Neutral Citation Number: [2024] EWHC 531 (KB)

Case No: QA-2020-000157

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2024

Before:

MR JUSTICE FREEDMAN

- -

Between:

CHIKE-C ONYEARI

Claimant

- and –

CHURCHIL LIMITED

Defendant

THE UNDERWRITING MEMBERS OF RIVERSTONE SYNDICATE 3500 (SUING AS REPRESENTATIVE OF THE UNDERWRITING MEMBERS OF ARGO SYNDICATE 1200 FOR THE 2014 UNDERWRITING YEAR, THE UNDERWRITING MEMBERS OF SYNDICATE 2015 FOR THE 2014 UNDERWRITING YEAR AND ALL SYNDICATE MEMBERS UNDERWRITING POLICY NO PSD02100723
CHURCHIL LIMITED

Interested Party

- and –

Case No: KB-2022-004071

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BETWEEN:

THE UNDERWRITING MEMBERS OF RIVERSTONE SYNDICATE 3500 (SUING AS REPRESENTATIVE OF THE UNDERWRITING MEMBERS OF ARGO SYNDICATE 1200 FOR THE 2014 UNDERWRITING YEAR, THE UNDERWRITING MEMBERS OF

SYNDICATE 2015 FOR THE 2014 UNDERWRITING YEAR AND ALL SYNDICATE MEMBERS UNDERWRITING POLICY NO PSD02100723

Claimant

- and –

(1) MR CHIKE CHUKWUKERE CHINEDU ONYEARI
(2) CHURCHIL LIMITED

Defendants

- -
- -

Mr Onyeari appeared in person for himself in the 2020 action 000147 and for himself and the Company in the 2022 action number 004071 (The solicitor for Mr Onyeari in the 2020 action and for the Defendants in the 2022 action are Charles Hill & Co)

Mr Jason Evans-Tovey (instructed by DWF Law LLP) for the Interested Party in the 2020 action 000147 and for the Claimant in the 2022 action number 004071

Hearing dates: 17 and 18 October 2023
Post-hearing submissions: 26 October 2023 and 1 November 2023
Judgment handed down in draft: 12 February 2024

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Approved Judgment

This judgment was handed down remotely at 12 noon on 8 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FREEDMAN :

I Introduction

1. On 5 November 2018, Mr Onyeari brought a claim against Churchil Limited ("the Company"), alleging negligence and/or breach of statutory duty. Mr Onyeari alleged that:

   (i) on 28 September 2015, he knocked over a drink and fell trying to prevent the spillage (or he fell due to the spillage) and injured his left knee and bruised his head on a wall;

   (ii) on 9 November 2015, a scar on the back of his head caused by that fall was cut by the headrest of his own office chair.

2. When the case was reported to the Underwriters, in what would be described as an "extraordinary" document, liability was admitted on behalf of the Company by a document dated 25 July 2018 through Mr Chinonye, a director of the Company, who would be found to be acting under the controlling mind of the Company: see the judgment striking out the claim at [29].

3. By its defence, the Company stated that Mr Onyeari was the controlling mind of the Company; he was the person who was solely responsible for his injuries (if anyone was at fault). It was said that the claim was circular and contrary to public policy, since Mr Onyeari was relying on his own failings to make his claim and then to recover money under a third-party insurance policy: see Defence [4-5].

4. There was an application to strike out under CPR 3.4(2) and, in the alternative, a claim for summary judgment under CPR 24. The matter was heard by HH Judge Lethem, who in a judgment given on 2 June 2020, struck out the claim under CPR 3.4(2)(a) and (b). The Judge said that if he had not struck out the claim, he would have ordered summary judgment.

5. The strike out was on the basis that Mr Onyeari was the controlling mind of the Company and that the action was seeking to hold the Company liable for the failings of Mr Onyeari. Mr Onyeari was a shareholder of the Company and at all material times he was the principal director of the Company and its controlling mind. A part of the reasons for the Judge to reach the decision which he did was the case of *Brumder v Motornet Service & Repairs Ltd* [2013] EWCA Civ 195; [2013] 1 WLR 2783 (*"Brumder"*).

6. On 24 July 2020, HHJ Lethem made various consequential orders including a direction for payment of the costs of the action, to be the subject of detailed assessment if not agreed, save for a particular head of costs. He ordered a payment on account of costs of £20,000. He determined and certified that the claim was totally without merit. DWF wrote to Mr Onyeari to the effect that the outlay of costs had been in the region of £75,000.

7. Since then, Mr Onyeari has taken steps to seek to avoid having to pay such costs including:

   (i) the Company purporting to change its legal representation away from the solicitors appointed by insurers;

   (ii) the Company passing a resolution dated 6 August 2020;

   (iii) Mr Onyeari seeking to appeal the orders of HH Judge Lethem;

   (iv) the Company causing Calver J to grant a Tomlin Order discharging the costs liability;

   (v) the Company seeking unless orders in respect of detailed assessments.

8. The appeal came before Picken J in April 2023. On that occasion, it was determined that all matters (including the appeal) should be addressed together, and further directions were given. Before this Court, there have been considered a number of applications as follows:

   (i) **Permission Application**: Mr Onyeari's application dated 19 August 2020 for an extension of time for a Notice of Appeal and for permission to appeal the orders of HHJ Lethem.

   (ii) **Set Aside Application**: the interested parties' (Underwriters') application dated 14 July 2021 (sealed on 26 October 2021) to set aside the Tomlin Order made by Calver J on paper and without a hearing dated 28 June 2021.

   (iii) **Amendment Application:** Underwriters' application dated 17 March 2023 to tidy-up by amendment the Interested Parties' (Underwriters') Part 8 claim.

   (iv) **Part 8 Claim**: Underwriters' Part 8 claim for various declarations as to their rights under an employer's liability insurance policy and specific performance and/or damages.

9. The case has generated a vast amount of paperwork and arguments. There were issues, with numerous files for the above applications, files of authorties and over 100 pages of written submissions. There were two full days of argument. Although Mr Onyeari made submissions for at least a court day, the Court made an order allowing him to supplement certain aspects of his submissions which led to further skeleton arguments (although briefer of Mr Onyeari dated 26 October 2023 and of Mr Evans-Tovey dated 1 November 2023). I shall refer to them as the post-hearing submissions.

II Background

10. Returning to the personal injury claim against the Company for negligence and/or breach of statutory, the Underwriters say that the reality is that Mr Onyeari's intention was to recover financial compensation against a combined policy of insurance ("the Policy") providing, amongst other things, employer's liability cover.

11. Exercising their rights under that Policy, the Underwriters instructed DWF Law LLP ("DWF") to act on behalf of the Company in defence of Mr Onyeari's claim in the County Court. One consequence was that, with Underwriters' written consent, legal costs and expenses were incurred on the Company's behalf defending Mr Onyeari's claim.

12. On 2 June 2020, HHJ Lethem struck out Mr Onyeari's claim pursuant to CPR 3.4(2) and ordered:

> *"4. [Mr Onyeari] shall pay the Defendants' costs of the claim, to be summarily assessed at the next hearing".*

13. The next hearing took place on 24 July 2020 when HHJ Lethem made various consequential orders including a direction for payment of the costs of the action to be paid by Mr Onyeari to the Company, to be the subject of detailed assessment if not agreed, save for a particular head of costs. An order was made for a payment on account of costs of £20,000. DWF wrote to Mr Onyeari to the effect that the outlay of costs had been in the region of £75,000.

III Post judgment matters

(a) Resolution of the Company of 6 August 2020

14. On 29 July 2020, Mr Chinonye was appointed a director of the Company. On 6 August 2020, a resolution was passed by the Company in the following terms:

> *"The legal representatives of the Company and the Insurer bring this matter to an end at no legal costs to Mr Onyeari, and THAT any such costs be covered through the Company's legal expenses insurance held with the Insurer.*
>
> *The Company has the benefit of legal expenses insurance and hereby instructs the Insurer to settle the legal expenses with the legal representatives and bring this matter to an end.*
>
> *In the light of the money the Company owes Mr Onyeari his liability for the Company's debt takes this into account and also takes account of the fact that he is a shareholder and director of the Company*

The Company reserves the right to publish this resolution and make it available for the public."

15. The Underwriters draw attention to the following matters, namely:

(i) this resolution was only 13 days after the costs order made against Mr Onyeari;

(ii) the resolution was not with any involvement on the part of the Insurer or DWF who acted for the Company at the instigation of the Insurer, contrary to the first paragraph;

(iii) it was not available to the Company to instruct the insurers to settle the legal expenses and bring the litigation to an end, contrary to the second paragraph;

(iv) there is a recital which contends that the amounts lent by Mr Onyeari are being forgiven which comprises a sum of in excess of £69,000 and is the entirety of the debts of the Company. The Underwriters say that there has not been evidence provided to support the existence or extent of this indebtedness.

(b) Appeal notice

16. In June 2020, an unsealed copy of an Appellant's Notice was served on DWF as solicitors for the Company. On 17 August 2020, an Appellant's Notice was received by the QBD Appeals Office. It was issued on 19 August 2020. Mr Onyeari seeks permission to appeal against the order of HHJ Lethem, an extension of time for filing the Appellant's Notice and the stay of the order as to costs pending the outcome of the appeal.

(c) Detailed Assessment – 15 November 2020

17. Still concerned about the costs orders against him, on 15 November 2020, Mr Onyeari made an application for an unless order in relation to detailed assessment of the costs orders made by HHJ Lethem. This became overtaken by the subsequent dispute between the parties, and so there has not been an assessment.

(d) Notice of change of solicitors

18. In March 2021, DWF was still on record for the Company in the underlying proceedings, and it sought agreement in respect of various orders including the payment of costs in a letter dated 2 March 2020 (in fact, meant to be 2 March 2021). On 29 March 2021, an N434 "Notice of change of legal representative" was filed. It appears from its face to have been served on behalf of the Company because (a) it was saying that DWF Law LLP had ceased to act (and it is or was the legal representative

on behalf of the Company), (b) it did not name that the person signing was acting on behalf of Mr Onyeari or the Company, but it must have been on behalf of the Company because the person signing was doing so as a director on behalf of a firm or company, and (c) that person appears to have been Mr Chinonye, by then a director of the Company. By that N434, the following was stated: "1(We) *have served notice of this change on every party to the claim and on the former legal representative)"*.

19. That statement was untrue. DWF had not been served. It is apparent not only from the evidence of Mr Donnelly that it was not served, but also from the correspondence of Mr Donnelly with the Court office of July and August 2021 (exhibited to his amended first witness statement) after receipt of the Tomlin order, to which reference will shortly be made. On 16 July 2021, he said *"so far as I am aware my firm is still the solicitor on record acting for Churchil in the underlying County Court proceedings and so I am presently unaware of how this order of Mr Justice Calver dated 28 June 2021 came to be made seemingly by consent"*. Notice of change was first received by DWF almost a year later on 11 March 2022. Mr Onyeari has contended that service took place at the time, but it is clear from the above-mentioned contemporaneous correspondence that the notice of change was not served. Had it been served, not only would there not have been the above-mentioned correspondence, but it would have prompted an immediate reaction and protest from DWF, who would have become concerned about the insurers' right of recovery becoming impaired.

(e) Tomlin order

20. On 28 June 2021 a Tomlin order was made, approved by Mr Justice Calver. It was stated at the top of the order *"the Appellant and the Respondent having agreed the terms set out in the schedule."* In the usual format, it ordered by consent that:

> *"all proceedings are stayed on the terms set out in the attached schedule except for the purpose of enforcing the terms of the agreement set out in the attached schedule"*.

21. Before 28 June 2021, a Tomlin order was applied for in reliance on the N434 form. It is not clear who wrote to the Court seeking the order. On 28 June 2021, Calver J granted a Tomlin order on paper and without a hearing.

22. The Schedule provided as follows:

> *"1. [Mr Onyeari] shall forfeit rights to claim monies and interest owed to him by the [Company] which includes monies owed to him as quantified in the director's loan account.*
>
> *2. [Mr Onyeari] shall stay his appeal against the judgments of HHJ Lethem of 2 June 2020 and 24 July 2020.*

> *3. [Mr Onyeari's liability to the [Company] arising from the Judgments [of HHJ Lethem of 2 June 2020 and 24 July 2020] is discharged.*
>
> *4. [The Company] shall indemnify [Mr Onyeari] against any liability to third parties."*
>
> *5. The [Company] not to hinder [Mr Onyeari's] right to enforce third party indemnity as resolved by the [Company].*
>
> *6. Full and final settlement."*

23. Particulars of the monies alleged to be quantified in the director's loan account were not given. Further, even on Mr Onyeari's case, there was a mismatch between the amount of Mr Onyeari's liability for costs which DWF had stated were in the region of £75,000 and the alleged sum due to Mr Onyeari of £59,328. The evidence of the accounts was that in the accounts for the year ended 30 September 2018, the amount said to be falling due within a year had been £67,463 and the amount falling due in over a year £208. In the year ended 30 September 2019, the amount falling due within a year was £12,723 and the amount falling due in over a year was £59,328. Mr Onyeari's case, as to which no documents have been provided to the Court, is that the entirety of the sum of £59,328 was owed to Mr Onyeari. He referred in oral submissions to the tenancy agreement being in his name and his being liable to pay the rent, but this was not supported in documents provided to the Court, despite a plethora of documents before the Court. There was simply reliance on the company accounts, which was obviously inadequate. It is also difficult to see how and when that liability was incurred given the sudden rise in the amount falling due in over a year from £208 to £59,238.

24. It is the case of Mr Onyeari that the Tomlin order is effective, and that in consequence he does not owe money to the Company under the costs order. It is the Underwriters' case that the Tomlin Order should be set aside, and that if it is, the Tomlin Order the Company has not waived or otherwise discharged the costs orders in its favour against Mr Onyeari. If the Tomlin order has been effective, and on that premise, Mr Onyeari said that he withdrew the application for permission to appeal against the costs order. The reason for this is that the costs order would then have fallen away as a result of the Tomlin Order.

25. The position of Mr Onyeari in respect of the appeal has been rather confused. In a skeleton argument of 15 May 2023, he appeared to accept that the appeal had not just been stayed, but that it had been settled. He said that *"I will not be pursuing the appeal should the Tomlin order be set aside"*: see the skeleton at [30]. In the course of the hearing, Mr Onyeari's approach was that if the Tomlin order were set aside and the other applications led to an ability of the Underwriters/the Company to enforce the costs order against him, he would wish to pursue the appeal. I shall assume for this purpose that despite his statement to the contrary in the above-mentioned skeleton argument that he wishes to pursue the appeal in case the Tomlin order is set aside.

26. If the appeal were to be determined in favour of Mr Onyeari, the consequence would be to remove some of the complications about the other applications. It is logical in the structure of this judgment to make that decision first.

IV The application for permission to appeal

27. The first matter to consider is the application to extend time. Since the delay is not great and since there seems to have been some confusion or misunderstanding in connection with the issue of the notice of appeal, I shall consider the application as if it had been brought in time. I shall thereafter revert to the question of the extension.

(a) The decision of the Judge

28. In the instant case, the Judge found, as was the case on the evidence before him, that whatever the directorships, Mr Onyeari was the only active director on a day-to-day basis of the Company. He was the only person who was employed by the Company. He was solely responsible for health and safety. It therefore followed that if he would be injured at work because there was no safe system of work or because of casual negligence at work, that would be attributable to him alone.

29. The Judge evaluated the evidence and found that Mr Onyeari was the controlling mind of the Company. In particular, he had regard to the following:

    (i) An email [J/43] Mr Onyeari to Mr Donnelly on behalf of the Company saying "*I was the person running and managing the business, period."*

    (ii) An email [J/44] Mr Chinonye to Mr Donnelly saying *"the Company in the UK has always been run by Mr Onyeari as the managing director. He has been obtaining instructions and signing all the paperwork on behalf of the Company."*

    (iii) The insurance proposal forms were provided by Mr Onyeari who signed the relevant documents and said that there were no other employees [J/45].

    (iv) All the activities on behalf of the Company in connection with the accidents were those of Mr Onyeari: see [J/49] and [J/50].

30. The Judge may also have had regard to Mr Onyeari's third witness statement dated 20 July 2019 at [9], which stated something very different from there being an outside invigilator, namely *"There is in evidence contemporaneous documents showing that the Claimant has carried out his health and safety responsibilities with skill and competence as an instructor".*

31. The Judge rejected the attempts of Mr Onyeari to suggest that he had not been honest with the Company's solicitors in contradiction of the emails and that there were other employees in contradiction of the insurance proposal form.

32. The Judge concluded that Mr Onyeari was in the same position as in the case of *Brumder* where the sole director and shareholder abrogated responsibility for health and safety issues. In those circumstances, the common law principle applied that a person cannot derive any advantage from their own wrong: see Pearson J in *Ginty v. Belmont Building Supplies Ltd.* [1959] 1 All E.R. 414. The proposition of Lord Diplock in *Boyle v Kodak Ltd* [1969] 1 WLR 661 was applied that *"'You are liable to me for my own wrongdoing' is neither good morals nor good law."* The Judge accepted the submission made at [J/17] that *"here we have the Claimant, who was the controlling mind of the Defendant Company, he was responsible for all the issues that give rise to this claim, and as such he falls squarely within the principle that a person cannot profit from their own wrongdoing."*

(b) The law relating to summary judgment/strike out applications

33. The relevant provisions of CPR which the Court had to consider were as follows:

> *Power to strike out a statement of case*
>
> ***3.4***
>
> *"…*
>
> *(2) The court may strike out a statement of case if it appears to the court –*
>
> *(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;*
>
> *(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or*
>
> *(c) that there has been a failure to comply with a rule, practice direction or court order.*
>
> *…*
>
> *(6) If the court strikes out a claimant's statement of case and it considers that the claim is totally without merit –*
>
> *(a) the court's order must record that fact*
>
> *…"*
>
> *Types of proceedings in which summary judgment is available*

> *"24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –*
>
> *(a) it considers that –*
>
> *(i) that claimant has no real prospect of succeeding on the claim or issue; or*
>
> *(ii) that defendant has no real prospect of successfully defending the claim or issue; and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial."*
>
> *(Rule 3.4 makes provision for the court to strike out a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim)"*

34. In *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), Lewison J said the following about summary judgment applications, but the same applies also to strike out applications:

> *"The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal*

Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550 ;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63 ;

vii)On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

(c) Submissions of Mr Onyeari on the appeal

35. Mr Onyeari contended that the Judge erred in making a finding on a summary basis. He submitted that the Judge ought to have concluded that there were too many factual issues and that a trial was required in order to determine if the Claimant was the controlling mind of the Company. In the alternative, he submitted that a trial was required in order to determine if the particular events giving rise to his accident were caused by people other than himself giving rise to vicarious liability of the Company or otherwise triggering liability under the policy.

36. Mr Onyeari submitted that the Judge was required to assume that he was not the person who had left the drink that caused the accident or that he did not breach his

duties for health and safety as a director. In *Brumder*, there was a finding that the sole director had abrogated his responsibility for health and safety, but such a finding was not available in this case or, if it was possible, it was not possible without a trial.

37. Mr Onyeari submitted that:

(i) A director and company can have joint liability: a director can be liable jointly with the company to a third party. A company's liability may be vicarious for the wrongful act or omission of the director. Thus, there is no reason why a director cannot sue a company even where he or she has been at fault.

(ii) He was not a sole director and shareholder: the *Brumder* case is to be distinguished because in that case there was a sole director and shareholder, whereas in the instant case at the time of the accidents, Mr Onyeari was only a one third shareholder and there may have been another director. Thus, it is not a case of a controlling mind.

(iii) He did not flout the law: in *Brumder,* there was a deliberate flouting of health and safety on the part of the director. That is or might be different from casual or momentary negligence (which might be a characterisation of the instant case) in that it might be systemic negligence or gross dereliction of duty.

(iv) Failure to follow procedural law: there was a failure to apply the relevant law in respect of striking out/summary judgment in that (a) the Judge did not accept what appeared in the pleadings, (b) the Judge conducted a mini-trial unfit for an interim hearing, (c) the Judge failed to recognise that in a case of contested issues, it was necessary for justice to be done to have a trial with live evidence and the capacity for cross-examination, (d) the Judge characterised the case wrongly as one in which the relevant negligence was that of Mr Onyeari, whereas there was a bigger picture which could only properly be tested at trial.

(v) Delay in bringing the application: this is a case where there has been a delay of months in bringing the strike out application and there is no or no adequate explanation for the delay. In those circumstances, a case should go to trial.

(vi) Inadequately pleaded: Mr Onyeari submitted that the Defence failed to set out the public policy reasons for striking out the claim. It appeared to be a defence of contributory negligence which was not good in law.

(vii) Other grounds were advanced which will be considered below.

(d) Decision and analysis

38. In my judgment, the Judge came to the right decision. I shall refer to each of the above-mentioned points separately, using the same numbering as appears in the preceding paragraph.

(i) Torts where joint liability of a company and a director are not relevant

39. In his second statement, Mr Onyeari considered torts where an individual director may be liable as a joint tortfeasor with the company e.g. in cases of infringement of intellectual property rights or in cases of conspiracy. The cases referred to in Ground 11, namely *Red Bull GmbH v Big Horn UK Ltd & Ors* [2020] EWHC 124 and *Vertical Leisure Limited v Poleplus* [2015] EWHC 841 (IPEC), are not in point. Those cases are not relevant to the instant case which is in negligence or breach of statutory duty. The director in that case is a potential defendant, whereas in this case the director is the claimant and is claiming that the Company owed a duty to him. The only person who can be liable to him is the Company. He clearly cannot sue himself, but he seeks to sue the Company. The instant case is about the circumstances in which a director whose fault is coterminous with that of the Company or who has caused solely the Company to be at fault may sue for consequences to himself or herself. Where the only responsibility of the Company to him is because of his own wrongful acts, then no claim lies due to the reasoning in the *Brumder* case.

(ii) Mr Onyeari was not the sole director or shareholder of the Company (Ground 2)

40. The Judge referred to the issue being about whether the claimant is a controlling mind, but it is evident from his judgment that he used this as a shorthand for whether a claimant is a controlling person as regards the particular wrong. It may not matter what is the shareholding or that there are other directors or employees. What matters is whether the director is the de facto director responsible solely for the particular activity. Further, the Judge did not refer solely to a controlling shareholding, but whether the person was the controlling mind of the Company at the time of the alleged accidents. That also meant something more specific still as stated by the Judge at [17] of the Judgment: *"here we have the Claimant, who was the controlling mind of the Defendant Company, he was responsible for all the issues that give rise to this claim, and as such he falls squarely within the principle that a person cannot profit from their own wrongdoing."* At [39], the Judge used the expression that in this case *"... it is the very negligence of the claimant that gives rise to the liability of the defendant."*

41. This is set out more fully at [40] where the Judge was considering whether there was a distinction between *Brumder* and the instant case. He said:

> *"... I therefore approach the matter on the basis that if it is shown that Mr Onyeari was the controlling mind, and if it is evident from the Claimant 's own documents that the negligent actions lead back to him, then there is no practical distinction between this case and the broader case. If, however, it can be legitimately argued that, in fact, he was not that controlling mind, or that the negligent claim had been caused by another party, then of course the matter must go to trial on those issues."*

42. It follows that the Judge analysed the matter not on the basis of whether one person was a more than 50% shareholder or the sole director, but on whether in respect of the relevant acts or omission, that person was in de facto control. What mattered was not whether there were some acts of the Company in respect of which someone else might have some control, but whether as regards the acts or omissions giving rise to the alleged wrong, the claimant had the relevant control leading up to the accident: see the judgment at [41] – [42]

(iii) Mr Onyeari did not deliberately flout the law

43. That might have been the facts in the case of *Brumder,* but as appears from the above analysis, it is not the basis of the proposition that a claimant cannot sue. The claimant cannot sue where the negligent acts or omissions giving rise to the alleged wrong are those of the claimant. In the instant case, it is said that this is satisfied as Mr Onyeari had the relevant control leading up to the accident. Thus, the acid test is not that the actions were deliberate or that in the corporate structure there were other people with control: it is that as regards the relevant acts or omissions, the control was that of Mr Onyeari alone.

(iv) Failure to follow procedural law (also see Ground 1A and 1B)

44. The Judge applied the above law in respect of strike out/summary judgment. He did not conduct a mini-trial. He did not have to take at face value every statement made by Mr Onyeari whether in the pleadings or the evidence. There were sufficient matters which the Judge related in his judgment which showed that Mr Onyeari did not have a real prospect of success in his assertions particularly when he claimed not to be the controlling mind of the Company. In particular, the Judge was entitled to consider the following information very telling, namely:

(i) The correspondence between Mr Onyeari and DWF on 4 December 2018 regarding his being the *"person running and managing the business, period"*, and that he was *"the only person running the business since 2010..."*: see the judgment at [43]. That is not a contemporaneous document, but it comes from Mr Onyeari writing to Mr Donnelly of DWF, saying: "*you should now deal with me directly as that's how the business has always been run*." The Judge did not make a material factual error in the way in which he approached this email, contrary to Ground 4.

(ii) It was corroborated by another director Mr Chinyone stating that the Company *"has always been run by Mr Onyeari as the managing director. He has been obtaining instructions and signing all the paperwork on behalf of the company"*: see the judgment at [44].

(iii) It is supported by the insurance proposals provided by Mr Onyeari in November 2014. There were no other employees: see the judgment at [45].

45. The Judge was entitled to consider that the responses of Mr Onyeari did not raise any case with a real prospect to the contrary that he was not the controlling mind. In particular, the suggestion:

(i) that the communications were limited in time was countered by the fact that there was nothing in them showing that they were so limited: see the judgment at [46];

(ii) that the Claimant had not been entirely honest with the Defendant's solicitors (made in the Reply) casts, as the Judge said, *"a long shadow over the consideration of the evidence in the case."* This takes the case of the Claimant backwards rather than forwards and was a good example of a case where a given assertion might not have to be taken at face value: see the judgment at [47]. Mr Onyeari's Reply, which took the case backwards, stated at [7]: *"When [insurers' solicitors] continued to oppressively question us, he was told the answer he wanted to hear so he could go away. He was told to assume that C was the only person running the business since 2010."*

(iii) that there were other employees of the Company is contradicted by the insurance proposal form, and in any event, as regards the accidents in question there was failure specifically to identify whose fault caused the relevant events. On the contrary, in the judgment at [48] - [50], the Judge demonstrated how everything led back to Mr Onyeari.

46. It therefore followed that the Judge was entitled to reach the conclusion at [51 - 52] that:

> *"51. ... this is a person who was the controlling mind of the company and in so far as the company was negligent, it was the claimant's own negligence, the evidence in this respect to which I refer is, by and large, non controversial, save perhaps in relation to the fact that others have some duty in respect of operations. But again, none of those are the relevant duties and it is clear to me that Mr Onyeari is more than significantly short of showing that he was not the controlling mind of the company. Now this is not to conduct a mini-trial, but to ask the question of whether the statutory provisions contained in Rule 3.4 and in Rule 24 are met.*
>
> *52. Now it seems to me that it is wrong to suggest that a court would find anything other that (sic) the fact that Mr Onyeari was the controlling mind of the case. As such it falls squarely within the Brumder decision and thus amounts to an abuse of due process whereby a claimant is seeking to benefit from their own wrongdoing…."*

47. Returning to *Brumder,* a useful summary is contained in Charlesworth and Percy on Negligence 15th Ed. at [13-93] and [13-94] as follows:

> *"The appeal nevertheless failed, the Court of Appeal preferring an analysis based on s.174 of the Companies Act 2006. A director is required by the section to use reasonable care, skill and diligence. The claimant had not, on the lower court's finding, discharged that duty and was thereby seeking to take advantage of his own wrong in suing for damages. Additionally there was an element of circuity of action if he could recover damages from the company, but the company could then recover from him whatever was awarded on the basis of his breach of the director's duty."*

48. The Judge then went on to consider that the case could be struck out under CPR 3.4(2)(a) and (b). He also found that he would have given summary judgment if he had not struck out the case.

49. None of this indicates any error. To the extent that the Judge ignored mere assertions, he was entitled so to do. The Judge was entitled to reach the view that a trial was not necessary, and the case was shown to be one in which there was an overwhelming case that the alleged wrongs were caused by Mr Onyeari alone. Contrary to Ground 5, the Judge did not fail to apply correctly the provisions regarding striking out. Nor, contrary to Ground 6, did the Judge fail to exercise his discretion correctly.

(v) Delay (Ground 3A)

50. Insofar as Mr Onyeari is contending that the application to strike out had to be brought promptly, that is not the case. It is a relevant factor in deciding to exercise the discretionary jurisdiction of striking out, but it can be brought at any time. It is relevant to the overriding objective that if there is a case to strike out, it is desirable that it should be brought promptly. Sometimes delay will evidence a lack of conviction in the application, which might be an indicator that the case should go to trial. In the instant case, there were reasons to indicate that the delay was not so great, which were set out in the evidence. In any event, the application was made before the first case management conference. The evidence also referred to matters of how the case was becoming difficult to manage because Mr Onyeari wanted to give instructions on behalf of the Company whilst bringing a claim against it himself. He wanted to see the privileged communications between solicitor and client. This was set out in detail in the judgment at [27] – [32]. Insofar as Mr Onyeari relies upon the case of *Petrou v Bertoncello & ors* [2012] EWHC 2286 (QB), this does not assist in that there is a satisfactory explanation which has been offered for any delay which may have occurred. The Judge's analysis is unimpeachable and so the criticism of the Judge for striking out despite alleged delay must fail.

51. A related Ground 3B referred to an application for wasted costs arising out of a lack of good explanation for delay and for making contentions which were unarguable. It

is apparent from the judgment that the Judge found that there was a good explanation for delay. This was not a case where there were significant issues on which the Company lost. This was not therefore a case for a wasted costs order or a split or partial costs order.

(vi) Pleadings

52. Paragraphs 4 - 7 of the Defence plead the public policy defence and the basis of the defence underlying the application to strike out fully. Even if it had not been pleaded fully, that would not have been a bar provided that it was presaged adequately in the strike out application and Mr Onyeari had had adequate opportunity to deal with it. All that has happened. The pleading objection must therefore fail.

(vii) Other grounds

53. There is a ground relating to the entering of the order (Ground 8). There is no real prospect that there was prejudice caused by a serious procedural or other irregularity. The points about the order are drafting points without serious consequences. The suggestion that the Claimant was rushed through his presentation is not developed in any detail, nor is there a transcript from which this can be borne out. It is often fair for a Judge to insist on equality of time for the parties, and in the instant case it seems that the Court considered that Mr Onyeari had taken more time than Counsel for the Company, which point is not contradicted.

54. The fact that employer's liability insurance may not be required where there is only one employee who has majority ownership of the Company is irrelevant in the circumstances of this case which concerns whether Mr Onyeari had a right to sue the Company. It therefore follows that Ground 9 does not advance his case.

55. The allegation in Ground 10 that the Judge failed to give adequate reasons is wrong. The judgment gave adequate reasons about the finding concerning what was described as Mr Onyeari being the "controlling mind" in respect of the relevant control of the Company. Likewise, the Judge explained why the claim was being dismissed on the ground of abuse of process. The conclusion is at [52], but most of the judgment sets out the reasons why the Judge comes to the conclusion.

56. It was alleged by Mr Onyeari that the Judge could not strike out the claim without a finding of fault on the part of Mr Onyeari, but the answer to this is in the judgment in *Brumder* at [32] where it was said that:

> *"... It is not necessary for the employer to lead evidence in order to set up the defence. An employer may be able to prove that he was not in any way at fault but the employee was alone to blame from the evidence put before the court by the employee."*

57. In this case it was not necessary for the Judge to make a specific finding of fault because it was clear from the facts of the case which were alleged by Mr Onyeari that, if there was fault, the only person who could have been at fault was Mr Onyeari himself. It was therefore apparent that a trial was not needed. Those facts are set out in relation to the headrest in the Amended Particulars of Claim at [31(e)-(g) and (k)(ii)] and in relation to the spillage at [31(a) and (k)(iii)]. It was telling that Mr Onyeari did not refer to others responsible for the wrongs including how realistically they could have been at fault given the facts alleged. The Judge answered the point that there might have been others who had some duties in respect of operations at [49-51] of the Judgment. He there set out how it was not reasonably arguable that any operational duties of others were relevant duties on the alleged facts of this case. It was not reasonably arguable that others were responsible for Mr Onyeari spilling the liquid or for the condition of Mr Onyeari 's own chair. Mr Onyeari has contended that he did not have an opportunity to answer the allegations of wrongdoing. This is not correct. He has had ample opportunity to put in evidence that someone else has been at fault, but he did not do this at first instance.

58. In his appeal skeleton at [4-5], Mr Onyeari seeks to introduce the suggestion that someone else other than him was responsible for identifying and removing the hazards of which he complains. He introduces the allegation that there were invigilators who were responsible: see [16] and [21] of his second statement of 29 March 2023 in support of the appeal The fundamental problems that he has with this assertion are as follows:

(i) Insofar as this was not before the Judge, this ought to have been the subject of an application for new evidence to be admitted on the appeal. Applying the usual principles in *Ladd v Marshall* [1954] 1 WLR 1489, there is no reasonable excuse for not having adduced that evidence before the lower court. (The principles in *Ladd v Marshall* apply to a hearing of an appeal against summary judgment and/or strike out applications: see *Aylwem v Taylor Johnson Garrett* [2001] EWCA Civ 1171; [2002] PNLR 1 at [47-49] per Arden LJ.

(ii) In any event on the totality of the information before the court and having regard to the lateness of the suggestion and even now the lack of material particulars of someone else involved, Mr Onyeari is unable to raise a case with any real prospect of success to the effect that anybody other than Mr Onyeari was responsible for health and safety matters at the Company. There was no suggestion in the Particulars of Claim that invigilators or any other persons were responsible. Even if it had not been too late after the decision of HHJ Lethem, when the point has been raised on appeal, there were not produced in advance of the hearing of the appeal particulars of the contracts with the invigilators or an identification of who the people were nor is there evidence of payments to them.

(iii) The matters set out in paragraphs 28-30 above are entirely at odds with this recent allegation of invigilators, and having regard to the sparsity of the information provided as set out in the sub-paragraph immediately above, it is not credible.

59. The matters set out in the post-hearing submission of Mr Onyeari in this regard does not assist his case, and is answered effectively in the post-hearing submission of Mr Evans-Tovey at [1-3]. I agree with the submission in response and adopt the reasoning therein. These comments are entirely consistent with the conclusions which have been reached above on the material prior to the post-hearing submissions, and they therefore do not advance Mr Onyeari's case even if there was an entitlement to rely on these matters at the appeal stage.

60. In Ground 11, it is said that the Judge has confused the joint tortfeasor concept with the issue of whether a person who is the controlling mind of a company can sue the company for a wrong based on his own negligence or fault. There is nothing in this ground since, even if he did, it would not advance the case.

(viii) Conclusion

61. For all these reasons, to the extent that Mr Onyeari pursues his application for permission to appeal, the application is refused. Any proposed appeal has no real prospect of success nor is there any other compelling reason for the appeal. The fact that there were numerous grounds of appeal does not create a case. In my judgment, the Judge was right in all respects to allow the strike out of the action, and it is informative that he found it be totally without merit.

62. Thus far, I have approached the matter as if the application was brought in time. It is not necessary therefore to consider whether independently of the merits the application should be dismissed because it was out of time. If the merits had been in favour of Mr Onyeari, the Court may have overlooked the delay. However, there being no merit in the appeal, there is no point in giving permission for an extension of time.

V Application to set aside the Tomlin Order

63. It is not apparent how the Tomlin Order was made. The Schedule is not signed by the parties. DWF, acting on behalf of the Company, was not informed about the purported notice of change of solicitors of March 2021. The notice of change was not served on DWF. DWF did not know about the notice of change until they received the document as a blind copy on 22 March 2022. It therefore follows that the statement on the notice of change that it had been served on the former legal representative was untrue.

64. The effect under the CPR is that absent service on the legal representative, the notice of change did not have any effect, and DWF remained on the record at least at the time of the Tomlin order. The relevant rules are in CPR 42.2 and read as follows:

> *"Change of solicitor – duty to give notice*
>
> ***42.2***

> *(1)* ***This rule applies where –***
>
> ***(a) a party for whom a solicitor is acting wants to change his solicitor****;*
>
> *(b) a party, after having conducted the claim in person, appoints a solicitor to act on his behalf (except where the solicitor is appointed only to act as an advocate for a hearing); or*
>
> *(c) a party, after having conducted the claim by a solicitor, intends to act in person.*
>
> *(2)* ***Where this rule applies, the party or his solicitor (where one is acting) must*** *–*
>
> ***(a) file notice of the change; and***
>
> ***(b) serve notice of the change on every other party and, where paragraph (1)(a) or (c) applies, on the former solicitor.***
>
> *(3) in the case of notice filed at court using MyHMCTS, the notice must state the party's new address for service.*
>
> *(4)* ***The notice filed at court must state that notice has been served as required by paragraph (2)(b).***
>
> *(5)* ***Subject to paragraph (6), where a party has changed his solicitor or intends to act in person, the former solicitor will be considered to be the party's solicitor unless and until –***
>
> ***(a) notice is filed and served in accordance with paragraph (2)****; or*
>
> *(b) the court makes an order under rule 42.3 and the order is served as required by paragraph (3) of that rule.*
>
> *..."* [emphasis added]

65. It follows that DWF were the solicitors for the Company and knew nothing about the Tomlin Order. No notice of change had been served on DWF for the purpose of CPR 42.2(2)(b). Since no notice had been served, in accordance with CPR 42.2(5), they remained the solicitors for the Company. To this end, they made the above-mentioned application to set aside the Tomlin Order.

66. The application to set aside the Tomlin order is made on the application of the Underwriters. The application was made under CPR 40.9 on the basis that the Underwriters were directly affected by the Tomlin order. CPR 40.9 reads as follows:

> *"A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied."*

67. A related rule is CPR 3.1(7) which reads as follows:

> *"(7) A power of the court under these Rules to make an order includes a power to vary or revoke the order."*

68. Mr Onyeari has submitted that the Underwriters have no standing because they are not affected by the Tomlin order for the purposes of CPR 40.9. Mr Onyeari's submission is that "*individual members of an organisation or group cannot be directly affected by a court order affecting that organisation or group*". Mr Onyeari relies on the case of *Abdelmamoud v The Egyptian Association in Great Britain* [2018] EWCA Civ 879; [2018] Bus LR 1354 in which individual members of a company could not be said to be directly affected by a judgment. I do not accept this submission in the context of a policy where each member has subscribed to a specific share of the risk and in the context of a representative claim where all Underwriters are in effect suing. Further, reference is made to the various capacities in which parties are suing. This is referred to in more detail in the consideration of the application for amendment referred to below, the intention of which is that the Underwriters should be before the Court. On the basis that the amendment application as to parties is allowed, which will be considered below, they have been directly affected by the matters which are the subject of the applications currently before the Court.

69. In what circumstances can an order like this be revoked? The Underwriters have referred to the case of *Tibbles v SIG plc* [2012] EWCA Civ 518, [2012] 1 WLR 2591 and to the non-exhaustive definition of the primary circumstances in which an order may be set aside. They were as follows:

> *"(ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.*
>
> *…*
>
> *(iv) Thus there is room for debate in any particular case as to whether and to what extent, in the context of principle (b) in (ii) above, misstatement may include omission as well as*

> *positive misstatement, or concern argument as distinct from facts. In my judgment, this debate is likely ultimately to be a matter for the exercise of discretion in the circumstances of each case.*
>
> *(v) Similarly, questions may arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknown, knowable or unknowable. These, as it seems to me, are also factors going to discretion: but where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate."*

70. A person considering the Tomlin order on the basis of the documents provided to the Court would consider that both Mr Onyeari and the Company were acting in person. In fact, the Court was misled. DWF remained on the record because they had not been served. The notice of change was misleading in stating that they had been served when that was not the case. Whether by pretence or otherwise, there was no effective change of solicitors under the CPR. It follows that steps taken other than by the solicitors on the record and without their knowledge and consent are and should be of no effect.

71. It is to be inferred that it was known that in the event that DWF had been informed, they and the Underwriters would have sought to remain on the record and/or to prevent any steps being taken to impair their rights of subrogation.

72. This was no mere technical irregularity. It mattered because the solicitors were acting pursuant to the rights of subrogation of the Underwriters. It is to be inferred that they would not have approved of the compromise in that (a) the Underwriters were seeking by subrogation to enforce the costs order for the benefit of the Underwriters, and (b) the Tomlin order, if effective, prevented the Underwriters directly or indirectly enforcing the costs order.

73. It follows that the Tomlin order should be set aside. It is no answer that there is an argument that there is an agreement in breach of the contractual right of subrogation between an insured and a third party which might take effect. Even if and to the extent that that were correct, that is no reason to steal a march on the insurer through a Tomlin order effected in the misleading way set out above. In any event, if this settlement agreement had been disclosed in advance to the Underwriters, they would have had the opportunity to contend in advance that it should not be permitted. Mr Onyeari must have recognised this possibility, and hence proceeded by misleading the Court in the way in which he did. Even if there were a possibility that the agreement would not have been prevented, it was wrong to make a pretence to the Court, conscious or unconscious, that the parties on the record were approving the Tomlin Order. On the basis that it was not approved by DWF for the Underwriters, it ought in my judgment to be set aside as a matter of right (ex debito justitiae).

74. Mr Onyeari has submitted that there has been delay in enforcing the rights under the costs judgment, which defeats the ability to apply to set aside the Tomlin order: see paras. 16-34 of the skeleton argument of Mr Onyeari dated 14 October 2023. I reject all of these arguments. Even if there had been delay, it was overshadowed by Mr Onyeari's conduct from immediately after the costs order (from the resolution of 6 August 2020) and thereafter by the Tomlin order without reference to the solicitors on the record or to the Underwriters. These actions were not taken because of some acquiescence or waiver of rights or in a belief that the Underwriters did not wish to pursue their rights. It occurred as part of a series of steps designed to lead to his not paying anything under the costs judgment. This is therefore not a case where any of the maxims of equity to which he refers or laches have any application. This is an application to set aside a Tomlin Order which was made by misleading the Court. The suggestion that the Underwriters' conduct or omissions or alleged high-handedness of their solicitors (which, in any event, are not established) or any delay had any relevance to the application is rejected.

75. It has also been submitted that any agreement should be struck down on public policy grounds as a result of Clause 4 which provides that the Company shall indemnify Mr Onyeari against any liability to third parties. The indemnity in Clause 4 is said to be unenforceable due to section 232 of the Companies Act 2006. This provides that *"Any provision by which a company directly or indirectly provides an indemnity (to any extent) for a director of the company, or of an associated company, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director is void…"* This is subject to various exceptions which do not apply.

76. The question then is whether or not the clause is severable. The test is set out in Chitty on Contracts at 19-273 in the following terms, namely:

> *"First, the severance of the offending clause may so alter the scope of the whole contract as to make it a new contract. The true test under this head is therefore whether the illegal promise is substantially the whole or main consideration for the promise now sought to be enforced. If it is, then the court will not sever it, leaving only a small part of the consideration to support the promise of the defendant; otherwise it may."*

77. It is arguable that there was here a unitary consideration that Mr Onyeari should be free of liability in respect of the costs incurred by the Underwriters, whether it is from Company (Clause 3) or from the Underwriters directly. In the latter event of the Underwriters seeking to enforce a liability of Mr Onyeari, Clause 4 was to require the Company to provide an indemnity. This was even if the liability had been brought about by a breach of duty of Mr Onyeari as director to the Company: it was therefore in contravention of section 232 of the Companies Act 2006. I prefer to express no view as to whether the illegal part of the consideration (Clause 4) is such that its severance would alter the scope of the contract as a whole.

78. It was also submitted that the agreement was a sham. A sham involves an intention by the parties to the "sham" *"to give to third parties or to the court the appearance of*

creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create": per Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802E-F. The agreement contained in the Tomlin order may have involved a breach of fiduciary duty or may have been for a purpose of injuring the insurers. That did not make it a sham in the *Snook* sense: on the contrary, it was intended to get rid of any obligation of Mr Onyeari to the Company. This was not an appearance, but the true intention of the parties.

79. In any event, on the basis of the other reasoning, no effect should be given to the Tomlin Order, and it ought to be set aside.

80. Mr Onyeari contends that he is no longer bound by the costs judgment because he has made an agreement with the Company discharging any liability. If there has been such an agreement, then he submits that it must take effect. If the Company had discharged the costs orders or had otherwise obstructed the ability of the Company to enforce the judgment, then the Company would have been liable to the Underwriters in damages for breach of contract and for prejudicing the right of subrogation. This will be referred to in more detail below in a section about the breach of contract.

VI The amendment application

(a) The correct parties

81. Issues have arisen as to whether the Underwriters are properly before the Court. The action is brought by the Underwriting members of the Riverstone Syndicate 3500 suing in a representative capacity as per the title of the action. A concern was expressed at a hearing before Master Marsh that "*the underwriting members of Riverstone Syndicate 3500*" were not a legal entity as such and that the Interested Party might not be correctly named or sufficiently identified. An issue arose as to whether the action could be brought by members of the Lloyd's Syndicate.

82. In the light of the foregoing, the names and capacities of the Claimants are sought to be amended. In support of the application to amend, there has been served very detailed evidence comprising the first witness statement of Mr Di Franco dated 16 March 2023 and the second witness statement of Mr Donnelly dated 17 March 2023 to prove that the parties put forward are the correct parties to bring the claim.

83. Following the concern of Master Marsh as to whether it was sufficient to have *"the underwriting members of the RiverStone Syndicate 3500"* as a party, Mr Di Franco has confirmed that RCCL is the sole member of RiverStone Syndicate 3500 such that in substance *"the underwriting members of the RiverStone Syndicate 3500"* describes RCCL. In order to remove any doubt, a part of the amendment is for RCCL to be identified as the Claimant.

84. Mr Onyeari has challenged that the Underwriters are properly before the Court. He claims that not all of the relevant Underwriting members are before the Court, and that it is not sufficient to have certain members. He says that not sufficient information has been provided regarding the identity of the relevant parties, and it has

not been shown that the proper parties are before the Court. I am satisfied that there has been detailed explanation in evidence to prove that the parties put forward are correct parties to bring the claim.

85. In summary only, the Underwriters are confirmed as various named Lloyd's Syndicates who each subscribed to a defined share of any claims made under the policies. Mr Di Franco has set out the names and shares of the underwriters under the employers' liability policy: see Di Franco para. 9.

86. The Part 8 claim is brought by RCCL as representative on behalf of the Underwriters identified at para. 9 of the witness statement of Mr Di Franco. Under reinsurance arrangements explained by Mr Di Franco (para. 14), RCCL as the sole corporate member of Riverstone Syndicate 3500 has taken over the role of slip lead from Syndicate 1200. It has also acquired the right to bring a claim in respect of the policy in respect of the policy from Syndicate 2015, Syndicate 1200 and Syndicate 4000. This has given to Syndicate 3500 a 46.154% share of the economic liabilities pursuant to the policy. On this basis, RCCL sues as representative of the underwriting members of Syndicate 2015, Syndicate 1200 and Syndicate 4000 for the 2014 underwriting year account (the relevant year when the contract of insurance was made) and all syndicate members underwriting the policy.

87. In case it was necessary to have a member of one of the underwriters who wrote the policy, rather than RCCL, that is done through Westfield Speciality Capital (604) Limited ("Westfield") being added as a claimant. The slip lead is Syndicate 1200 (see Di Franco, para 11) so in case the identity of an entity is needed, namely a member of Syndicate 1200, Westfield is the corporate member with the largest share of Syndicate 1200: see Di Franco para 12**.** Thus, Westfield is added because it is the largest entity comprising the members of the Slip Lead (Syndicate 1200). Accordingly, in the alternative, it sues on its own behalf and as representative of all corporate members of Syndicate 1200 for 2014 year of account and/or as representative of all of the Underwriters subscribing to the policy.

88. It is conventional for the lead insurer to issue proceedings both in its own interests and representing the interests of the other underwriting members. As can be seen, RCCL had a right to sue on behalf of over 45% of the Underwriters and having such a large part, it claims to be entitled also to act as representative for the remaining underwriters. That seems to be sufficient, but in case it is necessary for one of the Underwriters to have to be the claimant claiming for itself and the other underwriters, the claim is brought by Westfield as the member having the largest share of Syndicate 1200 for the Underwriting members of that syndicate and/or for all of the underwriters subscribing to the policy.

89. The Court is satisfied that at least one of the formulations suffices to enable the claim to be brought. It accords with the terms of CPR 19.8 (formerly CPR 19.6). This enables a claim to be brought by a person having an interest in a claim on behalf of other persons having the same interest in claim. The effect is that unless the Court directs otherwise, any judgment is binding on all persons represented in the claim. There is no indication of any objection to the claim being brought by any of the other Underwriters.

90. I am satisfied that any initial objections to the way in which the case was formulated are overcome by the amendment. Mr Onyeari has persisted in his objections in evidence, in written and lengthy oral submissions. He says that not sufficient information has been provided regarding the identity of the relevant parties, and it has not been shown that the proper parties before the Court. If the name, company number and address of Riverstone and Westfield have not been given, they should be given as a condition of the amendment. It is not an excuse that they are identifiable as companies registered with Companies House, but it does mean that no prejudice can have arisen from the failure or even refusal to provide this information. Further, the submissions which follow about the purchase of Argo Underwriting Agency Limited and Lloyd's Syndicate 1200 to Westfield (para. 51 of Mr Onyeari's skeleton of 14 October 2023 show that Westfield is known to Mr Onyeari, and it is to be inferred that so is Riverstone. There are three pages about this in Mr Onyeari's skeleton argument dated 14 October 2023. If this has not been provided, it should be provided as a condition of the amendment. The requests which were made to which Mr Onyeari has referred were not simply about the full name and address of the above companies but contained about 12 or 13 requests about the identify of the insurers which went beyond that which was reasonable. The Claimants refused to answer explaining that the requests went beyond that which was reasonable, and Mr Onyeari did not apply for an order.

91. Mr Onyeari says that not all of the relevant Underwriting members are before the Court, and that it is not sufficient to have certain members. It is sufficient, and indeed it is usual in such cases to have the lead insurer, or some other representatives represent the insurers. It is said that the interests of the original syndicates are not the same because each had a different stake in the policy. That does not make the syndicates having a conflicting interest. It is not required that the interest should be a joint interest, nor that the several interests must be equal.

92. The relevant rule is set out in the 2023 White Book at CPR 19.8 (formerly CPR 19.6) which provides as follows:

> *"Representative parties with same interest*
>
> *(1) Where more than one person has the same interest in a claim –*
>
> *(a) the claim may be begun; or*
>
> *(b) the court may order that the claim be continued,*
>
> *by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.*
>
> *(2) The court may direct that a person may not act as a representative.*
>
> *(3) Any party may apply to the court for an order under paragraph (2).*

> *(4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule –*
>
> *(a) is binding on all persons represented in the claim; but*
>
> *(b) may only be enforced by or against a person who is not a party to the claim with the permission of the court.*
>
> *(5) This rule does not apply to a claim to which rule 19.9 applies."*

93. The rule was reviewed by the Supreme Court in *Google LLC v Lloyd* [2021] UKSC 50; [2021] 3 W.L.R. 1268, agreeing with courts in Australia, Canada and New Zealand and found to a flexible tool of convenience.

94. The White Book at 19.8.3 referred to the same interest requirement as follows (the square brackets referring to paragraph numbers in the judgment of the Supreme Court):

> *"The representative procedure under r.19.8 is only available where the representative party has "the same interest" in the claim as those they represent. The phrase "the same interest", as it is used in the representative rule, needs to be interpreted purposively in light of the overriding objective of the civil procedure rules and the rationale for a representative procedure ([71]). The purpose of requiring the representative to have "the same interest" in the claim as the persons represented is to ensure that the representative can be relied on to conduct the litigation in a way which will effectively promote and protect the interests of all the members of the represented class. That plainly is not possible where there is a conflict of interest between class members ([71]). Where the interests merely differ or diverge somewhat, there is no reason why a representative party cannot properly represent the interests of all members of the class, provided there is no true conflict of interest between them. In line with adopting a less rigid approach, any procedural objection could be overcome by bringing two (or more) representative claims, each with a separate representative claimant or defendant, and combining them in the same action ([72])."*

95. There is a discretion to apply in accordance with the overriding objective. The considerations militate in favour of allowing a claim, where practicable, to be

continued as a representative action rather than leaving members of the class to pursue claims individually ([75]). It is not necessary to have the consent of the persons who are being represented, but in an appropriate case a judge may impose a requirement about notification of members of the class [77]. The adequacy of the class definition is a matter in the Court's discretion. In some cases, it will not matter that the class will be a fluctuating one [78].

96. Mr Onyeari's objection about differences in memberships or financial contributions is not well made out. The broad purposive approach in *Google* militates in favour of allowing the representation. It is to be seen in the context of the general approach to allowing a lead insurer to take the lead. It does not matter that following the policy of insurance, the class may be fluctuating or that corporate changes may have been made in respect of the individual underwriters. Through the representative action, the relevant Underwriters are adequately before the Court.

97. Having considered the objections which he has made, I am satisfied that there is no valid objection either to the principle of the amendment or to the claim being properly constituted. There is no prejudice in allowing an amendment to the title to the action, and accordingly it is granted.

98. In Mr Onyeari's post-hearing submissions, at [5-8], he has referred to areas where there is no documentary evidence before the Court. I reject the implicit submission that without further evidence, the Underwriters have not established their right to proceed. There is sufficient information in the statements of Mr Di Franco and Mr Donnelly. For the reasons above stated, they have established a proper basis for the amendment and a proper basis for a judgment to be given on behalf of all the underwriters who have provided the insurance.

(b) The other amendments

99. The other amendments include a claim for damages for breach of contract against the Company and for damages for procuring a breach of contract against Mr Onyeari. It is said by Mr Onyeari that if there is a contract claim, it should be made in separate proceedings using form N1. He submits that subrogation has nothing to do with breach of contract and there is a substantial dispute of facts.

100. In my judgment, the alleged breach of contract is very closely connected with the subrogation. The breach of contract arises because of the allegation that the Company has failed to allow the Underwriters to maintain their subrogated rights and have impaired the rights of recovery. The procurement of breach of contract arises out of the allegation that the breach of contract was procured by Mr Onyeari not for the benefit of the Company, but for his own benefit. If there were a substantial dispute of facts, then a question would arise as to whether there ought to be Part 7 directions. Subject to what is said below in considering whether there is a substantial dispute as regards the breach of contract and the procurement breach of contract allegations, there is no reason not to allow these causes of action by way of amendment to the Part 8 claim. These allegations will therefore be considered on the footing that this amendment is allowed.

101. All the remaining amendments are allowed. No prejudice arises out of them. They contain points of tidying up and a narrative of matters which have arisen since proceedings were issued including the initiatives affecting the ability of the Company and/or the Underwriters to enforce the costs order made by HH Judge Lethem against Mr Onyeari.

VII The Part 8 Claim

102. It is now necessary to consider the Part 8 claim. First, it is necessary to consider the contractual clauses. Second, it is necessary to consider the following issues:

(1) Is the Part 8 claim an abuse of process on the basis that the Underwriters ought to have sought to be joined in the action brought by Mr Onyeari against the Company and that it is now too late?

(2) Is the claim for the benefit of the costs order of the Company against Mr Onyeari a proprietary claim or a personal claim?

(3) Can an order for its assignment be made so that it is assigned by the Company to the Underwriters?

(4) Has the Company been in breach of its contract with the Underwriters in not enforcing the costs order and/or in seeking to compromise the same?

(5) Is Mr Onyeari liable for the tort of inducing or procuring the Company to be in breach of its contract with the Underwriters?

(6) Is Mr Onyeari exempt from subrogation due to General Condition 8;

(7) What is the remedy of the Underwriters against the Company and against Mr Onyeari respectively;

(8) What is the way ahead in this action?

(a) The Contractual clauses

103. It is first necessary to consider the insurance provisions and the rights of the Underwriters against Mr Onyeari in the circumstances which have arisen.

(i) The insuring clauses

104. Insuring Clause 4 provides (defined terms in bold):

> "[1] **We** agree to pay on **your** behalf all sums which **you** become legally obliged to pay (including liability for claimants' costs and expenses) as a result of any **claim** arising

> out of accidental injury to your directors, partners or **employees** occuring during **the period of the policy** in the course of **your business activities**. [2] We will also pay **costs and expenses** on **your** behalf." (numbering added)

105. The Definitions refer to "*the Underwriters named in the Schedule*". In the schedule "*the Underwriters*" was said to mean "*Underwritten by certain underwriters at Lloyd's*". Thus, one contracting party was the "*certain underwriters at Lloyd's"* who underwrote PS D02100723. They have been identified in the Part 8 claim and Mr Franco's witness statement.

106. "*You/your"* is defined at clause 38 of the Definitions to include:

> *"(a) the company named as the Insured in the Schedule or any subsidiary, and (b) any past, present or future employee, director or partner of the company named as the Insured in the Schedule or any subsidiary ……."*

107. Thus, besides being a combined policy, the Policy is also a composite policy with a number of insureds, each insured being an insured in respect of his own interest. The Company and Mr Onyeari were co-insureds.

108. Applying the facts to the Policy, Mr Onyeari's claim against the Company in the Underlying Proceedings fell within the scope of the insuring clause.

(ii) General Condition 4

109. By General Condition 4 of the Policy, the Company granted insurers the right to defend Mr Onyeari's claim and thus the Underlying Proceedings on the Company's behalf:

> *"We have the right (but not the obligation) to take control of and conduct in your name the investigation settlement or defence of any claim"*

110. Exercising that right under the Policy, Underwriters instructed DWF LLP to act on behalf of the Company in defence of Mr Onyeari's claim and the Underlying Proceedings.

111. One consequence was that legal costs and expenses were incurred on the Company's behalf defending the claim and Underwriters were obliged to pay those costs under both the second part of Insuring Clause 4 ("*We will also pay **costs and expenses** on your behalf*") and General Condition 4 which goes on to provide:

> *"We shall also pay on **your** behalf **costs and expenses** incurred with **our** prior written consent ……."*

112. For the purposes of the Policy, "**costs and expenses**" are defined at clause 7(e) of the Definitions as:

> *"**your** costs and expenses in the defence ….. of any **claim** made against **you**"*

113. General Condition 8 of the Policy provides in part:

> *"If any payment is made under this policy in respect of a **claim**, **loss** or **damage** and there is available to **us** any of **your** rights of recovery against any other party then **we** maintain all such rights of recovery. **We** shall not exercise these rights against any past, present or future **employee**, director or partner of the company named as the Insured in the Schedule or any **subsidiary**, unless such payment is in respect of any wilful, malicious or dishonest acts or omissions.*
>
> ***You** must do nothing to impair any rights of recovery. At our request **you** will bring proceedings or transfer those rights to **us** and help us to enforce them. Any recoveries shall be applied as follows:*
>
> *a first, to **us** up to the amount of **our** payment on your behalf including **costs and expenses**;*
>
> *b) then to **you** as recovery of **your** Excess or other amounts paid as compensation or costs and expenses."*

114. General Condition 8 reflects the doctrine of subrogation such that by General Condition 8 Underwriters maintained the subrogated rights for themselves: *West of England Fire Insurance Company v. Issacs* [1897] 1 QB 226 at p 229. The Underwriters have incurred and paid DWF's legal costs and expenses defending Mr Onyeari's claim against the Company: see the second statement of Mr Donnelly of 17 March 2023 at [11]. The Underwriters wished pursuant to their rights in equity and contract and continue to wish to recoup their outlay. The Underwriters relied on General Condition 8 to become subrogated to the Company's rights in the costs orders against Mr Onyeari made by HHJ Lethem.

(b) The issues to be considered

(1) Is the Part 8 Claim an abuse of process on the basis that the Underwriters ought to have sought to be joined in the action brought by Mr Onyeari against the Company and that it is now too late?

115. Mr Onyeari contended that it was an abuse of process for the Underwriters to bring a claim themselves directly against the Company. If they were to bring the claim directly, they ought to have done so as part of the adjudication of the claim as between the Company and himself. Alternatively, they ought to have consented to the application brought by Mr Onyeari to have them joined. Instead, it was resisted and was dismissed by the Court on 8 May 2020. Either way, Mr Onyeari submits that the result would have been that in the first proceedings, the issue would not then have been between himself and the Company, but between himself and the Underwriters. Under the principle in *Henderson v Henderson* a party may not raise any claim in subsequent proceedings matters which were not but could and should have been raised in earlier ones. The principle in *Henderson v Henderson* has been said to be a 'broad merits based judgment' as to whether a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before: see *Johnson v Gore Wood* [2002] 2 AC 1. Mr Onyeari also referred the Court to the much cited part of the judgment of Lord Sumption in *Virgin Atlantic Airways Limited v Zodiac Seats (UK) Limited* [2013] UKSC 46; [2014] A.C. 160 at [17] where he referred to res judicata as a portmanteau term to describe related circumstances in which a litigant is unable to raise a point or make a claim in subsequent proceedings.

116. It is misconceived to contend that there is an abuse of process in or any other bar to the Part 8 claim. The Underwriters were entitled to use the subrogation to maintain the defence of the action brought by Mr Onyeari against the Company and to step into the shoes of the Company and maintain their defence. It was appropriate at that stage for the Underwriters through the Company to resist the joinder of the Underwriters. In the ordinary course, the expectation was that Mr Onyeari would pay any costs ordered under the judgment. There was no expectation that Mr Onyeari would then act in a way designed to impair the rights of recovery of the Company. On the Underwriters' case, there was no exemption of Mr Onyeari from enforcement of the costs order. It arose because it has now been raised by Mr Onyeari, and this has been rejected for the reasons set out above. There was no good reason why it ought to have been raised in the case between Mr Onyeari and the Company.

117. When it was raised by Mr Onyeari in the context of the steps taken by him to impair the right of recovery of the Underwriters pursuant to the contract of insurance and the rights of subrogation, the Underwriters were then entitled to submit that that was a breach of the contract of insurance and that the exemption from subrogation of a co-insured does not avail Mr Onyeari in this case. In this context, the Underwriters brought the Part 8 Claim in order to enforce their rights of recovery which had become impaired. It was not an abuse of process to do so. Accordingly, the Part 8 proceedings are not an abuse of process and no *Henderson v Henderson* or other res judicata point (in the broad portmanteau sense) arises from the fact that the Underwriters did not intervene in the action brought by Mr Onyeari against the Company.

118. Mr Onyeari submitted that if the Underwriters wanted to have the costs of the exercise, then they ought to have made themselves a party to the action. There was an estoppel by convention, it was contended that the parties acted on the basis that the rights were between the Company and Mr Onyeari. In the events which occurred, those parties then acted on the convention that there was no longer an entitlement to the costs by the agreement which they had made between them. He referred to *Amalgamated Investments v Texas Commerce Bank* [1982] QB 84. There is nothing in these points. The Underwriters were entitled to provide the costs and expenses of the Company and to maintain the defence and then to maintain the right of recovery of the Company in respect of the costs order. The Underwriters were entitled to hold the Company to the terms of the contract of insurance and, insofar as their rights of recovery were not maintained by the conduct of the Company and Mr Onyeari, to make the Part 8 claim accordingly. They were also entitled to submit that Mr Onyeari had been guilty of wilful default such that he had lost any exemption from subrogation against him which he may otherwise have had.

(2) Is the claim for the benefit of the costs order of the Company against Mr Onyeari a proprietary claim or a personal claim?

119. A subrogated insurer has proprietary interest in the property recovered from the third party in the hands of the insured: see *Napier v Hu*nter [1993] 1 AC 713, 738, 744-745, 752. A question arose as to the whether a subrogated insurer has a proprietary interest in the right of action itself whether as a right of action or a judgment.

120. In a note prepared after the hearing, the Underwriters recognised that the probability is that the insurer does not have a proprietary interest to the chose in action, and therefore that the rights of the Underwriters are limited by defences available to Mr Onyeari against the Company. In *Napier v Hunter* [1993] AC 713, the point was considered by the House of Lords which refused to express a final view without a full examination of the authorities. Nevertheless, provisional views were expressed obiter by Lord Browne Wilkinson that he doubted that subrogation gave rise to a proprietary interest in the claim, and by Lords Goff and Templeman to contrary effect. They reserved their position on the question without a full examination of the authorities. In *Re Ballast PLC* [2006] EWHC 3189 (Ch) [2007] BCC 620, Lawrence Collins J (as he then was) did conduct a full review of the authorities from [90] and held that there is substantial authority supporting the proposition that an insurer who is subrogated to the rights of his assured has no beneficial interest in an insured's claim against a third party and no direct authority for the proposition that it does have such an interest. In *Dornoch v. Westminster International* [2009] EWHC 889 (Admlty) [2009] 1 CLC 645 Tomlinson J was evidently troubled about this issue, but stated at [52] that in view of *Re Ballast* he was reluctant not to follow the lead of Lawrence Collins J.

121. It is unnecessary to decide this point, and I do not do so. I shall assume without deciding the point, for the purpose of identifying the causes of action of the Underwriters that they are not enforcing a proprietary right to the right of action of the Company against Mr Onyeari. Instead, the above terms of the insurance policy require the Company to make available to the Underwriters its rights of recovery

against Mr Onyeari and the Underwriters then wish to maintain all such rights of recovery. This then gives rise to the question as to whether there has been a breach of contract on the part of the Company under the insurance policy, which is discussed below.

(3) Can an order for its assignment be made that it is assigned by the Company to the Underwriters?

122. In view of the conclusion in the preceding paragraphs, this question arises on the basis that the claim to the judgment debt is to be treated as a personal claim. There is a question as to whether an order may be obtained that an insured transfers the right of recovery to the Underwriters and/or pursues a right of recovery. This is expressly provided for in General Condition 8 which states:

> *"At our request **you** will bring proceedings or transfer those rights to **us** and help us to enforce them."*

The first part is about the Company proceeding. The second part is a transfer of rights to the Underwriters. This in broad terms and is referring to *"any rights"*. It is broad enough to refer to a costs order.

123. Without more, subrogation does not entitle an insurer - to receive an assignment of the insured's claim: it is a right to step into the shoes of the insured and use the insured's name. The general principle as summarised in *Arag plc v Jones & Another* [2020] EWHC 3484, citing MacGillivray on Insurance Law (14th Ed.):

> *"24-003 the cause of action for damages remains in the insured, and the insurer subrogated to the insured's rights requires the insured to bring the action... it remains the insured's action."*

124. The right of transfer is intended to provide an exception to the above and to be entitled to a transfer of the rights to the Underwriters. This entitles the Underwriters to require the insured to assign its rights of recovery, in this case, the costs judgment, to them.

125. The problem is that it is the case of Mr Onyeari that he has agreed with the Company that the judgment debt will not be pursued. It is his case that even if the Tomlin Order were set aside, that agreement is effective. If there has been such an agreement, it is at least a possibility that it is within the power of an insured to agree that with a third party. It is the possibility of such an agreement taking place, thereby impairing the rights of the insured, which gives rise to an implied, or in this case, an express term that the insured shall not impair the subrogated right of recovery of the insurer.

126. This right is set out in Colinvaux on the Law of Insurance 13th Ed. at 12-004:

> *"The most important consequence of the positive role of subrogation is to permit the insurer to proceed against the assured for taking any action which prejudices the insurer's rights against the third party. Thus, if having recovered from the insurer, the assured enters into a binding agreement with the third party waiving all claims against him, the insurer is entitled to sue the assured for the amount that would have been recoverable from the third party up to the amount of the insurer's own payment."*

127. The Court can make an order to transfer the right of the Company under the judgment debt to the Underwriters. The problem with this is that this might lead to an empty judgment. It should be kept alive, perhaps as a declaration. Before considering the remedies, it is necessary to turn to consideration of whether there has been a breach of contract on the part of the Company or a procurement of breach of contract on the part of Mr Onyeari. It is to these allegations that this judgment now turns.

(4) Has the Company been in breach of its contract with the Underwriters in not enforcing the costs order and/or in seeking to compromise the same?

128. The starting point here is the express contractual obligations set out above. The Underwriters paid the costs and expenses of the Company in defending the action brought by Mr Onyeari under a contractual obligation under the policy. Having paid such costs and expenses, those costs were repayable to the Company through the costs order made in favour of the Company against Mr Onyeari. The right of recovery of the costs would be in an action maintained by the Company. The attempt on the part of the Company to take over the conduct of the action would be as regards the Underwriters a breach of contract.

129. Further, there was an obligation in any event on the Company to do nothing to impair the subrogated rights of recovery of the Company against Mr Onyeari. The evidence is that the Company did impair the rights of recovery of the Company against Mr Onyeari. To that end, they did the following, namely:

(i) the Company purported to change its legal representation away from the solicitors appointed by insurers;

(ii) the Company passed a resolution dated 6 August 2020 instructing the Insurer to treat as discharged the costs order;

(iii) the Company causing Calver J to grant a Tomlin Order discharging the costs liability purporting to treat the costs order as discharged;

(iv) either the Company purported to enter into a contract with Mr Onyeari in terms whereby the costs order was purportedly treated as discharged or the Company and Mr Onyeari entered into a course of conduct over a period of years to deprive the Company of its ability to receive the fruits of the costs order.

130. There was a breach of contract by interfering with the right of subrogation whether there was a settlement of the case or obstruction preventing the enforcement of the costs judgment and the consequent ability of the Underwriters to recover the fruits of the judgment. I am satisfied that there is no substantial dispute in this regard.

131. There are some miscellaneous points to which I shall refer below, which, if they had any merit, might be said to give rise to a dispute about the breach of contract. For the reasons set out below, I am satisfied that they have no merit.

132. The consequence is that years after the judgment for costs, the Underwriters have not been able to collect on the judgment. In the event that the Company had not been in breach of contract, the Company would have sought to enforce the judgment. The moneys recovered would have been held on trust for the Underwriters. In the context of discussing damages below, I shall consider what that amount would have been.

133. There is a suggestion on the part of Mr Onyeari that there was no breach of contract because there was no reason for the Underwriters to pay the costs and expenses. It is suggested by reference to a letter dated 20 November 2018 that it might be found that the claim was notified knowing that it was fraudulent: see Mr Onyeari's skeleton at [29-30]. Mr Onyeari has also pointed to what is referred to as a resolution of the Company dated 27 November 2018 to the effect that DWF should cease to act immediately after filing the defence and directing that the *"insurer bears the costs of these proceedings"*. That is not an answer because the Underwriters did not terminate the insurance contract, and any unilateral instruction of the Company or decision about costs was not binding on the Underwriter. In any event, it was not followed through: the defence of the Company was paid for pursuant to the costs and expenses being met by the insurers, and in the end the Company's defence prevailed. That all happened under the contract of insurance, and in particular the costs of defending the cover included under Clause 4 (set out above) which referred expressly to the Underwriters agreeing to *"pay costs and expenses on your behalf"*. That was a contractual commitment, contrary to the post hearing submission of Mr Onyeari at [29] that it was a matter of discretion on the part of the Underwriters. It led to the judgment for costs against Mr Onyeari. In May 2020, Mr Onyeari did not rely on the so-called resolution of 27 November 2018 when he sought that the insurers be joined in the proceedings. At a hearing before Picken J in April 2023 when Mr Onyeari contended that the Company had given notice to the insurers that it would waive its entitlement to costs, in answer to Picken J's question as to whether this point was raised before HHJ Lethem at the time when the order as to costs was made, Mr Onyeari accepted that it had not been made. The resolution had no meaning and effect, but even if it did, it was overtaken by the continuation of the proceedings and the 2020 order. Nor did the point itself since it is on the premise that a claim can be covered by insurance without the insurer being allowed to exercise its contractual rights to represent the insured company.

134. In the ordinary course, the Underwriters ought to have been able to enforce their subrogated rights, but that has not been possible due to the breach of contract. In his post-hearing submission at [1], [10] and [11], Mr Onyeari submits that after the order of the Judge, the insurance contract came to an end and "we accepted that it was over". This is incorrect. The insurance contract remained in existence in the sense of the Underwriters being able to enforce their subrogated rights to the costs in contract or in equity and in the Company being obliged not to impair any rights of recovery.

135. Towards the end of the oral hearing, Mr Onyeari stated that he wished to make further submissions about the insurers' equitable interests. To that end, he has referred to the case of *Westdeutsche Landesbank v Islington London Borough Council* [1996] 3 All ER 961 in his post-hearing submissions at [1] and [9], but nothing is cited which changes the position.

136. It is not an answer to the breach of contract that Mr Onyeari contends that after a set off against alleged moneys owed to him, he had no liability to the Company. That is to confuse the breach of contract with the damages arising from the breach of contract. The breach of contract was to prevent the Company through its lawyers maintaining its rights of recovery and to impair the rights of recovery including by purporting to enter into an agreement with the Company to discharge any liability for costs and by then misleading the Court so as to be able to drive through a Tomlin order behind the back of the subrogated Underwriter. The damages arising from the breach of contract will be a matter for the quantum stage which will be referred to below.

(5) Is Mr Onyeari liable for the tort of inducing or procuring the Company to be in breach of its contract with the Underwriters?

137. The ingredients of the tort of inducing a breach of contract are each satisfied. The ingredients of the tort of inducement or procurement of breach of contract were set out by the House of Lords in the case of *OBG Ltd v Allen* [2007] UKHL 21; 2008 1 AC 1 at [39-45].

138. First, there has been a breach of the contract of insurance in that the right of subrogation has been impaired either by agreeing to write off the judgment debt without the consent of the Underwriters or by having a course of conduct designed to impede the ability of the Underwriters to enforce the judgment. The section immediately preceding describing the breach of contract is repeated here.

139. Second, Mr Onyeari knew of the terms of the contract of insurance and in particular that there was an obligation on the part of the Company not to impair the ability of the Underwriters to collect its costs through enforcing the judgment in the name of the Company. Mr Onyeari knew about the subrogation and the fact that DWF was maintaining the right of subrogation on behalf of the Company through its contractually subrogated rights.

140. Third, Mr Onyeari knowingly intended to cause a breach of the contract of insurance between the Company and the Underwriters. He knew about the terms of the contract, and he knew how the subrogation was to work. In particular, he knew that

the Underwriters stepped into the shoes of the Company by way of contractual subrogation. He knew that the Underwriters arranged for the conduct of the defence of the Company of his action and that they arranged for solicitors appointed by them to act and at their cost and expense. He knew that they were entitled to recoup their costs from a costs order made against him in the event that one would be made. He knew when the costs order was made, it would be payable to the solicitors for the Company, and that it would be paid over to the Underwriters to recoup the costs and expenses incurred by them.

141. Mr Onyeari knew and intended to break the contract in the manner described above. The intention was for him to frustrate and impair the rights of recovery of the Underwriters. That this was his intention is evidenced by the terms of the Schedule to the Tomlin order and by the resolution of 6 August 2020 intended to deprive the Underwriters of the benefit of the costs order. They were both without the prior knowledge or participation or consent of the Underwriters. If Mr Onyeari had no intention of causing a breach of contract, then there would have been no reason for him not to discuss matters with the Underwriters and inform them that he was for some reason excused from paying the Company.

142. Mr Onyeari has advanced a case to the effect that he believed that he was excused from paying because he was a co-insured and therefore exempted from a subrogated costs order. This is not a sensible explanation. Leaving aside the fact that he was not a co-insured as regards an action brought by him against the Company, which is discussed below, the resolution of 6 August 2020 and the purported Tomlin order demonstrate that he was not acting because of a belief that he was exempted from subrogation. On the contrary, both the resolution and Schedule to the purported Tomlin order referred to liabilities from the Company to him and that both would be discharged.

143. If Mr Onyeari had believed that the Company was not able to enforce the costs order against him because of being co-insured, then that would have been shown in the two documents. Further, there would have been no need to refer to the alleged liabilities of the Company to him or indeed to waive them. Another step that is inconsistent with the alleged belief is the initiative of Mr Onyeari in November 2020 to have the costs assessed. It is not apparent what its purpose was, but whatever it was, it was inconsistent with a belief that he was excused from paying. It follows that the steps taken following the judgment were not because of the co-insured point but were designed to frustrate and impair the right of recovery of the Company against him. It was therefore a breach of contract which was procured knowingly by Mr Onyeari.

144. It is also not an answer that there might have been liabilities of the Company to Mr Onyeari. Assume for this purpose that there were, it is at lowest questionable as to whether a Court would allow a judgment for costs against Mr Onyeari subrogated to an insurer to be stayed pending a cross claim of Mr Onyeari to the Company about unrelated matters. Mr Onyeari evidently knew that this was the case as is evidenced by the fact that he chose to issue the resolution of 6 August 2020 and to enter into the alleged Tomlin order and act as above without any prior consultation with the Underwriters. In short, he must have known of the breaches of contract, and the assessment of the losses (including any questions of set off) was about the loss caused by the breach of contract.

145. Fourth, Mr Onyeari procured the Company to act in breach of contract. Since he was acting primarily for his own benefit, he in his personal capacity engineered the situation where he would be discharged from liability, or he would prevent such collection in combination with the Company. To that end, whilst acting for himself, he procured the Company wearing his director hat to enter into a contract to forgive the judgment debt or a course of conduct designed to prevent collection of the judgment debt.

146. Fifth, Mr Onyeari was acting not simply as a director of the Company such that he might be able to say that he was acting simply bona fide as an employee or director on behalf of the Company: see *Said v Butt* [1920] 3 KB 497. In this instance, Mr Onyeari was not acting simply in that capacity. He was acting for himself in his personal capacity to impair the ability of the Company to enforce the judgment debt against him. Accordingly, this is not a case where the third party director is simply the alter ego of the contracting party, the Company. This is a case of genuine tripartite relationship where the leading force is Mr Onyeari acting for himself in seeking to extricate himself from his liability to the Company and thereby to prevent the Underwriters from obtaining satisfaction through the enforcement of the judgment debt. In acting as he did behind the back of the Underwriters and seeking to cut out their subrogated rights and acting in the manner described above as regards the Tomlin order including misleading the Court and all for his own advantage as a judgment debtor, this is not a case where Mr Onyeari has a defence to this tort based on acting bona fide as an employee or director. He was acting for himself and for his own benefit, and ignoring or reckless as to any detriment to the Company or to the Underwriters.

147. Sixth, there is no justification for the impairment of the Underwriters' ability to collect under the insurance contract. This was intended for the advancement of Mr Onyeari's interests which is not a form of justification.

148. Seventh, for the tort of procurement of breach of contract sounding in damages, it has to be shown that as a result of the above acts, the Underwriters have suffered loss and damage. As regards damages, that is a matter which can be considered at the stage of the assessment of damages. The starting point is that the Underwriters have been deprived of the amount of the costs ordered to be paid. It will be necessary to assess how much would have been ordered on an assessment of those damages. There can then also be considered at that stage, what cross claim, if any, there may have been of Mr Onyeari against the Company. The next matter to be considered would be whether there is any reason why the judgment (the fruit of which would have been held by way of subrogation for the Underwriters) should be reduced as a result of a cross claim in respect of unrelated matters. The judgment shall return to this below.

149. As regards the matters save for quantum, I am satisfied that there is no substantial dispute as regards not only the breach of contract, but also the tort of inducing a breach of contract.

(6) Is Mr Onyeari exempt from subrogation due to General Condition 8?

150. General Condition 8 has been set out above. The first part of it mirrors the insurer's inability to sue a co-insured by way of subrogation. The principle is that where co-insurance is in place there is generally an implied term in the arrangements between the co-insureds that they would look to the insurance rather than to each other in the event of a loss. It was said in *Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582 that in order to avoid circuity of action, it was an implied term in a policy that an insurer could not exercise rights of subrogation against a co-assured who had the benefit of cover protecting against the very loss which formed the basis of the subrogated claim.

151. That immunity however fell away in the event that the co-insured was not insured for the loss in question such as in a case where there was wilful misconduct on the part of the co-insured. The implied term does not apply to benefit a party who has acted in a way to deprive itself of insurance coverage: see *Colinvaux* at 12-061 and following. The principle does not apply where the co-insured is not insured in respect of the loss under the policy, such as when the co-insured is guilty of wilful misconduct: see *Colinvaux* at 12-081 and following. At 12-084, the authors stated as follows:

> *"it may be that the correct analysis is that the contract between the co-assured's is to be construed as giving rise to subrogation immunity only insofar as the guilty co-assured remains an insured person under the policy. Thus, if the co-assured is in breach of a policy term or condition which precludes an action by him on the policy, then he ceases to be co-assured and potentially exposes himself to subrogation proceedings."*

152. In this case, Mr Onyeari is a co-insured in the sense that the definition section "you/your" in Clause 38 of the Definitions (set out above) applies not only to the Company, but also to *"any past, present or future employee, director or partner"* of the Company. General Condition 8 is then saying that a person will not in effect lose the benefit of the insurance because the Company is seeking to use rights of subrogation against them personally, subject to the exception where "*such payment is in respect of any wilful, malicious or dishonest acts or omissions"*.

153. Mr Onyeari's case is that he falls within the immunity as a director of the Company, and further that the exception does not apply in his case. As regards being a director of the Company, his submission is to the effect that there was blanket exclusion of the right of subrogation against a director, and that it is fatal to any right to subrogation. Secondly, he says that the acts or omissions referred to in the exception refer to the accident which has given rise to the personal injuries claim. There was nothing that was wilful about the accidents which gave rise to the claims. He submits that the liability under the policy is the injury which occurred in 2015, and that the costs of defending are not a liability. He denies in any event that his conduct in connection with the action was wilful within the meaning of the exception.

154. The Underwriters submit that the subrogation immunity does not apply in this case. That is because when General Condition 8 refers in the first sentence *to "your rights of recovery against any other party"*, this must mean against a party other than the

party who brought the original claim (or the party who suffered the loss or damage). The second sentence says that the immunity of employees, directors and partners is only in respect of *"these rights*", that is to say the rights of recovery against a person who has not brought a claim.

155. It is not in relation to all rights including those against a person who has brought a claim. This does not affect the width of the second paragraph of General Condition 8 about doing nothing to impair *"any rights of recovery"*, which is wider than *"these rights"* as referred to above. It is sufficiently broad to allow for subrogated rights of recovery whether in equity or under the contract in respect of the judgment costs. The post-hearing submission of Mr Onyeari at [29] that the right of recovery would be limited to "any other party" and would preclude recovery of costs from the party suing the Company is therefore fallacious.

156. In my judgment, the Underwriters' submissions are correct. Not only does the language support this, but it is to be seen also in the context of the purpose of the first part of General Condition 8, reflecting the principle that a co-insured should not find themselves sued indirectly by the insurer unless guilty of wilful default and the like. It is to be noted here that the language in General Condition 8 about the immunity of employees, directors and partners is identical to the definition of you/yours in Clause 38 which gives rise to the notion that they are co-insured. This shows that the clause was replicating the principle about co-insureds. Mr Onyeari was a co-insured as regards claims brought against him, not as regards claims which he would make against others including the Company.

157. If it were, otherwise, an employee might sue an employer for personal injuries at work or some other claim perhaps unrelated to his work, lose and be able to contend that this kind of policy condition should make the employee exempt from an enforcement of the costs. That ought not to be the case on the basis that the action gave rise to a liability for costs that fell outside the cover under the insurance policy. Mr Onyeari was not a co-insured for this liability. This is the context in which General Condition 8 is not so broad as to prevent the subrogated insurer from enforcing the costs order against the unsuccessful claimant (for which liability the employee or director was never insured). It follows that the construction set out above of the first paragraph 8 not only accords with the textual construction, but also with the context. Applying an iterative process moving from the words to the context and from the context to the words: see *Wood v Capital Services PLC* [2017] UKSC 24, Mr Onyeari is not entitled to the immunity from subrogation referred to in the first part of General Condition 8.

158. In case a different construction prevailed and it were held that the immunity applied subject to wilful acts or omissions, this judgment now considers whether the exception applies, namely "*unless such payment is in respect of any wilful, malicious or dishonest acts or omissions."*

159. How do the Underwriters answer Mr Onyeari's point that the wilful acts or omissions had to be in respect of the personal injury, not in respect of how the claim was conducted three years later? The answer is that the exception is in respect of the payment. The relevant payments here were not in respect of the personal injury, but they were in respect of the costs of defending the cover included under Clause 4 (set out above) which referred expressly to the Underwriters agreeing to *"pay costs and expenses on your behalf"*. Those were incurred because of the claim which was

brought by Mr Onyeari. The immediate cause of the payments was the decision of Mr Onyeari to commence and continue the claim, and not the personal injury which was the subject of the claim.

160. The actions in this case which are said to be wilful were the commencement and then the continuance of the Underlying Proceedings. Both were intentional. They were also said to be blameworthy in that Mr Onyeari commenced and continued proceedings which were totally without merit and certified as such by HH Judge Lethem. That means not simply that the proceedings did not have any real prospect of success and were therefore susceptible to a strike out/summary judgment application, but that they were bound to fail and/or hopeless and/or did not have any rational basis: see *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82; [2016] 1 WLR 2793.

161. Mr Onyeari sought to get the Company to admit liability (by the email dated 25 July 2018 characterised by the Judge as "extraordinary" in [29] above) and then pass on the liability in the action to the insurers to make a payment. In other words, he expected to be able to win without having had the claim tested. When this failed, and the Underwriters defended the claim, and pointed out the hopelessness of the proceedings as above, Mr Onyeari pursued this hopeless claim in the knowledge of how it was defended and knowing also that the Underwriters were incurring substantial costs in defending it. He acted in the manner set out especially at [44] of this judgment and behaved vis-à-vis the Underwriters in not an entirely honest way as set out at [44(ii)] of this judgment. It was this conduct, which, said the Judge at [47] of his judgment, cast *"a long shadow over the consideration of the evidence in the case."* The case was conducted by himself in person without the cost of hiring external lawyers, and the Company's resources were not being used to defend this totally without merit claim.

162. What as a matter of construction is meant by 'wilful' acts or omissions for this purpose? The word "wilful" must take its meaning according to its context. According to the Shorter Oxford English Dictionary, "wilful" means "*Done on purpose or wittingly; purposed, deliberate, intentional. (Chiefly, now always, in bad sense of a blameworthy action; freq. implying perverse, obstinate.)"*

163. In *Patrick v Royal London Mutual Insurance Society Ltd* [2006] EWCA Civ 421; [2007] Lloyd's LR 85, Tuckey LJ said (in the context of a policy exclusion which excluded "*any wilful malicious or criminal act*" carried out by the insured's immediate family, including children) as follows:

> *"15. It is tolerably clear what malicious or criminal acts are and I think these words lend colour to what is meant by a wilful act. In this context it must be some act which is blameworthy. If so, something more than a deliberate or intentional act is contemplated. If that is all the word meant, the wide cover apparently provided by the extension would largely be taken away by the exclusion. Most acts, including negligent acts, are deliberate and intentional.*
>
> *16. Obviously if the act is deliberate and intended to cause damage of the kind in question it will be within the exclusion. It*

> *will be wilful, as the judge held, and might also be malicious or criminal. But for an act to be wilful I do not think it is necessary to go as far as this. It will be enough to show that the insured was reckless as to the consequences of his act. Recklessness has been variously defined but if someone does something knowing that it is risky or not caring whether it is risky or not he is acting recklessly. Put more precisely for present purposes if the insured is aware that what he is about to do risks damage of the kind which gives rise to the claim or does not care whether there is such a risk or not, he will act recklessly if he goes ahead and does it. I think such conduct was intended to be included in the exclusion and I would equate a reckless act with a wilful act for this purpose. This approach focuses upon the state of the insured's mind when he does the act rather than its intended consequences. Defined in this way the exclusion does not require the insured to intend to cause damage of the kind in question.*
>
> *17. Equating wilfulness with recklessness is consistent with the dictionary definition of wilful which includes obstinate and headstrong conduct. That is the essence of recklessness as well…"*

164. In *Burnett or Grant v. International Insurance Co of Hanover Ltd* [2021] UKSC 12: [2021] 1 WLR 2465, Lord Hamblen said at [53]:

> *"while the natural meaning of wilful includes deliberate, wilful is capable of having a wider meaning, depending on the context. This was a point made by Tuckey LJ in the CP case [2006] 1 CLC 576, para 13:*
>
> > *"The legal dictionaries show that wilful is used in many contexts. One can safely say that it always means deliberate and that it will take any further meaning from the word or words which it qualifies and its context but beyond that one cannot go."*

165. The decision in any case will turn upon a construction of the words seen in context, applying the iterative process referred to above. In the above two cases the results were different according to the words and the context. In the case of *Patrick,* the Court of Appeal considered a policy provision which excluded claims arising from *"any wilful, malicious or criminal acts"* and held that the insured will have acted wilfully if he was reckless as to the consequences of his act, i.e. if he does something knowing that it is risky or not caring whether it is risky or not. However, in the case of *Burnett*, in the context of a public liability insurance policy, the Supreme Court held that an exclusion in respect of an employee's *"deliberate acts"* did not extend to acts of recklessness, as that involved a different state of mind. Mr

Onyeari submits that what is required is an act which was malicious or criminal or dishonest. It must be deliberate, and it is not broad enough to be a reckless act.

166. Applying the above to the instant case, I am satisfied that the clause is to be interpreted and applied as follows:

(i) It was not sufficient to show that the conduct was intentional or deliberate in the sense that most actions are intentional or deliberate, for example a negligence case.

(ii) It was not necessary to prove that the acts or omissions were 'malicious' or 'dishonest': otherwise the word "wilful" will add nothing.

(iii) Those words "malicious" or "dishonest" lend colour to the word "wilful", and mean that the acts or omissions must be in some way blameworthy.

(iv) In the circumstances of this case, it was blameworthy to commence and continue an action which was not only susceptible to being struck out, but which was totally without merit in the senses referred to above.

(v) He knew of the defences to the case including the public policy objections. His continuation with a hopeless case can be characterised with the adjectives of Tuckey LJ in *Patrick* as *"headstrong and obstinate"*

(vi) Mr Onyeari knew that in so doing, he was exposing the Underwriters to the payments to be made, namely their costs of defending the action.

(vii) It is no answer that the insurers stood to recover such costs by way of subrogation. They would in the ordinary course not recoup all of their costs, and whether or not they would be able to enforce such costs would always be an open question. This is without taking into account, as I do not for this purpose, the subsequent conduct of Mr Onyeari in obstructing the enforcement of the costs judgment.

167. I therefore find that the commencement and the continuation of this claim found to be totally without merit by the trial Judge comprised wilful acts of omission. The language in the *Patrick* case referring to wilful, malicious or criminal was similar to the language in the instant case *"wilful, malicious or dishonest"*. Applying the language of the above authorities, particularly of Tuckey LJ in *Patrick,* the commencement and the continuation of the action in the face of the opposition of the Company was blameworthy. The adjectives of Tuckey LJ *"headstrong and obstinate"* are apposite.

168. In all the circumstances, General Condition 8 does not entitle Mr Onyeari to avoid the consequences of subrogation. First, the opening sentence has no application to the enforcement of a costs order in an action brought by an employee or director. Second, if it did, the exception in the second sentence of General Condition 8 is satisfied. The payments made to defend the action were the result of the commencement and continuation of the action being due to Mr Onyeari's wilful acts

or omissions. It therefore follows that there was no barrier to the enforcement of the costs judgment by the Underwriters through subrogation and that the analysis about the breach of contract above is unaffected by General Condition 8.

(7) What is the remedy of the Underwriters against the Company and against Mr Onyeari respectively?

169. As noted above, there is the possibility of an order against the Company to transfer the rights of the costs judgment from the Company to the Underwriters. Whilst there may be an entitlement of that kind, the problem in the events which have occurred is that it may have no worth if, as is indeed contended by Mr Onyeari, the right of the Company to enforce the costs judgment has been discharged by agreement. The analysis of breach of contract above is broader than this, and applies even if the judgment was not discharged by agreement but from the steps taken to impair the right of recovery of the Company. Similarly, the tort of inducement of breach of contract applies whichever way the breach of contract is formulated.

170. If it is the case that the liability of Mr Onyeari has been extinguished by a settlement between Mr Onyeari and the Company (which, as has been found above, is in breach of contract), then the remedy in damages is to sue the Company for the amount that would have been recoverable from Mr Onyeari in respect of the costs order. As part of the consequentials to this judgment, it will be necessary to consider the appropriate remedy given the conclusions in this judgment as regards breach of contract and inducement of breach of contract and the entitlement to a transfer of rights.

171. It might be that at this stage, it is not necessary to make an irrevocable election of rights, pending a determination of a damages claim for breach of contract and inducement of breach of contract. The court will consider this as part of the matters consequential upon judgment, and in connection with the drawing up of an order to reflect this judgment and directions for the future disposal of this matter. It is necessary to formulate what relief is sought in respect of the entitlement to a transfer of rights. Is it a declaration of an entitlement? Is it an order for transfer? There are proposed orders as regards transfer in para. 91(4) of Mr Evans-Tovey's skeleton argument dated 10 October 2023, but it is necessary to consider how they work in the light of any argument that these orders have been discharged by agreement between the Company and Mr Onyeari, albeit one which on the findings in this judgment that such agreement, if effective, would be a breach of contract. What order, if any, is there to be made to give effect to the requirement to transfer? Does it await the determination of the damages for breach of contract/inducement of contract or are the two reliefs to be coterminous?

172. It ought to be added that Mr Onyeari has stated that there is no scope for an order for a transfer on the ground that it would be an order for specific performance, and a usual bar to specific performance is that damages is an adequate remedy. If in fact an order for a transfer would add nothing, then an order for a transfer would not be necessary. However, the Underwriters are entitled to be concerned as to what will be said by way of the answer on the assessment of damages, and whether at that stage there is an argument to the effect that the liability of the Mr Onyeari has not been discharged by agreement (especially in consequence of the Tomlin order having been

set aside), and then a submission that this impacts on the level of damages. There have been so many formulations intended to impair the rights of recovery (as this judgment has found), that it is legitimate for the Underwriters not to fall between two or more stools. This requires attention at the time of formulation of the order and the submissions as to consequential directions and orders.

173. In this case, damages for breach of contract against the Company would involve assessing how much would have been obtained in the event of the enforcement of the judgment for costs against Mr Onyeari. The first question is: how much are the costs upon an assessment? Have those costs yet been assessed? It appears that the answer is that they have not been assessed. It would be necessary for the court to assess what they would have been in order to have the starting point of the damages, namely the amount of the costs that would have been ordered on an assessment. That is assuming that there is no mechanism for having an assessment as a step within the assessment of damages, as to which I express no view at this stage.

174. As regards the assessment of damages, it would be necessary to consider how, if at all, to take into account, the alleged cross claim of Mr Onyeari against the Company. The Underwriters submit that this should not be taken into account because there has been no evidence adduced about the same other than an assertion that it is the totality of the sums said to be owed by the Company in the accounts of the Company. That is said to be incredible and, in any event, unsupported by documents of account or contemporaneous documents evidencing any liability and the amount of the same.

175. Even if there were any such cross claim, the question then arises as to why that should affect the amount that would have been recovered under the judgment in the event that the Company had complied with the contract of insurance and not interfered with the right of subrogation. In that event, the question would arise as to whether any judgment for costs would be stayed in order to enable the judgment debtor to pursue his cross claim to damages and then to set off that judgment against the first judgment.

176. That involves consideration of how the Court would treat any cross claim of Mr Onyeari against the Company. The sub-issues here might include the following (but nothing here is intended to be comprehensive):

(i) can or ought a cross claim of Mr Onyeari against the Company which has not given rise to a judgment be set off or give rise to a stay of a judgment in respect of a judgment for costs in favour of the Company against Mr Onyeari;

(ii) what are the cross claims, and are they capable in whole or in part of giving rise to a set off, whether in the nature of mutual dealings or equitable set off or any other kind of set off. How closely connected are the cross claims with the subrogated claim to costs, and do they in any sense impeach the claim or judgment for to costs? In what sense, if at all, could a judgment for costs be subject to mutual dealings or any other sense of set off? Is there something falling short of set off, which might lead to be a basis for staying an order under a judgment?

(iii) does it affect the above considerations that the claim which has given rise to the costs was consequent upon a claim which was found to be totally without merit;

(iv) does it affect the analysis that whilst the order for costs may not be held on trust for the Underwriters, the benefit of payment under the judgment for costs when paid would be held on trust for the Underwriters.

177. As regards the amount of cross claims, I should not wish to dismiss the undocumented assertions simply because the paucity of documentary evidence about the possible cross claims at this stage. It is not impossible that all of the Company's debts are owed to Mr Onyeari. Having said this, in order to found a cross claim, a mere assertion to that effect will not do. The Court would want to consider disclosure of all relevant contracts, all payments made by Mr Onyeari to the Company, all bank statements evidencing such payments and all other evidence in support of the cross claims. The Court can evaluate the alleged cross claims in the light of such evidence. The existence of alleged cross claims would only be a starting point in that the matters set out in the preceding paragraph would still fall to be considered.

178. Nothing which is written here is comprehensive as regards the matters to be considered in respect of quantum, and it will be necessary to specify directions in connection with quantum.

179. The damages for the tort of inducing a breach of contract are to be assessed by reference to what would have occurred in the event that the tort had not occurred. In the instant case where the breach of contract and the tort went hand in hand, it is likely that the damages will be the same both for the breach of contract against the Company and for the tort against Mr Onyeari. This will be a matter to be determined at the quantum stage.

(8) Conclusion, disposal and the way ahead

180. It follows from the above that:

(i) the application for permission to appeal has been dismissed;

(ii) the application to set aside the Tomlin Order has been allowed;

(iii) the application to amend the Part 8 Claim has been allowed;

(iv) the Part 8 Claim has been transferred and, subject to discussion of the appropriate relief and remedies, the Court has found that the Underwriters have an entitlement to (a) judgment for breach of contract with damages to be assessed, (b) subject to proving damages which is the subject of damages to be assessed, Mr Onyeari is liable to damages for inducing breach of contract;

(v) the matters set out above at [170 – 173] as regards an order for a transfer of the right to the recovery of the judgment for costs stand to be considered, and

how that will dovetail with a judgment for the Underwriters on the Part 8 Claim for damages to be assessed against the Company for breach of contract and damages to be assessed against Mr Onyeari for inducing breach of contract;

(vi) there are to be directions for the way ahead including an assessment of damages;

181. The Underwriters might specify what directions which they would seek in the nature of information about the alleged indebtedness and disclosure of documents. The Underwriters ought to set out such directions that they require to an assessment including the possibility, if sought, of any application for an interim payment. Mr Onyeari must be able to respond.

182. Unless there is agreement between the parties about all of the above including the costs of the above applications, an oral hearing will need to be fixed to deal with consequentials. In the meantime, the parties are asked to provide agenda points for such a hearing.