Neutral Citation No. [2014] NIQB 122

Ref: STE9424

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: 24-11-14

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

TOMASZ BARANOWSKI by his mother and next friend
ANNA BARANOWSKI

Plaintiff/Appellant:

-and-

MICHAEL RICE

Defendant/Respondent:

STEPHENS J

Introduction

[1] This is a plaintiff's appeal in relation to an order for costs made in the County Court on 25 April 2013 in favour of the defendant upon the plaintiff's claim being dismissed. The appeal is confined to the issue of costs, there being no appeal in relation to the dismissal of the plaintiff's claim. The plaintiff's claim arose out of a road traffic collision and the defendant, Michael Rice, was insured by Axa Insurance Limited ("Axa"). The policy of insurance included cover in respect of the costs of legal representation but allowed Axa to conduct the defence of any civil proceedings including appointing solicitors to act for the defendant. In exercising that power under the policy Axa instructed Campbell Fitzpatrick, solicitors and they in turn instructed Mr Spence of counsel to appear on behalf of the defendant.

[2] The plaintiff contends that an order for costs should not have been made as the fee arrangement between Axa and Campbell Fitzpatrick contravened either the indemnity rule in relation to costs or the rule based on public policy prohibiting contingency fees including what are now termed conditional fees, or both.

[3] I heard the appeal on Friday 24 October 2014 and on Friday 21 November 2014. All the facts in relation to the appeal were contained in the correspondence which had taken place between the plaintiff's solicitors and the defendant's solicitors after 25 April 2013. That correspondence was admitted in evidence without formal proof. There was no need for any further evidence. I heard legal submissions from counsel for the plaintiff and from counsel for the defendant.

[4] The day before the appeal was initially listed for hearing an application was made to the court by the plaintiff's solicitors for a stenographer to be permitted to be in court so that an immediate transcript could be prepared. I was not persuaded that there was any need for a stenographer to be present particularly given that the proceedings are digitally recorded and any party could apply to the office of the Lord Chief Justice for the release of a CD of the digital recording of the hearing. Such an application to the office of the Lord Chief Justice would have to be accompanied by undertakings and the payment of a fee. Normally the exact purpose to which the CD was to be put would have to be explained. It may be that it was anticipated by the plaintiff's solicitors that oral evidence would be given but even if that was so the amount of oral evidence and its anticipated lack of complexity could not justify the presence of a stenographer in court. I refused the application which was not renewed.

[5] Mr McCombe appeared on behalf of the plaintiff/appellant and Mr Montague QC and Mr Spence appeared on behalf of the defendant/respondent. I acknowledge the assistance that I received from counsels' written and oral submissions and in particular I acknowledge the professionally appropriate tone of all the submissions.

Factual background

[6] On 25 April 2013 the plaintiff's claim was dismissed and an order for costs was made in favour of the defendant in accordance with Order 55 of the County Court Rules (Northern Ireland) 1981. The order specified the amount of costs as £3,555.20 plus VAT. As will become apparent the amount of scale costs was in fact £3,475.20 inclusive of VAT and it is unclear as to why this larger sum was stated in the order of the County Court. Regardless as to the outcome of the main issues in this appeal the amount of costs recorded in the order was incorrect.

[7] Also on 25 April 2013 and subsequent to the hearing, Mr Spence submitted a fee note to Campbell Fitzpatrick in accordance with the County Court scale in respect of his fees.

[8] On 28 May 2013 Campbell Fitzpatrick sent a bill of costs to Axa which included the fee charged by Mr Spence and also their own professional fee in accordance with the County Court scale. The total fee amounted to £3,475.20 inclusive of VAT.

[9] Also on 28 May 2013 Campbell Fitzpatrick sent to JMK Solicitors, who were the plaintiff's solicitors, a bill of costs in the total sum of £3,475.20 inclusive of VAT which is exactly the same amount as Axa had been charged.

[10] By letter dated 12 June 2013 the plaintiff's solicitors asked Campbell Fitzpatrick to forward to them a copy of their terms of engagement with Axa. This was made available in redacted form on 2 July 2013. Due to the number of cases in which Campbell Fitzpatrick are engaged by Axa they do not have individual letters of engagement in relation to each case that they conduct but rather they enter into an overall agreement ("the agreement") and it was a redacted version of the agreement which was made available. Clause 4 of the agreement under the heading "Remuneration" states:

> "(Axa) will pay to (Campbell Fitzpatrick) fees at the rate set out in Schedule 3, subject to and in accordance with the provisions contained therein. These fees may be amended by (Axa) at its discretion."

Schedule 3 of the agreement in respect of County Court costs provides for remuneration at a:

> "… discount on current listed defence scale – potential of case".

The amount of discount has been redacted as commercially sensitive information. There was no challenge to that redaction. There are other provisions in schedule 3 for discounts in relation to multiple claimants arising out of the same accident. In addition Schedule 3 provides for remuneration in respect of a successful contest in the County Court so that the fee that is then applicable is:

> "full fee, defence scale"

and this is regardless as to whether there are multiple claimants arising out of the same accident.

[11] Upon receipt of the redacted copy of the agreement the plaintiff's solicitors contended that the amount of fees recoverable from the plaintiff should be reduced to the discounted amount it being perceived incorrectly that Campbell Fitzpatrick "claim two separate fees." That is one fee which entitles them to recover the discounted amount from Axa and another fee which entitles them to full scale costs from the plaintiff. In fact, unbeknownst to the plaintiff's solicitors, Campbell Fitzpatrick was entitled on the face of the agreement to charge Axa and to be paid by Axa the full scale fees regardless as to whether Axa were able to recover that amount from the plaintiff. Furthermore and again unbeknownst to the plaintiff's solicitors Campbell Fitzpatrick had already billed Axa for the full scale costs. The fact that on the face of the agreement Axa had an obligation to pay the full scale fees regardless

as to whether they could be recovered from the plaintiff is evidenced by the situation which occurs when a plaintiff is legally aided and his claim is dismissed with costs in favour of the defendant not to be enforced without further order. Campbell Fitzpatrick are entitled to and do bill Axa full scale costs despite there being no prospect of any recovery from the plaintiff. In this case Axa has paid Campbell Fitzpatrick the full amount of the costs contained in the fee note dated 28 May 2013. The identity of the person with the obligation to pay does not impact on the amount that Campbell Fitzpatrick charge. This is not an agreement that if Axa pays that Campbell Fitzpatrick charge one fee but that if the plaintiff has to pay then another fee is charged.

[12] The plaintiff's solicitors accepted in their letter dated 30 August 2013 that the higher fee is independent of who ultimately discharges the bill of costs. However, it was subsequently contended that the costs agreement with Axa was an unenforceable contingency fee arrangement in that the increased fee was dependant on success. That the plaintiff had an obligation to pay the costs which the defendant had incurred and that as the agreement between Axa and Campbell Fitzpatrick was against public policy and unenforceable that there was no obligation on the plaintiff to pay any costs or alternatively that no order for costs ought to have been made.

[13] On 27 February 2014 the plaintiff issued out of time a notice of appeal in relation to the costs order dated 25 April 2013. Time for appeal was extended by order of the Master dated 30 June 2014.

[14] Counsel's fee was not and could not have been subject to the agreement between Campbell Fitzpatrick and Axa. There was no contingency element to that fee. During the course of the initial hearing before me on Friday 24 October 2014 that was accepted and it is accepted that element of the defendant's costs has to be paid in any event by the plaintiff.

[15] The defendant is insured by Axa. The policy of insurance has not been introduced in evidence. I have referred to what I considered to be standard policy terms providing for legal representation for the insured. It is also apparent from the correspondence that the plaintiff was insured in respect of his legal expenses by Granite Insurance Services Limited. That policy of insurance has not been introduced in evidence. I was informed that this was an after the event insurance policy and insofar as it is relevant to this appeal the plaintiff's solicitors have stated in categorical terms that they have no agreement "with Granite Financial or otherwise" and "are instructed by the plaintiff".

[16] The scale fees marked by Campbell Fitzpatrick are prescribed by the County Court Rules. They are entirely appropriate professional fees representing adequate and appropriate remuneration for the professional work undertaken by that firm. Campbell Fitzpatrick has acted in accordance with the highest professional standards providing information to and also assisting the court in relation to the issues raised in this appeal. It was never suggested that by virtue of

having entered into the agreement they had in any way compromised their professional integrity in this case in the County Court or indeed in any other case in the County Court which they had conducted for Axa. It is accepted on behalf of the plaintiff and accordingly by Granite Financial Services Limited who will ultimately have to pay the plaintiff's costs, that if the appeal succeeds so that no costs are payable by the plaintiff, then this amounts to a windfall in favour of the plaintiff and in favour of Granite Financial Services Limited.

Legal principles

[17] The indemnity principle in its application to contentious business agreements is articulated in Article 65(3) of the Solicitors (Northern Ireland) Order 1976 which provides that:

> "(3) A client shall not be entitled to recover from any other person under an order for the payment of any costs to which a contentious business agreement relates more than the amount payable by him to his solicitor in respect of those costs under the agreement."

So if the contentious business agreement between Campbell Fitzpatrick and Axa is invalid being contrary to public policy no costs would be payable by Axa on behalf of the defendant to Campbell Fitzpatrick and Axa and the defendant could not recover any costs from the plaintiff.

[18] The leading authority in relation to contingency and conditional fees is *Awwad v Geraghty and Co* [2001] QB 570. The facts in that case were that in September 1993 a solicitor in the defendant firm entered into an oral contract to act for the plaintiff in libel proceedings. Under that oral agreement the solicitor agreed to charge her normal hourly rate if the plaintiff was successful in the litigation and the lower rate of £90 per hour if he were unsuccessful. The solicitor's letter confirming the retainer stated that she would charge at the rate of £90 per hour making no mention of the normal fee being payable on success. The absence of any reference to charging at her normal higher rate in the event of the plaintiff winning the litigation was attributable to the solicitor's desire to keep out of written correspondence any reference to an agreement which appeared to be prohibited by the Solicitors Practice Rules. The libel proceedings came to an end after the plaintiff accepted his opponent's payment into court. The solicitor then charged the plaintiff at the lower rate of £90 per hour. The plaintiff declined to pay on the basis that the fee agreement was unenforceable as a differential fee agreement. Rougier J found that the real agreement was the oral agreement and that as it was champerous the solicitor was not entitled to recover a penny. The defendant firm appealed and the leading judgment was given by Schiemann LJ with whom May LJ and Lord Bingham of Cornhill CJ agreed. The following can be taken from the judgments in that case:-

(a) Many professions operate with a concept of success fees but the position of solicitors and barristers is to a degree different in that they are regarded as owing a duty to the court which may require them to reveal to the court matters which it would be in the interests of their client to conceal. Accordingly the courts in the interests of the public and the administration of justice have on policy grounds held that contingent fees, including what are now called conditional uplift fees and conditional normal fees, are unlawful, see *Trendex Trading Corp v Credit Suisse* [1980] QB 629, 654, *Re Trepca Mines Limited (No. 2)* [1963] Ch 199, 219-220, and *Giles v Thompson* [1994] 1 AC 142, 161.

(b) There has been a public debate as to whether the policy should change and the background to the debate has been, on the one side, a historically widespread perception that if the lawyer has too much at stake in the success of the litigation then he may yield to the temptation to prolong litigation which could have been settled or to a temptation to act improperly in order to secure success, and on the other side, a conviction that it aids access to justice if clients can litigate without the fear of having to pay both sides costs if they lose.

(c) There are three categories of reward for success as follows namely:-

(i) Where the lawyer will recover some of the client's winnings ("a contingent fee").

(ii) Where the lawyer will recover his normal fees plus a success uplift ("a conditional uplift case").

(ii) Where the lawyer will only recover his normal fees ("a conditional normal fee case"). As can be seen a conditional normal fee entitles a solicitor to no more than his ordinary costs if he wins and he risks obtaining less if he loses.

(d) The public debate as to whether the policy should change has seen a shift from a situation in which both contingency fees and conditional fees were generally regarded as unprofessional to one in which conditional fees are regarded as acceptable in closely defined circumstances.

(e) That Parliament has increasingly intervened to modify common law and the courts enunciations of public policy arguments take place in a context which includes changing public perceptions as evidenced in legislation.

(f) The legislative statutory provisions in England and Wales were analysed. Those provisions are different from the statutory provisions applicable in Northern Ireland.

(g) The case law including *Thai Trading Company v Taylor* [1998] QB 781, *Hughes v Kingston-upon-Hull City Council* [1999] QB 1193, *Swain v The Law Society* [1983] 1 AC 598 and *Mohamed v Alaga and Co* [2000] 1 WLR 1815 were analysed.

(h) In 1993, the date upon which the plaintiff and the solicitor entered into the fee agreement and at common law sums on the face of the agreement due under a conditional normal fee agreement were irrecoverable unless sanctioned by statute see 587H, 588A-B and 593C.

(i) That the court should be reluctant to develop the common law when Parliament was in the process of addressing public policy issues. The courts cannot fully probe, analyse or assess: it being legislative not forensic work. Alternatively, per May LJ, that any individual judge cannot readily or convincingly be regarded as representing a consensus sufficient to sustain a change in public policy. (At paragraph 41 of *Sibthorpe and Morris v London Borough of Southwark* [2011] EWCA Civ 25 Lord Neubergur MR stated that "There is also much to be said for a properly funded legal profession, which has no need to have recourse to conditional fees or contingency fees or the like. It is a matter for the legislature if such arrangements are thought to be necessary for economic or other reasons, and, if they are so necessary, then it is for the legislature to decide on their ambit.")

(j) That the Solicitors Practice Rule made under Section 31 of the Solicitors Act 1974 by the Council of the Law Society with the concurrence of the Master of the Rolls are secondary legislation having force of statute, see *Swain v Law Society* [1983] 1 AC 598.

[19] The decision in *Awwad v Geraghty and Co* being a decision of the Court of Appeal in England and Wales is not binding in this jurisdiction but the Court of Appeal in Northern Ireland has adopted the practice of following the decisions of the English Court of Appeal where it has pronounced upon a topic in certain defined circumstances, see *Beaufort Developments v Gilbert-Ash* [1997] NI at 155, *McGuigan v Pollock* [1955] NI 74 at 107, *Re McKiernan* [1985] NI 385, *Re Donaghy* [2002] 5 BNIL 84, *Donnelly v Donnelly* [2002] NI 319 at 324d, *Re Staritt; re Cartwright* [2005] NICA 48 [2006] NIJB 249, *Fermanagh District Council v Gibson (Banbridge) Ltd* [2013] NIQB 117, at [26], *Breslin and others v McKevitt, Real IRA, Campbell. Murphy and Daly* [2011] NICA 33 [2011] 7 BNIL 75.

[20] I apply the principles set out in *Awwad* and doing so requires this court to address two questions:-

(a) Whether at common law in 2012/2013, which I assume was the date of the agreement between Campbell Fitzpatrick and Axa, sums due on the face of the agreement were irrecoverable.

(b) Whether a conditional normal fee agreement of the type entered into between Campbell Fitzpatrick and Axa has been sanctioned by statute.

Two of the potential routes for a conditional normal fee agreement to be sanctioned by statute are first by legislation enacted by the Northern Ireland Assembly and secondly by Regulations made under Article 75 of the Solicitors (Northern Ireland) Order 1976.

The comparative position in England & Wales, Scotland and Ireland

[21] Before addressing those two questions and given the industry of counsel in researching the comparative position in other jurisdictions I briefly summarise the legislative and judicial approach adopted in England & Wales, Scotland and Ireland.

[22] In England and Wales there were extensive legislative reforms which in the event were perceived to have been unsuccessful and have led to further changes. The legislative sequence commences with section 59 of the *Solicitors Act 1974* which is in similar terms to Article 64 of *the Solicitors (Northern Ireland) Order 1976*. The law was then changed in England and Wales by virtue of the *Courts and Legal Services Act 1990*. Section 58 permitted conditional fee agreements but not as between the parties. Under that legislation a success fee of up to 100% could be recovered but only from the client and not from the opponent. However a further change was introduced by the *Access to Justice Act 1999* which allowed that additional liabilities including a success fee would be recoverable from the opponent. That Act was followed by the *Conditional Fee Agreements Act 2000, the Collective Conditional Fee Arrangements Act 2000 and the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003*. The consequence appears to have been an increase in satellite litigation and an increase in costs. *The Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003* were revoked in 2005. Lord Justice Jackson reported in 2010 recommending ending recoverability of additional liabilities including success fees as between the parties to the litigation. That recommendation was accepted by the government. *The Legal Aid Sentencing and Punishment of Offenders Act 2012 and the Conditional Fee Agreements Order 2013* made additional liabilities in all but insolvency work, mesothelioma claims and limited after the event insurance in clinical negligence claims irrecoverable as between the parties. A success fee may be recoverable from the client but this must not exceed 25%.

[23] In Scotland Section 61A(3) of the *Solicitors (Scotland) Act 1980* permits solicitors to act on a speculative basis. The *Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992* provides that a solicitor can enter into a speculative fee arrangement with a client where it is agreed that the solicitor shall be entitled to a fee

for the work only if the client is successful in litigation. The client cannot recover the success element from the opponent.

[24] In Ireland the *Solicitors (Amendment) Act 1994* prohibits a contingency fee arrangement (except for a debt recovery) if the fee is calculated as a specified percentage or proportion of any damages awarded. A conditional normal fee agreement is not prohibited and is permitted at common law see *Fraser v Buckle* [1996] 1 IR 1, *McHugh v Keane* unreported 16 December 1994 and *Synnott v Adekoa* [2010] 1 IEHC 29 January 2010. See also the position in relation to after the event insurance in *Greenclean Waste Management Limited v Maurice Leahy & Co Solicitors (No 2)* [2009]. A different approach was taken by the courts in Ireland developing the common law than was taken by the courts in England and Wales in *Awwad* it being stated in *Fraser v Buckle* that

> "The law can develop to ameliorate the strictness of an existing precept of the common law, thereby implicitly acknowledging that the courts may modify the doctrine of champerty."

The competition authority in Ireland in its report dated December 2006 entitled "Competition in Professional Services: Solicitors and Barristers" at paragraph 5.100 that conditional fee agreements are not uncommon in Ireland and were regarded by the authority as "an important aspect of access to justice and a usual market feature."

[25] In England and Wales, Scotland and Ireland there have been reforms. In relation to a normal conditional fee agreement in none of those jurisdictions would the outcome be that no costs would be recoverable from the losing party. The outcome sought by the plaintiff in this case could not be achieved in any of those jurisdictions and such an outcome would be unique to Northern Ireland. In all of those jurisdictions and at the very least, the successful defendant would be entitled to recover the reduced fee as opposed to the normal fee from the unsuccessful plaintiff.

Conditional normal fee agreement at common law

[26] For the reasons set out in *Awwad* I consider that the sums due under the conditional normal fee agreement entered into between Campbell Fitzpatrick and Axa are irrecoverable unless sanctioned by statute. I emphasise that this is on public policy grounds and it is no reflection at all on the probity or professional integrity of the particular firm involved in this case.

Potential sanction of a conditional normal fee agreement by legislation enacted by the Northern Ireland Assembly

[27] The inquiry then turns to whether the conditional normal fee agreement has been sanctioned by statute, by for instance one of those two potential routes. I will

first consider legislation enacted by the Northern Ireland Assembly and then consider Regulations made under Article 75 of *the Solicitors (Northern Ireland) Order 1976*.

[28] Article 3(2) of the *Solicitors (Northern Ireland) Order 1976* provides that:

> "contentious business" means business done, whether as solicitor or advocate, in or for the purposes of proceedings begun before a court (including the Lands Tribunal) or before an arbitrator. . . , not being business which falls within the definition of non-contentious probate business contained in Article 2(2) of the Administration of Estates (Northern Ireland) Order 1979."

So within the definition of "contentious business" would be for instance, road traffic and employers liability litigation. However "contentious business" is much wider than that and would include criminal proceedings and family proceedings. It is clear that the nature of the business the subject of the agreement between Campbell Fitzpatrick and Axa was contentious business within Article 3(2).

[29] The *Solicitors (Northern Ireland) Order 1976* then makes provisions as to agreements between a solicitor and a client in relation to contentious business. These are termed contentious business agreements. Article 3(2) provides that a "contentious business agreement" means an agreement made in pursuance of Article 64 and so the enquiry then turns to that Article which under the heading "Contentious business agreements" states:

> **"**Subject to paragraph (2), a solicitor may make an agreement in, or evidenced by, writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him providing that he shall be remunerated by a gross sum, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated.**"**

This enables a solicitor to enter into a range of agreements as to remuneration with his client and apart from Article 64(2), would amount to a statutory sanction of a conditional normal fee agreement of the type the subject of the agreement between Campbell Fitzpatrick and Axa.

[30] However, Article 64(2)(b) qualifies the agreements which are valid by providing:

> "Nothing in a contentious business agreement shall give validity to—
>
> (a)…; or
> (b) any agreement by which a solicitor retained or employed to prosecute any action or other contentious proceeding, stipulates for payment only in the event of success in that action or proceeding; or
> (c) … ."

If Article 64(2)(b) applies then not only has a conditional normal fee agreement of the type entered into between Campbell Fitzpatrick and Axa not been sanctioned by statute its invalidity at common law has been specifically maintained.

[31] Article 64(2)(b) states that it applies to a solicitor:

> "retained or employed to *prosecute* any action or other contentious proceedings" (emphasis added).

In this case Campbell Fitzpatrick was retained or employed "to defend" contentious proceedings. By way of contrast in England and Wales Rule 8(1) of the Solicitors Practice Rules 1990 were amended to include the words "or defend". No similar amendment has been in Northern Ireland to Article 64(2)(b). Accordingly the question arises as to whether the qualification in Article 64(2)(b) only applies to solicitors engaged on behalf of plaintiffs. I consider that this would be an unexpected result as the public policy reasons are equally applicable to a solicitor acting for a plaintiff as for a solicitor acting for a defendant. There could be no valid reason why contingency fees or conditional normal fees would be sanctioned for a defence solicitor but not for either a plaintiff's solicitor or for a defence solicitor who is instructed to counterclaim. Furthermore if that was so then contingency fees or conditional fees would be sanctioned for the defence in both criminal proceedings and in family proceedings which would be entirely inappropriate.

[32] The verb "prosecute" includes the following meanings:

1. Follow up or pursue (an inquiry, studies, etc.): persist in or continue with (a course of action or an undertaking) with a view to its completion.
2. Examine, investigate: consider or deal with (a subject) systematically or in detail.
3. Pursue (a fugitive): chase (a person) with hostile intent.
4. Treat (a person etc.) with regard, disrespect, etc.
5. Engage in, practise, or carry on (a trade, pursuit, etc.).
6. Follow up (an advantage); take advantage of (an opportunity).
7. Institute or conduct legal proceedings against (a person); call (a person) before a court to answer a criminal charge. Institute or conduct legal proceedings in respect of (a crime, action, etc.).

8. Seek to gain or achieve (a desired result); strive for.
9. Persecute: harass.
10. Follow in detail: to go into the particulars of, investigate: to deal with in greater detail.

The seventh meaning is generally used in criminal proceedings for the initiator of criminal proceedings but the meanings are equally appropriate in civil proceedings to describe both the initiator of the civil proceedings and also those who defend the claim by for instance going into the particulars of the claim, by investigating the claim and by dealing with the claim in greater detail. In that sense one can prosecute the defence of contentious proceedings in civil, criminal and family proceedings.

[33] Order 3, Rule 6 of the Rules of Court of Judicature (Northern Ireland) 1980 provides for a notice of intention to proceed where a year or more has elapsed since the last proceeding in a cause or matter. There is a line of authority in Northern Ireland in relation to the definition of proceedings including *Glass v Glass* [1956] NI 119, *Donnelly v Gray* NIJB October 1970, *McMullan v Wallace and another* [1977] NI 1 and *Harland & Wolff Ship Repair and Marine Services Limited v Stolt Off Shore Services SA* [2001] NIQB 2. It is clear that both a plaintiff and a defendant can proceed with contentious business. Ultimately a proceeding is something which advances the action or calls for any preparation or reply from the other side, see *Allen v Redland Tile Company (NI) Limited* [1973] NI 75 at 79 line 10. I consider that either party can proceed with an action or advance an action or call for preparation or reply from the other side. In that sense a solicitor engaged by a defendant proceeds with or prosecutes an action at the very least by going "into the particulars of" "investigating" or "dealing with" it in "greater detail".

[34] Accordingly, I consider that both a defence solicitor and a plaintiff's solicitor "prosecute" an action within the meaning of Article 64(2)(b) and that Article applies equally to both of them. This means that there is no statutory sanction for a conditional normal fee agreement to be found in Article 64 of the Solicitors (Northern Ireland) Order 1976.

[35] Part III of the *Access to Justice (Northern Ireland) Order 2003* provides for Conditional fee and litigation funding agreements but the relevant parts of the legislation have not been commenced. If they had been then the conditional normal fee agreement in this case would have been sanctioned by statute. It is useful to consider the terms of Part III because it provides definition to the precise circumstances in which a conditional normal fee agreement would be sanctioned and it also provides regulation and control for the protection of the client and the proper administration of justice.

[36] Article 37 of the *Access to Justice (Northern Ireland) Order 2003* defines "a conditional fee agreement" as "an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances." Article 38 then provides that a

conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this Article shall not be unenforceable by reason only of its being a conditional fee agreement; but (…) any other conditional fee agreement shall be unenforceable. The conditions are that (a) it must be in writing; (b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and (c) it must comply with such requirements (if any) as may be prescribed. Article 38(3) then sets out further conditions which are applicable to a conditional fee agreement which provides for a success fee, namely (a) it must relate to proceedings of a description specified by order made by the Lord Chancellor; (b) it must state the percentage by which the amount of fees which would be payable if it were not a conditional fee agreement is to be increased; and (c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor. Article 39(1) sets out the proceedings which cannot be the subject of an enforceable conditional fee agreement namely (a) criminal proceedings; and (b) family proceedings. "Family proceedings" means proceedings under any one or more of the following (a) the Matrimonial Causes (Northern Ireland) Order 1978; (b) the Domestic Proceedings (Northern Ireland) Order 1980; (c) the Adoption (Northern Ireland) Order 1987; (d) Part IV of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989; (e) Parts II, III, V and XV of the Children (Northern Ireland) Order 1995; (f) the Family Homes and Domestic Violence (Northern Ireland) Order 1998, (g) Chapter 2 of Part 4 of, or Schedules 15, 16 or 17 to the Civil Partnership Act 2004, (h) Schedule 1 to the Forced Marriage (Civil Protection) Act 2007, and the inherent jurisdiction of the High Court in relation to children.

[37] As I have indicated these provisions in the *Access to Justice (Northern Ireland) Order 2003* have not been commenced. This litigation should not operate to affect a commencement order in respect of them.

[38] Accordingly, having considered both the *Solicitors (Northern Ireland) Order 1976* and the *Access to Justice (Northern Ireland) Order 2003* and having held that neither of them sanctions a conditional normal fee agreement of the type entered into between Campbell Fitzpatrick and Axa I hold that one of the routes of obtaining a statutory sanction has been exhausted and the invalidity of such an agreement has been specifically maintained by Article 64(2)(b) of the *Solicitors (Northern Ireland) Order 1976*.

Potential sanction of a conditional normal fee agreement by Regulations made under Article 75 of the Solicitors (Northern Ireland) Order 1976

[39] The second route of obtaining statutory sanction is under Regulations made under Article 75 of the *Solicitors (Northern Ireland) Order 1976*. Article 75 provides that the Society with the concurrence of the Lord Chief Justice may make Regulations with respect to any matter which under this Order may or is to be prescribed or is to be provided for by Regulations. One of the matters which is to be provided for by Regulations is set out in Article 26(1), namely the Society may make Regulations as

to the professional practice, conduct and discipline of solicitors. Regulations made in that way are secondary legislation having force of statute, see *Swain v Law Society* [1983] 1 AC 598.

[40] Exercising that power to make Regulations the Society with the concurrence of the Lord Chief Justice and for the purposes mentioned in Article 26(1) has made the *Solicitors Practice Regulations 1987 (as amended)* and the *Solicitors' Practice (Cross-Border Code of Conduct) Regulations 2006*. I will deal with each of those Regulations in turn.

[41] Regulation 2(2) of the *Solicitors Practice Regulations 1987 (as amended)* defines a contingency fee as meaning:

> "A fee for services rendered in connection with contentious business which is only payable in the event of the *proceedings* to which the services relate being successful."(emphasis added)

Accordingly a contingency fee relates to proceedings and as is apparent from the authorities set out in paragraph [33] of this judgment the successful outcome of proceedings can apply equally to the plaintiff and to the defendant. Regulation 17 then provides that:

> "A solicitor shall not accept instructions in respect of any claim or in relation to any matter in circumstances or under any arrangement whereby he will receive, in respect of such claim or matter a contingency fee; …"

That part of Regulation 17 prohibits all contingency fees whether a solicitor is employed to prosecute or to defend. This means that there is no statutory sanction for a conditional normal fee agreement to be found in the Solicitors Practice Regulations 1987 (as amended). Furthermore there is a statutory prohibition on a solicitor accepting instructions in respect of claim or in relation to any matter in circumstances whereby he will receive, in respect of such claim or matter a contingency fee.

[42] I also consider that there is no statutory sanction for a conditional normal fee agreement to be found in the *Solicitors' Practice (Cross-Border Code of Conduct) Regulations 2006*. This is not a cross-border case and those Regulations do not apply. The Regulations if they did apply do refer to the Code of Conduct for lawyers in the European Community adopted by the Bars and Law Societies of European Community on 19 May 2006. The Council of Bars and Law Societies of Europe (CCBE) has adopted two foundation texts including the Code of Conduct for European Lawyers ("the Code"). The Code was originally adopted on 28 October 1988 and was last amended at the plenary session on 19 May 2006. In section 3 which is headed "Relations with Clients" and at 3.3.1 - 3.3.3. the Code states:

> "3.3. Pactum de Quota Litis
>
> 3.3.1. A lawyer shall not be entitled to make a pactum de quota litis.
>
> 3.3.2. By «pactum de quota litis» is meant an agreement between a lawyer and his client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter.
>
> 3.3.3. The pactum de quota litis does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of competent authority having jurisdiction over the lawyer."

The commentary to the code goes on to state:

> "Commentary on Article 3.3 – Pactum de Quota Litis
>
> These provisions reflect the common position in all Member States that an unregulated agreement for contingency fees (pactum de quota litis) is contrary to the proper administration of justice because it encourages speculative litigation and is liable to be abused. The provisions are not, however, intended to prevent the maintenance or introduction of arrangements under which lawyers are paid according to results or only if the action or matter is successful, provided that these arrangements are under sufficient regulation and control for the protection of the client and the proper administration of justice."

[43] The Code is no different in effect than the legal position as set out in *Awwad* namely that contingency and conditional fees are unlawful unless sanctioned by statute.

[44] Accordingly, the second route for obtaining a statutory sanction has been exhausted.

Conclusion

[45] I consider that the agreement between Campbell Fitzpatrick and Axa is a conditional normal fee agreement payable on success and on policy grounds is unlawful, which remains the position as it has not been sanctioned by statute. Accordingly, no costs are due from Axa to Campbell Fitzpatrick except in relation to counsel's fees and under the indemnity principle no order for costs should have been made against the plaintiff except in relation to counsel's fees. I accordingly allow the appeal so that the order for costs is restricted to a requirement that the plaintiff pay the defendant's counsel's scale fees.

[46] I will hear counsel in relation to the costs of this appeal.

[47] Article 60 (3) of the County Courts (Northern Ireland) Order 1980 provides that the decision of the High Court on an appeal under that Article from the County Court shall be final. That is however subject to Article 62 which provides that the High Court may, upon the application of a party, state a case for the opinion of the Court of Appeal upon a point of law arising on an appeal under Article 60, see *Valentine, County Court Procedure*, paragraphs 19.87 and 20.70-71. I will hear counsel in relation to any application to state a case for the opinion of the Court of Appeal.