriety of RPC acting for Mr Deacon against Ms Forster, and about RPC indemnifying Mr Deacon in relation to the application. He required Mr Ballinger to make a further witness statement explaining these matters.

173. Before the return date, Mr Ballinger wrote to Mr Kushner, the Opponents' solicitor, copied to Mr Brown. He referred to the opportunity for Ms Forster to challenge the ex parte injunction and said that his concern was "that we should sign up the [new Tomlin] order before then, so that if Debbie Forster were successful in challenging the injunction (and then immediately seek to enter judgment and bankrupt Kate [Bleasdale] and John [Cariss]), she would find herself bound by an order agreed while we were the solicitors of record." Fortunately, Mr Kushner was unattracted to seeking to pre-empt the court's decision in that way and it did not happen.
174. On the return date, Ms Forster and RPC came to terms and the injunction was discharged and RPC confirmed as acting for Ms Forster going forwards.
175. A consent order was then filed on 19 December 2011 ("the Second Tomlin Order"). New terms additionally included interest at 5% p.a. on the outstanding 'damages' of £300,000 from September 2011, security over The Pines and the Opponents' interests in Cedars Investments LLC, and obligations on them to notify RPC of any default, judgment or statutory demand. A long stop date of 30 September 2012 for full payment remained, but otherwise the Opponents were only liable to pay further sums out of realisations and entitled to retain a proportion of net proceeds.
176. On 20 December 2011, Xchangeteam presented bankruptcy petitions against Bleasdale and Cariss, whose lawyers notified RPC incorrectly on 26 January 2012 that statutory demands had been served by Xchangeteam and that an application had been made to set them aside. Bleasdale and Cariss got the bankruptcy petitions adjourned at their first hearing.
177. On 28 March 2012, Bleasdale and Cariss agreed to grant a second charge over the Colorado property in return for RPC agreeing to give them a further 6 months to pay the outstanding £700,000. Ms Forster said that she disagreed with the strategy.
178. Bizarrely, in April 2012, Giltspur Capital, acting by Mr Deacon, began to work for Bleasdale and Cariss in attempting to raise investment in Cedars Investments LLC. Mr Ballinger felt that this was justified because it might add value to the Colorado property.
179. On 18 April 2012, Mr Ballinger informed Ms Forster that an agreement had been reached for the Xchangeteam petitions to be withdrawn on the basis of an acknowledgment of a debt at £105,000 and an assignment of the debt to RPC, with £70,000 of the debt ranking equally with RPC's debt. Ms Forster was highly critical of this move. RPC proceeded to execute a deed of assignment from Xchangeteam, using Mr Deacon's power of attorney. This was explained to Ms Forster as being to protect the charge taken over The Pines, which postdated the bankruptcy petition.
180. On 28 June 2012, Ms Forster issued an application in the Leeds District Registry seeking to enforce a judgment for £700,000, on the basis of a breach by Bleasdale and Cariss of the terms of the Second Tomlin Order.

181. On 3 July 2012, Ms Forster filed a notice of change to act in person, and on 5 July she issued an application to revoke the power of attorney under the Deacon Funding Agreement. Mr Brown reported the problems to his senior partner, and said that he thought that once RPC got an adverse costs order against Ms Forster, they would need to bankrupt her. Presumably, that was to ensure that any interest that she had in the settlement with Bleasdale and Cariss was taken away from her.
182. On 9 July 2012, RPC applied on behalf of Mr Deacon for an order restraining Ms Forster from acting in person, on the basis that she was in breach of the terms of the Deacon Funding Agreement by not acting through RPC. Mr Marshall prepared a skeleton argument, informing the court that Mr Deacon was good for an undertaking in damages by reason of RPC's indemnity and that Mr Deacon sought an order for costs against Ms Forster – his schedule of costs amounted to £15,417.40.
183. HHJ Purle QC – before whom coincidentally the matter was heard again – granted the injunctive relief sought and ordered Ms Forster to pay Mr Deacon costs assessed at £11,000.
184. In October 2012, Ms Forster instructed RPC to enforce the sums due under the Second Tomlin Order. RPC refused.
185. As the prospects of any recovery from Bleasdale and Cariss receded, Ms Forster sought to negotiate release from the second injunction, and on 31 January 2013 she was released, by consent. Thereafter, Ms Forster acted in person, with some assistance from RPC on occasions. On 6 March 2013 judgment was obtained by Ms Forster for the compensation and costs, pursuant to the Tomlin Orders.
186. Bleasdale and Cariss reacted by bringing counterclaims against Ms Forster, to attempt to forestall any bankruptcy action by Ms Forster. She obtained summary judgment on one counterclaim and on 5 April 2013 Ms Bleasdale was served with a statutory demand, but Mr Cariss evaded service. Bleasdale and Cariss made settlement offers but these were rejected.
187. On 8 August 2013, Coutts provided redemption figures for their first charges over The Cedars (£4,762,953.05) and The Pines (£3,809,574.28). Since no interest had been paid on either mortgage since October 2011, these figures show that the figures given by Mr Kushner in November 2011 for Coutts' secured liabilities – in aggregate £8 million – were probably correct.
188. On 30 July 2014, applications by Bleasdale and Cariss to set aside the statutory demands were dismissed with costs. Ms Forster promptly presented bankruptcy petitions against them both, and they filed notices of opposition. The first hearing was adjourned on 23 September 2014.
189. RPC came back on the record acting for Ms Forster in the bankruptcy petitions in January 2015. Bleasdale and Cariss were adjudged bankrupt on Ms Forster's petition on 30 April 2015.
190. It had therefore taken over two years from service of the statutory demand on Ms Bleasdale to obtain the bankruptcy orders. Ms Milner and Mr Stephen Cork were

appointed joint trustees in bankruptcy. The estates had no ready assets and so the trustees were limited in the steps that they could afford to take to investigate the bankrupt estates. Despite making reasonable endeavours, no unsecured assets were recovered during the bankruptcy. It is common ground that there was no realisable value in Cedars Investments LLC or the Colorado property.

191. RPC sought possession of the Cedars and The Pines in August 2015, at which time Coutts was already in possession of The Pines. This apparently prompted Coutts to bring its own possession claim in respect of The Cedars. By September 2015, it was in possession of both. RPC withdrew its possession proceedings in February 2016, against the wishes of Ms Forster.
192. Ms Bleasdale died in September 2017 and second bankruptcy orders were made against her estate and Mr Cariss in January 2020.
193. Still no recoveries were made.

### **Allegations of Breach of Duty**

194. Ms Forster alleges that RPC acted in breach of duty and negligently in the following principal respects, summarised broadly:
  - i) Failure to inform her about the exceptionally high level of costs that were accruing throughout the retainer, with the commensurate risk of a shortfall in costs recovery that would erode any judgment she obtained;
  - ii) Failure to advise her adequately on the benefits and disadvantages of using a Deloitte partner as her expert witnesses, rather than Ms Cheung, including the need to fund Deloitte disbursements;
  - iii) Failure to advise her adequately and fairly on the benefits and disadvantages of the Deacon Funding Agreement and the significance of its terms;
  - iv) Failure to enforce the terms of the schedule to the First Tomlin Order in accordance with her instructions, in October 2011, and acting instead in concert with Mr Deacon to prefer their own interests.

195. I shall deal with these allegations of breach in this section.

### **Information about costs being incurred**

196. As to advice on quantum of costs, there is no doubt (and Mr Ballinger and Mr Brown did not really dispute) that RPC failed adequately to keep Ms Forster informed of the level of fees that they were incurring in acting for her. She only discovered the amount of costs incurred by July 2010 as a result of reading the ATE insurance proposal in August 2010, and was not told of the amounts and estimated future amounts reported to RPC's CFA committee in September 2010. She only learned of the costs incurred up to December 2010 at the mediation. By that stage they were almost £2.5 million. Thereafter, Ms Forster was at no time informed of the increase of costs up to and including the trial, which resulted in a bill of costs in excess of £5.3 million being filed.

197. The reason she was not told was that Mr Ballinger considered that it was not a matter to concern her, since RPC had been retained on a “no win no fee” basis. However, this importantly overlooked the risk to Ms Forster of the shortfall between the chargeable fees and disbursements and the costs recovered from the Opponents eating into any compensation that she was awarded. This was already a risk by September 2010 and was probably inevitable by the date of the mediation, shortly after which Ms Forster offered to settle at a figure that would have been exceeded by irrecoverable costs. The likelihood of that was increased by the instruction of Leading Counsel in February 2011, but Ms Forster was not advised about that. Further, the higher the costs were, the harder it would be to arrive at a reasonable settlement of the claim.
198. It is hard to imagine that Ms Forster would have had nothing to say if warned in September 2010 that costs already exceeded £2 million, and had been told in December 2010 that costs by the start of the trial might exceed £5 million, with the 100% mark up. These figures fall to be compared with an initial estimate of costs of £700,000.
199. The answer for RPC cannot be that they acted on a “no win no fee” CFA because the CFA expressly requires RPC to give Ms Forster the best information possible about the likely costs of her claim, and to advise her of any circumstances affecting the amount of costs to be incurred, the degree of risk involved or the cost-effectiveness of continuing the case. The staggeringly high level of costs, as compared with the value of the claims, self-evidently impacted the cost-effectiveness of the case.
200. However, no loss was caused by RPC’s breach of its duties in this regard. Ms Forster does not allege in this claim that her claim against Bleasdale and Cariss would have been settled earlier, or more favourably, but for the high level of costs. The only loss that Ms Forster claims to have suffered is the lost opportunity to recover the £350,000 for which she agreed to settle her petition on 30 March 2011, on terms that it would be paid by 30 September 2011. Ms Forster has no liability for RPC’s fees or any disbursements.

#### Selection of expert witness

201. RPC agreed to take on Ms Forster’s case on a CFA at a time when Ms Cheung was the retained adviser on the value of the Company and Ms Forster’s interest in it. Ms Cheung had the confidence of Mr Marshall and Ms Forster. RPC did not stipulate in the retainer for the right to nominate a different expert witness. It appears to have been Mr Ballinger’s decision that Ms Cheung should be replaced by a partner in a large City firm of accountants. It was presented to Ms Forster as a *fait accompli*, to her and Ms Cheung’s considerable surprise. There was no advice given about options or advantages or disadvantages of instructing such a firm, or discussion with Ms Cheung of how well she would be able to carry out her instructions or act as an expert witness.
202. It may be that Mr Ballinger was justified in thinking that, presentationally, a partner from BDO or Deloitte would have more impact on the Opponents and might hold more sway in court: this was not a straightforward valuation case. I am unable to make any decision about that, as I have not seen any of the work



that Ms Cheung and Mr Robinson did on the case. But instructing Deloitte rather than Mall & Co came at a high price. Ms Forster should have been advised of the implications of this change, and how a different expert witness might be funded - but she was not. She was simply told that the ATE cover would be extended and a loan could be obtained to cover the fees on an interim basis. Again, Mr Ballinger's view seemed to me to be that these were simply costs of the litigation, with which Ms Forster was not directly concerned. This was quite wrong, as Ms Forster in the event had to sign up to onerous terms of the Deacon Funding Agreement in order to pay Deloitte as the case went on, and she was personally liable for interest on the loan. This was all known by Mr Ballinger before Deloitte was approached.

203. Ms Cheung had agreed to defer payment until the end of the case. To an impecunious person such as Ms Forster, that was a considerable advantage. It is possible that a partner of a large firm might similarly have agreed to defer payment – given that the instructions were only to be given at the end of October 2010 and the case was due for trial only 5 months later. If the disbursements were to be covered by an ATE policy, there was no serious risk to the firm, only delay.
204. Mr Ballinger said that, given the late stage of proceedings, he was not satisfied that Ms Cheung would be able to operate within the required timescale, or had the right background to provide a valuation. However, there is no evidence that he asked her. He had already formed the view that a top firm needed to be instructed and told Mr Buss of ARAG two days before the conference at which he first met Ms Cheung that he had BDO in mind, and that the budget was £150,000. In the event, BDO were conflicted and so Mr Ballinger turned to Deloitte, where he already had contacts. Deloitte's budget was up to £200,000.
205. Mr Ballinger said in his witness statement that he recalls that he did ask Deloitte whether they would be prepared to defer their fees until the conclusion of the case, and that they "robustly refused that request". Having heard Mr Ballinger cross-examined on the subject, I am unable to accept that evidence. It was clear to me that Mr Ballinger had no recollection of having done so, and was really only saying that he believed he "would have" done so.
206. I was unimpressed with Mr Ballinger's attempts to explain what if anything he remembered about this. Nothing about payment of fees is contained in the correspondence or note of the initial meeting with Deloitte. A subsequent meeting note records that "MB explained that [sic] the method of funding of Deloitte's fees and the case in general. He also explained the level of cover in place for expert fees." There is no record of a request to defer payment. On the same day, Mr Ballinger wrote to Ms Forster explaining the need for an increase in ATE cover and funding for cash flow. This would have been an obvious point at which to explain that he had asked Mr Robinson or Mr Rees to agree to defer fees, on the back of the ATE Policy, and that they refused; but the email does not do so. When Deloitte sent RPC a draft engagement letter, which provided for monthly invoices, Mr Ballinger had a meeting with Messrs Robinson and Rees to discuss the terms. Mr Ballinger pushed back on the cap on liability and a negotiation ensued, which resulted in an offer to double the cap. Nothing is recorded about a request to defer fees.

207. I conclude that Mr Ballinger did not ask for Deloitte's fees to be deferred. He did not do so because he already had in mind that the fees would be covered by the ATE Policy and by a loan from Giltspur, on the same terms as Giltspur had funded another case on which Mr Ballinger had been involved. On 1 November 2010, before any agreement was reached with Deloitte, Mr Ballinger had emailed Mr Buss in relation to the additional ATE premium, copied to Mr Deacon and saying to him:

“John – this is the investor case I mentioned, where we are looking for a disbursement funding facility similar to the one we did on Digital Pos. Probably just need the same documentation again – perhaps we could have a chat?”

208. In my judgment, Mr Buss of ARAG and Mr Deacon of Giltspur came as a convenient package, and Mr Ballinger was content that RPC would be able to draw down funds from Giltspur (or, as it turned out, Mr Deacon personally) to pay Deloitte's fees. In that knowledge, he was happy for RPC to commit to retain Deloitte on its terms even before a funding agreement had been put in place. Given the close working relationship between RPC and Giltspur, and between Mr Ballinger and Mr Deacon personally, Mr Ballinger was confident that – when needed – the loan would be forthcoming, and he also knew, as he told Ms Forster, that the interest rate would be 24%.
209. In my judgment, RPC failed to advise Ms Forster, in breach of duty, on the benefits and disadvantages of retaining Deloitte as expert witness, as compared with retaining the services of Ms Cheung or engaging a different expert witness. That included the full financial consequences of retaining Deloitte, as compared with other expert witnesses. What Mr Ballinger did was to tell Ms Forster that Ms Cheung was not suitable and that a large City firm was required; then find a partner at Deloitte suitable for the task; and then provide a ready-made solution for the consequential funding requirement. He did not advise Ms Forster on the choices that she had, or on what terms as to payment Deloitte or other suitable witnesses might be willing to agree.
210. Despite the CFA, Ms Forster remained the client and RPC owed duties of loyalty to her, as well as contractual duties to keep her informed of matters that had an impact on the cost of the litigation and matters that could adversely affect her interests. It was her decision which expert witness to retain, to be made with the benefit of RPC's advice – strong and forthright advice, if appropriate – not RPC's decision, as long as her instructions did not prevent RPC from doing their work properly, or require them to work in an unreasonable way. If, having been instructed by Ms Forster to retain Ms Cheung as expert, RPC considered that Ms Forster was asking it to work in an unreasonable way, or that as a result she was unlikely to win the claim, then they had the right to terminate the CFA under clause 11(b). Otherwise, they had to respect their client's informed wishes.
211. RPC disputed this conclusion (as it applies on this point and in relation to the alleged failure to enforce the First Tomlin Order in accordance with Ms Forster's instructions) on two grounds.

212. (1) *Interpretation.* First, Mr Campbell submitted that, as a matter of interpretation of the CFA, RPC were permitted in appropriate circumstances to have regard to their own interests. These circumstances, he argued, include a case where RPC reasonably concluded that the client's instructions would have disastrous consequences for them both. He submitted that in a CFA of this kind a solicitor had to have the ability to protect their own interests, particularly where the solicitor had a greater financial interest than the client.
213. Mr Campbell relied on Groom v Crocker [1939] KB 194 and Butler v Bankside Commercial Ltd [2020] EWCA Civ 203; [2020] PNL R 15 in support of his argument, as showing that solicitors are entitled to act contrary to clients' instructions. In my judgment, neither authority stands for any such general proposition: they are both cases on the true meaning of express terms of particular contracts.
214. In Groom v Crocker, an insurance policy gave the insurer the right to appoint a solicitor to act for the assured and to "have absolute conduct and control of all or any proceedings against the assured" (condition 2). The contract of services was nevertheless made between the assured and the solicitor, such that the assured was the client. The insurer without the instructions of the assured admitted his liability for a motoring accident, pursuant to a collateral bargain struck with the insurer of the driver primarily responsible for the collision. The issue was whether the solicitor could act on the insurer's instructions in that regard.
215. The Court of Appeal held that it could not do so. Lord Greene MR said that the duty of such a solicitor cannot be the same as that which arises in the ordinary case of solicitor and client, but that the extent to which the solicitor could properly act on the insurer's instructions depended on the true interpretation of the policy. He noted that the assured and the insurer had a common interest in the proceedings, and said that the effect of the policy wording was:
- "... to give to the insurers the right to decide upon the proper tactics to pursue in the conduct of the action, provided that they do so in what they bona fide consider to be the common interest of themselves and their assured"
- but that they could not pursue their desire to obtain a collateral benefit.
216. Scott LJ agreed that the policy did not entitle the insurer to conduct the assured's defence by reference to a secret bargain with another insurer.
217. MacKinnon LJ considered that condition 2 of the policy was subject to an implied term that the solicitor appointed should act reasonably in the interests of both assured and insurer.
218. That, however, was a case where the solicitor had effectively to take instructions from someone who was not his client. There was an express provision that cut down the rights of client in favour of the insurer. The majority of the judges agreed that this provision was nevertheless subject to an implied limitation that the interests of the client also had to be taken into account. It was not a case where

the relevant contract required the solicitor to act in the best interests of the client. The decision turned on the words of that contract.

219. Butler v Bankside Commercial Ltd was a case of a conditional fee agreement but it concerned the true meaning and effect of a condition entitling the solicitors to cease acting for the client, in the following terms:

“We can end this agreement if you reject our opinion about making a settlement with your opponent. You must then ... pay the basic charges and our disbursements, including barristers’ fees; [and] ... pay the success fee if you go on to win your claim for damages.”

B did not accept the solicitors’ advice to make a counteroffer of settlement and they ceased to act. When B recovered an award of less money at an arbitration, the solicitors sued for their fees and success fee.

220. The only issue was whether the wording of this condition, which expressly conferred rights on the solicitors, applied where advice was given to make a settlement offer or only to advice on a settlement offer made by an opponent.
221. The judge held that, given that the solicitors were themselves at risk in relation to the case, their protection against the whims of an unreasonably optimistic client should not be interpreted as turning on fine distinctions between advice about an offer received or an offer to be made. That was a case in which an express term of the contract conferred a degree of protection on the solicitors against unreasonable behaviour of their client. The only issue was its breadth.
222. In principle, despite a solicitor owing a duty of fidelity to their client, the duty can be qualified by the express terms of the contract. A retainer can include agreed terms that allow a solicitor’s judgment (or someone else’s) to supplant the client’s instructions. Absent such a term, the solicitor must respect the client’s instructions, if what is required is not improper or in breach of the solicitor’s overriding duty to the court.
223. The fact that the CFA includes “no win no fee” terms and provides a significant uplift on fees in the event of success does not mean that a different approach to solicitors’ duties and the interpretation of the retainer is required. The well-known principles of interpretation are those summarised by Carr LJ in EMFC Loan Syndications LLP v The Resort Group plc [2021] EWCA Civ 844; [2022] 1 WLR 717 at [57]. In reaching my decision, I bear in mind in particular the passages at [15] to [23] of the judgment of Lord Neuberger of Abbotsbury PSC in Arnold v Britton [2015] AC 1619 and at [11] and [12] of the judgment of Lord Hodge JSC in Wood v Capita Insurance Services [2017] AC 1173.
224. The CFA does not provide for RPC to be entitled to have regard to its own interests, apart from particular conditions that confer rights on them, such as conditions 7, 11 and 12. There is an express term that requires RPC otherwise always to act in the client’s best interests. The retainer was to pursue Ms Forster’s claim, enforce a judgment and assess her costs. There is therefore no distinction in principle between the claim and the enforcement stage, as regards this term. Condition 10 specifically provides for the possibility that RPC and Ms Forster

have different views when a settlement is considered. But this only applies to proposed settlements that, if accepted, would entitle RPC to a success fee – i.e. settlement of the claim itself, such that “success” is achieved. Not even under that condition is there provision for RPC’s view or interests to override Ms Forster’s. There is no equivalent condition where there is disagreement about the method of enforcement of a judgment or settlement.

225. The express terms requiring Ms Forster to give instructions that allow RPC to do their work properly, and not to ask RPC to work in an improper or unreasonable way, are not obligations to defer to RPC’s own interests at any stage. They are terms governing the way that Ms Forster is to act to enable RPC to do its work, by giving appropriate instructions to them when needed, not an obligation requiring Ms Forster to allow RPC to have regard to their own interest in deciding what to do. Thus, Ms Forster was not in breach of either term because she formed one view about the reasonableness of the enforcement strategy, having regard only to her interests, whereas RPC and Counsel formed a different view, inevitably taking into account their interests.
226. It is impossible to read between the lines of the express terms, or interpret any of them, to reach a conclusion that the express terms of the CFA mean that RPC were permitted to have regard to their own interests, either generally or in connection with enforcement of a judgment or settlement.
227. (2) *Implied term.* Second, Mr Campbell submits that there is to be implied into the CFA the following term (using the pronouns and tense in the CFA terms):

“We can have regard to our own interests and take reasonable steps to protect them, even if this is contrary to your instructions, if you refuse to accept reasonable and relevant advice from us.”

This is argued to be both necessary to achieve business efficacy for the CFA and sufficiently obvious that it went without saying when the CFA was made on 17 March 2010: see the summary of the legal approach to implication of terms in commercial contracts in Yoo Design Services Ltd v ILV Realty Pty [2021] EWCA Civ 560, per Carr LJ at [51]

228. In my judgment, this term is not implied for the following reasons:
- i) It is inconsistent with the express term requiring RPC always to act in Ms Forster’s best interests;
  - ii) Although arguably a reasonable term that the parties might – if they had known what was coming – have agreed, it is not necessary to make the CFA work. The CFA does not lack commercial or practical coherence as written. When it was made, RPC had carried out research on the assets of Ms Bleasdale and were satisfied that she was good for the money, otherwise they would not have taken on the claim on the basis that they did. There was therefore no anticipated conflict between client and solicitor once a judgment or a settlement was obtained. That is doubtless why condition 10 addresses only disagreement on a settlement that would result in RPC earning their uplift. It is not necessary to imply a term to deal with an issue

that was not envisaged when the parties make their contract. There is no suggestion that the term is otherwise necessary to give the CFA commercial or practical coherence.

- iii) The term is only one of a number of possible reasonable terms that the parties might have agreed to deal with conflicts of interest and duty during the retainer. As Mr Fennell suggested, another such term would enable RPC to substitute its own view of what was in Ms Forster's best interests if her view was unreasonable, or (in a further alternative) if it was irrational; or, alternatively, to permit RPC to have regard to its own interests if Ms Forster's instructions were irrational.
  - iv) It is far from clear that Ms Forster would have thought it obvious that RPC should be able to take steps to protect its own interests simply because RPC's advice (that Ms Forster did not accept) was "reasonable and relevant". It is easy to envisage two competing reasonable assessments about what should be done, either in the conduct of the litigation or in enforcing a judgment.
229. Further, given the fiduciary relationship between solicitor and client (even under a conditional fee agreement, once it has been concluded: see Belsner v Cam Legal Services [2022] EWCA Civ 1387 at [72], [75]) and the potential for conflicts of interests inherent in a conditional fee agreement, it would be very surprising for a general term to be implied entitling the solicitor to prefer their own interests over the client. The expectation, where an actual conflict of interest and duty may arise, is the opposite, namely that the solicitor will so conduct matters to avoid an actual conflict, if possible, and where there is an unavoidable conflict ensure that it does not prejudice their client's best interests. There would have to be very particular and cogent circumstances to justify the implication of a term to the opposite effect. This is not such a case.
230. The loss that Ms Forster complains that she suffered because of RPC's failure to advise her on the consequences and terms of Deloitte's retainer is not adverse costs or the costs of retaining Deloitte as such, but losses following from the Deacon Funding Agreement that was needed as a consequence of the retainer of Deloitte. In final submissions, Mr Fennell contended that the loss attributable to this breach was £17,000, which was agreed to be the interest on the Deacon loan for which Ms Forster was liable out of the damages to be paid to her. Mr Fennell did not submit that RPC's negligent failure to advise Ms Forster appropriately on expert witness selection caused Ms Forster to lose the chance to enforce the First Tomlin Order. That in my judgment was a realistic approach because the settlement at £350,000 that was achieved may well have been because of the cogency of the Deloitte valuation evidence – which was served at a late stage, after previous settlement negotiations at about the same level had failed.

#### The Deacon Funding Agreement

231. The position with the Deacon Funding Agreement allegation is relatively simple. RPC had a clear conflict of interests in advising Ms Forster to borrow money from Mr Deacon and then advising and acting for (or in the name of) Mr Deacon in preventing Ms Forster from enforcing the First Tomlin Order. RPC could not

properly have advised or acted for borrower and lender without the informed consent of both. Mr Brown agreed that Ms Forster was not told that RPC was acting for Mr Deacon until 7 December 2011 (shortly before she notified RPC that she was acting in person).

232. The conflict went further than acting for two clients whose interests in a transaction conflicted because RPC had its own interest in the business of Giltspur and in working with Mr Deacon, which it did not disclose to Ms Forster at any time. Mr Brown in cross-examination readily conceded the error that had been made in not making full disclosure to Ms Forster. Mr Ballinger was not willing to concede that anything had been done wrong. He felt that RPC was not at any stage advising or acting for Mr Deacon and that it had an arm's length relationship with Mr Deacon.
233. Mr Wyles had given evidence in writing on behalf of RPC explaining that RPC was acting for Mr Deacon from 21 February 2011, and Mr Ballinger himself explained in detail how RPC was seeking to assist with funding and promoting Giltspur's business. RPC clearly advised Mr Deacon on the intended terms and effect of the Deacon Funding Agreement before it was entered into.
234. Mr Ballinger suggested that, in some way, RPC had been acting for Ms Forster, not Mr Deacon, when seeking injunctive relief against Ms Forster, on account of the power of attorney given to Mr Deacon in the Deacon Funding Agreement. This was nonsensical. The application was made using Mr Deacon's name to assert *his* rights against Ms Forster, the respondent, to require her to instruct RPC. Mr Ballinger either did not understand that a serious conflict of interests had arisen, or he was not being frank about what was really happening.
235. What was happening was that RPC was preferring Mr Deacon's and its own interests over those of its client, Ms Forster. That had happened when the Deacon Funding Agreement was made and it continued to happen when Bleasdale and Cariss defaulted on payment. It became even more obvious when Mr Deacon's name was used to compel Ms Forster to continue to instruct RPC.
236. Ms Forster was given no choice about who the lender should be, nor any chance to negotiate terms. Mr Ballinger apparently felt that the 24% charged previously to an insolvency practitioner pursuing recovery on behalf of creditors was an appropriate interest rate for an impecunious, uncommercial individual such as Ms Forster to pay for funding, the need for which might have been avoided if he had acted in her best interests.
237. Ms Forster was given no adequate advice on the terms and potential effect of the Deacon Funding Agreement. After Deloitte were retained, nothing further was said to Ms Forster about funding their fees until after Deloitte's first monthly invoice was sent to RPC in January 2011. At that point, RPC was, by default, the interim funder, as it had signed up to Deloitte's terms in its own name.
238. The trial was less than two months away, and Ms Forster's summary judgment application was due to be heard on 8 February 2011. Nevertheless, having first discussed the loan terms with Mr Buss and Mr Deacon at the end of January and advised them on their content, Mr Ballinger recommended the Deacon loan to Ms

Forster in a telephone conversation on 4 February 2011. He followed that up with two emails, only 40 minutes apart, which attached a draft loan agreement. They said, in slightly different terms, that the loan was for the cost of disbursements and that it was made on a “no recourse” basis, provided Ms Forster did not misbehave (eg by settling the case otherwise than through RPC). The loan and interest at 24% would be a first call on recoveries if the claim succeeded, and, if it did not, the ATE Policy paid off the loan at a lower interest rate. The second email introduced Mr Deacon as a solicitor, very well known to RPC, who ran an FSA licensed business and who had provided disbursement funding to RPC on a previous case. Neither email said anything about whether the 24% interest would be covered by the ATE Policy (a point that Mr Ballinger had doubted when explaining to Ms Forster in an email dated 2 November 2010 the terms of the ATE Policy).

239. Both emails invited Ms Forster to read through the draft agreement and then telephone Mr Ballinger, so that he could make sure she understood the agreement. Neither Ms Forster nor Mr Ballinger could specifically recall a conversation in which Mr Ballinger explained in detail the effect of the terms of the agreement. Ms Forster said that she recalled a conversation in which she asked what clause 3 of the agreement meant and Mr Ballinger said that it was no risk for her – a formality, and part of the Alchemy Scheme. She said that he said the agreement was no risk for her, because either Bleasdale and Cariss would be paying it off or the ATE Policy would. She said she therefore did not ask further, even though she and Mr Wilson did not understand some of the terms. Mr Ballinger said that he did not draw attention to clause 3 and that the terms of the agreement meant what they said. They were “fairly standard terms”. Nevertheless, he felt that he “would have” explained this agreement on the telephone.
240. I find that it probable that no such advice was given, beyond Mr Ballinger reassuring Ms Forster that the terms were standard and acceptable for this sort of funding agreement. I find that Mr Ballinger did ask if Ms Forster had read it and that she said that she had. Going no further would have been consistent with his approach that Ms Forster did not need to be troubled with these matters, as costs was not really her concern, and would be covered at the end of the day by others.
241. The terms of the Deacon Funding Agreement were both complex and onerous for Ms Forster. No one but a lawyer or an experienced user of litigation funding would easily have understood the overall effect of the terms. Apart from the headline figure of 24% interest on monies drawn down, with an alternative rate of interest (effectively a minimum 5% facility fee) on monies not drawn down, Ms Forster gave Mr Deacon power to control the litigation in her name and to control enforcement of any award or settlement. Ms Forster had to follow RPC’s advice about any settlement offer or repay the loan (which she would be in no position to do). Ms Forster could not disinstruct RPC or instruct another solicitor without Mr Deacon’s consent.
242. For as long as Mr Deacon and RPC were in agreement, the Deacon Funding Agreement therefore gave RPC effective control of the settlement of the litigation and the means of enforcement. Mr Ballinger’s answer to Mr Nash’s question outside court on 30 March 2011 (see [110] above) is more readily understood in this context. As security for his rights, Ms Forster assigned to Mr Deacon



absolutely all compensation (including costs), the proceeds of the ATE Policy and any right to make a claim against RPC. It was because of the Deacon Funding Agreement that RPC was able to obtain an injunction against Ms Forster when she was trying to enforce the settlement that had been negotiated.

243. It was the clearest and a serious breach of duty for RPC to encourage Ms Forster to enter into the Deacon Funding Agreement without explaining their connection to Mr Deacon, the fact that RPC were advising Mr Deacon, and the effect of entering into the Deacon Funding Agreement in the event that Ms Forster and RPC later disagreed about settlement or the enforcement of any settlement or judgment.
244. Although RPC and Ms Forster agreed a settlement on 30 March 2011 without having to resort to Mr Deacon's power of attorney, it was deployed by RPC when there was disagreement about the enforcement strategy.

### Enforcement

245. When, at the end of September 2011, it became clear that the Opponents could not or would not pay, RPC's first reaction was to propose immediate enforcement, principally against The Cedars (over which RPC had a legal charge), The Pines and the Opponents' shares in HCL (which would require an application for judgment and charging orders). These shares were assumed to have a combined value of over £800,000 at the time, though the price was clearly volatile. The Cedars was subject to prior charges in favour of Coutts and Goodman Derrick, but limited in amount, and The Pines to a charge to Coutts. At that time, enforcement could only be in relation to the £750,000 due. An application was issued promptly to enter judgment for that sum. If the Opponents remained in default at the end of October 2011, the full amount of costs became payable after assessment, and RPC could have applied for an interim payment pending detailed assessment.
246. Instead of pursuing that course, Mr Ballinger and Mr Brown held meetings with and made an offer to the Opponents. This had the effect of giving them more time for an orderly realisation of assets in return for agreement on the quantum of costs and more security (para 148 above). The monies to be paid to Ms Forster were to be significantly deferred. Despite Ms Forster's instructions and Mr Coppel QC's opinion, the application for judgment was adjourned (the first time for 14 days with Ms Forster's agreement) and RPC continued to negotiate with the Opponents.
247. RPC declined to act in accordance with Ms Forster's instructions and eventually, in December 2011, Mr Deacon's rights were deployed, and Ms Forster was told by RPC that she had to do as they were advocating. This was presented by RPC as a settlement offer within condition 10 of the CFA conditions, but it was not, as Ms Forster correctly pointed out at the time. Ms Forster's claim had already been settled. She had won the claim within the meaning of the CFA and RPC were entitled to their success fee. Condition 10 did not apply to the wish of RPC not to enforce the settlement but to agree different terms, in their interest.

248. As between RPC and Ms Forster, RPC were not entitled to refuse to act in accordance with her instructions. The fact that they had a greater financial interest in successful enforcement than she did, as a consequence of the CFA, did not entitle them to decide what to do, though that is what Mr Ballinger believed. There was no duty on Ms Forster, by reason of the CFA and its financial consequences, to take into account RPC's interests, and no correlative right for RPC to decline to follow her instructions. There is no relevant distinction in this regard between a CFA and a conventionally funded retainer, absent terms that so provide: Candey Ltd v Bosheh [2022] EWCA Civ 1103, per Coulson LJ at [38]:

“...I reject the suggestion that, because this was a CFA, as opposed to a traditional retainer, a duty of good faith arose in consequence. A CFA is merely a vehicle by which a party obtains legal services for minimal initial financial outlay. It governs the solicitor's remuneration; it does not change the services or duties that the solicitor owes the client, or vice versa. Beyond the question of remuneration, therefore, there is no relevant distinction between a CFA and an ordinary retainer; certainly not one which justifies the inclusion of a duty of good faith in the former and not the latter.”

249. I accept that Mr Ballinger, Mr Brown and Counsel honestly believed that their enforcement strategy was wiser and that Ms Forster's wish to enforce immediately carried a risk of non-recovery. But so did giving debtors known to be slippery and untrustworthy time and room in which to manoeuvre, as events later proved. The lawyers' genuine view was also inevitably influenced by their own interest in taking steps calculated to secure a larger recovery in the longer term.
250. Whose judgement about which enforcement strategy would be effective is irrelevant, because ultimately RPC had to respect Ms Forster's right to decide, subject only to the terms of the CFA. For the reasons previously given ([222] – [229] above), these did not include a term that allowed RPC to substitute its own judgement if it thought that Ms Forster was not accepting their reasonable advice. The fact that Ms Forster turned out to be entirely right about the degree of trust that should be placed in Bleasdale and Cariss and RPC and Counsel did indeed end up with egg on their faces, proves that lawyers do not have a monopoly on sound judgement on such matters, though they may have valuable advice to give.
251. As between Ms Forster and Mr Deacon, the position in relation to enforcement was more nuanced, as Mr Deacon undoubtedly had a power of attorney and title to pursue the Compensation, as defined in the Deacon Funding Agreement. He also had a right (under clause 8.4) to require Ms Forster to follow RPC's recommendation about a settlement offer, which arguably (as a matter of interpretation of that Agreement) does include an offer to settle the quantum of costs. Ironically, clause 8.6 of that Agreement required Ms Forster to use her best endeavours to procure full and prompt payment of the Compensation and not to do anything which would delay payment. It was Ms Forster who was seeking to comply with that obligation and RPC who were seeking to delay enforcement.
252. Mr Deacon's interests were in fact more closely aligned with those of Ms Forster than with RPC, as Mr Deacon had first priority out of any realisations. It was

therefore in his best interests for a sufficient recovery to be made sooner rather than later, in order to fund his 24% interest. He was also in a better position than Ms Forster and RPC in that his capital and interest at 10% was covered by the ATE Policy in the event of non-recovery.

253. Whatever rights Mr Deacon had against Ms Forster, those rights only came into existence as a result of RPC's breaches of duty in failing to advise her about the Deacon Funding Agreement and acting for and advising Mr Deacon when a conflict of interests existed. A matter of real concern is that Mr Deacon was seeking to injunct Ms Forster with the benefit of an indemnity provided by RPC against the financial consequences of doing so. That strongly suggests that Mr Deacon was not taking action to protect his own interests but lending his name and his contractual rights to RPC, to enable them to restrain their client from acting in person. Mr Deacon regrettably was not called by RPC to explain what he understood in this regard. In view of their clear conflict of interests, RPC should not have acted for Mr Deacon in seeking an injunction against Ms Forster. RPC was in breach of its contractual obligation to act always in Ms Forster's best interests as well as its fiduciary obligation of loyalty to her (though the latter was not pleaded and cannot form the basis of any damages awarded).
254. In my judgment, for reasons I have given, RPC was also in breach of its duty to Ms Forster at an earlier stage, in October 2011, when it declined to act on her instructions to convert the First Tomlin Order into an enforceable judgment and then enforce it and the charge over The Cedars.
255. As a result of the enormous costs incurred on Ms Forster's claim and the modest settlement in her favour, there was an intractable conflict of interest and duty on the part of RPC once the Opponents defaulted. No term of the CFA in this case allowed RPC to refuse to perform Ms Forster's instructions and place its own interests before hers. It was a breach of duty for RPC to fail to act in the way that she instructed. It continued to breach that duty by effectively compelling her to agree the Second Tomlin Order on 19 December 2011, which precluded enforcement of the First Tomlin Order and deferred payment of Ms Forster's £350,000 until 30 September 2012 or any sooner sale of one of the charged properties.
256. Thereafter, RPC again injuncted Ms Forster from seeking to enforce the Second Tomlin Order and, in October 2012, once the deadline for payment had expired, refused to perform Ms Forster's instructions to enforce. These were further breaches of duty. Ms Forster had to negotiate her release from the injunction and was not in a position to seek to enforce until February 2013. Her own attempts to enforce eventually resulted in the bankruptcy of Bleasdale and Cariss in April 2015.

### **The specific allegations of breach of duty**

257. There are fourteen individually pleaded breaches of duty in this claim (at para 75 of the Amended Particulars of Claim). It is unnecessary to set them all out below and summarise my conclusion on each: the reasons for my conclusions on the main allegations that were pursued are explained in the previous section. These main allegations are all covered by the individual alleged breaches of duty. There

were other allegations that were not pursued at trial, or which, although raised, were not proved. As previously indicated, some breaches were proved but no loss was caused by the breaches.

258. It is unnecessary to address other alleged breaches further.

### **Causation and loss**

259. I have already explained, in the sections addressing breaches of duty, that although RPC was in breach of duty in failing to inform Ms Forster of the level of fees being incurred, and of the alternatives to instructing Deloitte on a pay as you go basis, no loss was caused by those breaches of duty.

260. The next breach of duty was allowing Ms Forster to enter into the Deacon Funding Agreement on an uninformed basis, where a conflict of interests existed, and without proper advice.

261. I find that if RPC had correctly advised Ms Forster in writing on or shortly before 4 February 2011, she would not have agreed to enter into the Deacon Funding Agreement, or that RPC could act for Mr Deacon as well as for her in relation to the funding of disbursements. Ms Forster has a strong sense of what is right and what is wrong, and (with the assistance of Mr Wilson) had an intelligent approach to the advice that she was given. She would in my view have understood that the Deacon Funding Agreement was disadvantageous to her and that RPC could not properly act for her and for Mr Deacon. The financial consequences and terms of the Agreement were onerous. Given that Ms Forster had no means of repaying Mr Deacon before Bleasdale and Cariss paid, she was handing over significant control of the litigation to RPC and Mr Deacon.

262. In these circumstances, the likelihood is that either Deloitte would have been persuaded by RPC to defer payment of their fees, or RPC would have reached an agreement to fund them in the interim, in either case in return for priority payment from any recovery following the trial. In the event of non-recovery, the ATE Policy would have reimbursed the Deloitte fees in any event, so this would have been a short-term, no risk loan. It is also possible that Mr Ballinger would have found a different funder for Ms Forster, but I consider that less likely, given the proximity of the trial and the fact that RPC did not have another disbursements funder readily available. RPC had far too much at stake in terms of fees earned to risk the case not proceeding because of a modest short-term funding requirement.

263. By not entering into the Deacon Funding Agreement, Ms Forster would have avoided becoming liable to pay interest to Mr Deacon at 24% per annum, and RPC would not have been able to use Mr Deacon's rights to prevent Ms Forster from seeking to enforce the First Tomlin Order.

264. The only loss asserted by Ms Forster to which this breach relates – apart from the lost chance to enforce the First Tomlin Order, to which Mr Deacon's rights contributed – is the £17,000 agreed by the parties approximately to represent the interest payable to Mr Deacon, to be deducted from the compensation payable to

Ms Forster. She therefore contends that, in calculating the value of the lost chance to enforce the First Tomlin Order, the £17,000 should not be deducted.

265. It seems to me that any liability to pay contractual interest to Mr Deacon is loss that is within the scope of the duty to advise Ms Forster on the suitability for her of the proposed loan, and that such liability was caused by RPC's failure to advise appropriately. Although Ms Forster did not in fact pay that interest to Mr Deacon, deducting £17,000 from the £350,000 compensation for the purpose of calculating the value of the lost chance would have the same effect. Accordingly, I will disregard the £17,000 in assessing the value of the lost chance.
266. The final questions are accordingly whether RPC's breaches of duty caused the loss of a chance to enforce the First Tomlin Order and, if so, what was the value of the lost chance.
267. The relevant duty that RPC owed, in the context of the litigation it was retained to conduct, was to protect Ms Forster from financial loss resulting from its acting in someone else's interests or from failing to do what she instructed. The retainer was to pursue the litigation and enforce any judgment or settlement. Accordingly, if this breach of duty caused Ms Forster to lose a realistic chance of enforcing the settlement in 2011/2012, that loss (whatever its value) is recoverable from RPC in damages. It was perfectly foreseeable that Ms Forster would suffer financial loss if RPC preferred its own or someone else's interests or refused to carry out her instructions to enforce, at a time when a judgment or settlement had been obtained.
268. The understanding reached between RPC and Ms Forster on 30 March 2011 was not that she would receive the first £350,000 paid by the Opponents. It was agreed that Mr Deacon came first: that is why Ms Forster did not object to the only £50,000 that was paid by the Opponents being paid by RPC to Mr Deacon. The assumption made by Ms Forster's team on 30 March 2011 was that £750,000 would be paid on 30 September 2011. As I have found, the £400,000 interim payment on account of costs was negotiated by RPC with the Opponents with a view to enabling them to pay priority debts. There was no understanding that Ms Forster would be ahead of such creditors in the queue. It was not agreed that Ms Forster would be prioritised to any extent within the £750,000 expected to be received: she was to be paid £350,000 (less Deacon interest) out of £750,000 paid.
269. For Ms Forster to recover £350,000, there therefore needed to be payment of £750,000 by Bleasdale and Cariss. If only £500,000 was paid on 30 September 2011, she was only entitled to £100,000 at that time, until the remainder of the £750,000 initial payment was paid.
270. It is common ground that causation and loss should be approached on the basis that Ms Forster suffered (if anything) a loss of a chance. This is because recovery of the debt depended on the actions of third parties, namely Bleasdale and Cariss, who might submit to or contest the enforcement proceedings, and to a degree on what Coutts would have done with its priority charges over The Cedars and The Pines. The relevant questions are therefore: was there a real prospect of recovering sufficient monies from Bleasdale and Cariss by enforcing the First Tomlin Order, starting in October 2011; if so, what was the percentage chance of

that happening: see Perry v Raleys Solicitors [2019] UKSC 5; [2020] AC 352, per Lord Briggs at [20], [[21], approving Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602. If there was no real prospect of recovery, Ms Forster has suffered no loss and her claim must be dismissed.

271. It is obvious (with the benefit of hindsight) that Bleasdale and Cariss would not have rolled over and paid a further £700,000 if the First Tomlin Order had been turned into a judgment, whether on 14 October 2011 (the first hearing date) or on 28 October 2011. Nor would they have done so if threatened with bankruptcy. It is clear to me that they were determined to give Ms Forster nothing unless they had no real alternative. Mr Fennell was willing to accept that there was no reasonable prospect of a payment being made without enforcement measures. The £50,000 was only paid early in October 2011, in my judgment, to lend credibility to their argument, which RPC accepted, that given time they would be able to make full payment. RPC were willing to concede the further time if Bleasdale and Cariss agreed the quantum of costs and provided further security.
272. From the conversations that Bleasdale and Cariss had with Mr Ballinger and Mr Brown, it is obvious that they had in mind setting up a new business structure, which would be a rival to HCL. Bleasdale and Cariss were also defaulting on debts to others at the same time (including at least Xchangeteam), so they intended to retain money that they had to fund their new business venture, as well as the Colorado property development. Mr Ballinger's assessment in October 2011 of being very comfortable that they would pay proved to be a serious misjudgement.
273. The Cedars was on the market at this time at £6.75 million. It had previously been valued by Knight Frank at £7.5 million in June 2010 and marketed at that level but it had not sold. It is clear from documents provided later in the year that the Coutts debt secured on The Cedars was in the region of £4.5 million in October 2011. Goodman Derrick had a second charge securing £450,000 of fees. There was therefore probably equity of around £1.5 million in 2012, after costs of enforcement and sale, assuming that there was a normal 'unforced' open market sale process achieving a price of about £6.5 million.
274. The Pines was on the market for £4.75 million (having been purchased by Bleasdale and Cariss in late 2009 for £4.1 million and rented out at £14,000 per month (£168,000 per annum)). The secured debt was in the region of £3.5 million in October 2011. Mr Ballinger believed, after meeting Bleasdale and Cariss, that the combined equity in the properties was about £3.5 million, after allowing for Goodman Derrick's charge for £450,000. But that was on the basis of an unduly optimistic combined value of £12 million. Ms Forster rightly disagreed with his assessment that the equity was sufficient to cover all the debt.
275. It is unlikely, in my view, that The Pines would have sold, tenanted, for much more than Bleasdale and Cariss had paid for it. So there was probably equity of about £500,000 in The Pines in 2012, assuming a normal sale process.
276. The market was not strong in 2012 and did not get better. At later times, valuations were obtained by RPC and Coutts. These do not directly assist in assessing the likely equity in the properties in the period 2011-2013 but do give

some context. Matthews and Goodman did a desk top valuation for RPC in July 2015 valuing The Cedars at £6.25 million and The Pines at £5 million. At this time, Coutts were intending to sell them at £5.25 million and £4.1 million respectively, having obtained valuations at £5.75 million and £4 million in 2014. RPC sought to restrain the intended sales, contending that they were significant undervalues. Coutts' evidence in response asserted 'red book valuations' received in 2015 at £4 million for The Pines and £5.25 - £5.5 million for The Cedars. Offers received by Coutts were £4 million and £5.5 million respectively. There was no evidence of the prices at which the properties eventually sold.

277. From October 2011, Bleasdale and Cariss stopped paying the interest on the mortgages of The Cedars and The Pines, despite the income from the Pines being received by them. This is evident from the mortgage account bank statements, and has nothing to do with whether they were interest-only mortgages. As a result, the equity in those properties was significantly eroded between late 2011 and 2015, by an aggregate amount of over £1.2 million. Why Coutts allowed them an interest holiday for such an extended period is unclear, and was not explained in Coutts' evidence filed in 2015.
278. The position in late 2011 was therefore that the further payment of £700,000 due was secured by a third charge over The Cedars. Once a judgment had been entered and a charging order nisi obtained over The Pines, there would have been security over The Pines too, though not enforceable before an order absolute was made. Had RPC not agreed the quantum of costs, it was their intention to obtain an order for an interim payment on account of costs, pending the detailed assessment. That order, in addition to the £700,000 due, would probably have taken the total judgment debt to a level where it was not fully secured. A likely enforcement strategy would therefore have been to obtain and pursue the security over the properties initially, and then serve a statutory demand for the balance at a later stage, once Bleasdale and Cariss were in default of an interim payment order.
279. Ms Forster and RPC also knew in October 2011 that Cariss and (through Healthmark UK LLP) Bleasdale had 12 million shares in HCL worth, in mid-September 2011, £840,000 and trading at 7p per share. The original enforcement note prepared by Mr Ballinger dated 15 September 2011 had proposed seeking a charging order over Cariss's and Bleasdale's interests in Healthmark UK LLP, as a means of obtaining security over the HCL shares.
280. However, the enforcement position in relation to these shares rapidly deteriorated. By 27 September 2011, Mr Ballinger was told in a meeting with Bleasdale and Cariss that 2 million shares had been sold at 6p, 2 million were pledged to secure the debt over the Colorado property, and Coutts were requiring 4 million shares to be pledged. That left only 4 million shares. RPC did not seek to preserve them. By November 2011, a financial statement produced by Bleasdale and Cariss's solicitor showed that only 2.3 million shares remained, now valued at 3p (i.e. worth only £69,000). The £282,000 received for the shares most recently sold had vanished, save for £57,206 shown as a receipt in bank statements.
281. In my judgment, there were too many difficulties surrounding the HCL shares for there to have been a real chance of realising significant sums from them. RPC could have sought a charging order over Mr Cariss's shares in late October 2011,

but would not thereby have been in a position to realise them before about February 2012. By then, the value was very small, and the legal costs and costs of sale would have absorbed a significant proportion of the monies realised, if the shares could have been sold at market value at that time. The other shares were owned by Healthmark UK LLP and so enforcement would have been indirect, more complex and more time consuming. Without a freezing injunction, they would have been sold or charged before Ms Forster could sell them. By December 2011, almost all those shares had gone. Bleasdale and Cariss were determined to realise them for their own benefit, to keep them afloat while they set up their new business. Even acting promptly in October 2011, the remaining value of those shares would in my judgment have eluded Ms Forster.

282. The question is therefore whether The Cedars and The Pines could have been sold at open market values in 2012 if RPC had taken steps to enforce starting in October 2011.
283. There was nothing that Bleasdale and Cariss could realistically do to prevent the First Tomlin Order being turned into a judgment debt for the outstanding £700,000, or a charging order being obtained over The Pines. Ms Forster already had a charge over The Cedars and could have applied for possession or an order for sale. Coutts's prior rights were protected, but in principle sale by a professional third chargee should not have been viewed by Coutts as a threat, given their priority and the adequacy of the security.
284. When Ms Forster tried to make Cariss and Bleasdale bankrupt in 2013, they raised arguments designed to delay and obfuscate. These were: a counterclaim that Ms Forster had breached the terms of the First Tomlin Order, causing them huge losses (which was struck out by Master Leslie); an argument that Ms Forster had no standing as a creditor because RPC was entitled to all the debt (eventually rejected by ICC Judge Briggs); and an argument based on Giltspur's later involvement with Cedars Investments LLC (which was hopeless but confusing). As Mr Fennell argued, none of these would have had the slightest credibility if RPC on behalf of Ms Forster had been seeking to enforce in 2011 shortly after default by Bleasdale and Cariss.
285. Due process takes time, however, and it is unlikely that their objections would have been dealt with much before mid-2012 at the earliest. There was therefore every prospect that a sale of The Cedars would not have been achieved before the end of that year. By that time, 15 months of unpaid interest would have accrued on The Cedars mortgage, at about £12,500 per month, absorbing another £162,500 of the equity in that property. (The monthly unpaid interest on The Pines was at roughly double that level.)
286. There was nevertheless no reason in principle why The Cedars could not have been sold in that way, by early 2013, realising enough equity after payment to Coutts and Goodman Derrick to pay £700,000 to RPC. There was in my judgment a real prospect of that being achieved. As Mr Fennell submitted, with that much equity in The Cedars, the default undisputed, a legal charge already in place and the professional resources of a top City law firm to deploy, it would have been very surprising if attempts to realise £700,000 in 2011/2012 did not succeed. Mr Ballinger's considered opinion in his email to Ms Forster dated 3 October 2011



was that there was sufficient equity to recover the whole of the debt, not just the £700,000 immediately due. The failure of the trustees in bankruptcy to make progress in 2015/2016 with recovering assets is not, in my view, a good guide to whether specific enforcement for the benefit of one creditor over one property (or two) in 2011/2012 would have had success.

287. There were however undoubted risks and uncertainties. Bleasdale and Cariss could have created spurious arguments and fought tenaciously, with the effect of delaying the process of obtaining an order for sale of The Cedars. A delayed sale was likely to mean a lower price (as the values apparently fell from 2010 to 2015) and would mean less equity, owing to unpaid mortgage interest. The need to secure vacant possession prior to sale would also have affected the timing and the price obtainable, to some extent. There might have been significant difficulty finding a reliable buyer for The Cedars at a suitable price. Complications could have arisen once an interim costs order had been obtained by RPC and the total judgment debt was not then fully secured, leading to bankruptcy proceedings. Coutts could, for whatever reason, have sought to prevent Ms Forster obtaining possession, thereby delaying enforcement, though this would have been unlikely once bankruptcy proceedings had started. Coutts might, however, have insisted on having conduct of the marketing, with the risk that a lower sale price was achieved (as in fact happened in 2015). The chance of recovering £700,000 was clearly significantly less than 100%.
288. Given the amount of equity in The Cedars (and, if needed, The Pines), this is nevertheless a case where there should have been sufficient equity to realise £700,000. There was, according to Ms Milner, little other creditor pressure, even in 2015. But the real competition was Bleasdale and Cariss themselves, who were very determined to move assets beyond Ms Forster's reach, so far as they could. £2,533,290 was transferred to Cedars Investments LLP on 25 November 2011. The only assets that they could not move were the properties, though only the two UK properties were realistically within RPC's reach.
289. In my judgment, taking into account all the risks identified above, there was probably a slightly better than 50% chance of recovering £700,000 from Bleasdale and Cariss. I will assess it at 55%. I considered whether allowance should be made for the greater prospects of recovering lesser amounts than £700,000 – e.g. there would have been a better chance of recovering £450,000, which would have given Ms Forster £100,000 – but (a) assessing differential probabilities rather than one overall probability is inherently unreliable and (b) the scale of probabilities that I had in mind did not in any event make any significant difference to the ultimate value.
290. Mr Campbell submitted that Ms Forster's loss was nevertheless not caused by RPC's failure to enforce but by the intransigence and insolvency of Bleasdale and Cariss. He relied on the decision in Pearson v Sanders Witherspoon [2000] PNLR 110 that a solicitor did not owe a litigation client a duty to protect them against the insolvency of the defendant, unless such a duty was assumed. The submission is wrong in principle because what Ms Forster lost was not £350,000 but the chance of recovering that sum, which was directly attributable to RPC's breaches of duty. Given my conclusions about the value of Ms Forster's security, the insolvency of the debtors was in any event not the real cause of the loss: it was

the delay in realising the security. Further the decision in Pearson can hardly apply where, as here, there is a retainer to enforce any judgment obtained.

291. I therefore conclude that the chance that Ms Forster lost to enforce the First Tomlin Order was worth £192,500, being 55% of £350,000, and judgment will be entered in her favour for that sum.
292. I am grateful to Counsel and their instructing solicitors for the exemplary way in which the trial was prepared and conducted.