Neutral Citation Number: [2018] EWHC 23 (Comm)

Case No: CL-2015-000573

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2018

Before :

SIR ANDREW SMITH
(Sitting as a Deputy High Court Judge)

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Between :

(1)	**Accident Exchange Limited**	**Claimants**
(2)	**Automotive and Insurance Solutions Group PLC**	

- and -

(1)	**Colin McLean**	**Defendants**
(2)	**Suzanna Forrest**	
(3)	**Morgan Cole (a firm)**	
(4)	**Morgan Cole LLP**	
(5)	**Neil Forsyth**	
(6)	**Keoghs (a firm)**	
(7)	**Keoghs LLP**	
(8)	**Melanie Mooney**	
(9)	**Lyons Davidson (a firm)**	
(10)	**Nigel Partridge**	

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Robert Anderson QC, Anna Dilnot and Stuart Cribb (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimants**
Tom Adam QC, Tim Kenefick and Oliver Jones (instructed by **Herbert Smith Freehills LLP**) for the **Third, Fourth and Fifth Defendants**
Hugh Norbury QC and Dan McCourt Fritz (instructed by **Norton Rose Fulbright**) for the **Sixth, Seventh and Eighth Defendants**
Miles Harris and Mark Cullen (instructed by **Bond Dickinson LLP**) for the **Ninth and Tenth Defendants**

Jonathan Hough QC (instructed by **Berrrymans Lace Mawer LLP**) for **The Direct Line Group**

Julian Kenny QC (instructed by **RPC**) for **Royal & Sun Alliance Insurance Plc**

Hearing dates: **7, 8 and 9 November 2017**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR ANDREW SMITH

Sir Andrew Smith :

Introduction

1. The claimants in this case (whom I need not distinguish and to whom together I refer as "AE") are companies that provide what are described as accident management services, and in particular they provide replacement motor vehicles on credit terms to clients whose vehicles have been damaged in road accidents. Their plan is to recover the hire charge from another driver involved in, and alleged to be responsible for, the accident, or in reality from the insurers of the other driver. (For convenience, I shall refer to that other driver as the "defendant driver".)

2. Damages can of course be recovered for loss of the use of a vehicle damaged as a result of negligence of another driver, and if the loss can be mitigated by hiring a replacement vehicle, the cost of hire is normally the measure of recoverable damages. But it was established in Dimond v Lovell, [2002] 1 AC 384 that, if a replacement vehicle is hired on credit terms by someone who does not need credit, generally the cost attributable to the provision of credit will not be an expense incurred by way of reasonable mitigation of the loss and so will not be recoverable. The cost of hire net of any such credit element has come to be called the "basic hire rate" or "BHR". Prima facie, however, a claimant can recover the hire charge that he has agreed to pay, and it is for a defendant to show that the hire charge is excessive because it includes an unnecessary credit element, and to demonstrate that that is to be "stripped out" from what is recoverable: Dickinson v Tesco Plc, [2013] EWCA Civ 36.

3. This litigation concerns the activities of a company called Autofocus Limited ("AF"), which is now in liquidation. It used to provide forensic services, in particular for cases where a question arose about the hire recoverable by a claimant who had hired a replacement vehicle on credit terms. AF produced thousands of such reports: according to AE, between 2005 and 2010 AF's evidence was deployed in some 4,700 cases in which it (AE) was interested. The insurers of the defendant drivers would want to show that the credit hire rate was higher than the BHR, and AF produced reports for them about the BHR for a comparable vehicle. The reports reflected the result of research and surveys of rates charged in the market, or purported to do so. In 2009, in a case called Glossop v Salvesen Logistics Limited it became apparent that an employee of AF described as a "rates surveyor", who had prepared a report for a hearing in the Chesterfield County Court, had falsely claimed to have based the evidence on information from car hire companies who had been contacted about their hire rates.

4. AE alleges that this case reflected the common practices of AF: that, in the years before AF went into liquidation on 29 July 2010, it was involved in the systemic and endemic fabrication and manipulation of evidence about rates and the research that it had conducted so as to deceive businesses such as AE and, if the claim was not settled, to deceive courts. I do not need to set out in detail the allegations against AF: the nature of them can be seen in the judgment of Supperstone J in Accident Exchange Ltd v Broom and ors, [2017] EWHC 1096 (Admin), in which, in so far as they were not admitted, he upheld complaints of contempt of court against seven persons whom AF had employed as "rates surveyors" and whose dishonesty had interfered in the due administration of justice. It is sufficient for me to refer to the six

kinds of practice identified in his evidence by Mr Neil Bowker, then a member of DLA Piper UK LLP, who acted for AE. He gave undisputed evidence that:

i) AF adopted a dishonest system for producing false and misleading evidence, providing manuals and guidance about how evidence of rates should be manipulated to assist AF's clients.

ii) Reports produced by AF's rates surveyors were changed by directors and senior employees, who removed unhelpful information and added misleading information.

iii) Reports included evidence of hire rates purportedly obtained over the telephone, but the information was either entirely false or was based on calls for different cases.

iv) Reports were routinely swapped between employees and presented in court by witnesses who had had no involvement with the investigation behind them.

v) AF employees were trained to give false evidence in court.

vi) AF employees in fact gave false evidence in court.

AF's purpose, it is argued, was to achieve favourable settlements or court decisions for those defending credit hire claims and correspondingly adverse to the interests of AE and others with such businesses, and so to attract business and so increase its profits.

5. The first defendant, Mr Colin McLean, and the second defendant, Ms Suzanna Forrest (the "AF defendants"), were directors of AF. The other eight defendants are solicitors who acted for defendant drivers facing claims by AE's clients to recover the hire charges for replacement vehicles. They fall into three groups:

i) The third and fourth defendants are a firm of solicitors who practised as Morgan Cole until 4 February 2010 and the successor limited liability partnership, and the fifth defendant was a solicitor employed by Morgan Cole. I refer to them together as the "Morgan Cole defendants";

ii) The sixth and seventh defendants are a firm of solicitors who practised as Keoghs until 21 July 2007 and the successor limited liability partnership, and the eighth defendant was a partner at Keoghs. I refer to them as the "Keoghs defendants"; and

iii) The ninth defendant is a firm of solicitors who practised as Lyons Davidson and the tenth defendant was a partner in the firm. I refer to them together as the "Lyons Davidson defendants".

6. In this action AE brings claims against all ten defendants for damages for conspiracy and deceit, alleging that between 2005 and July 2010 they were party to a scheme or schemes to produce false and misleading information and to deploy it in litigation against AE (and others carrying on a similar business) and in settlement negotiations. The case is listed for trial of specified issues in October 2018.

The applications

7. On 24 June 2016 it was ordered that the parties give standard disclosure, but that generally documents relating solely to the conduct and disposal of individual credit hire claims should be disclosed only in respect of a sample of cases. Disclosure lists have now been exchanged, and issues about disclosure have led to the applications that are before me.

8. First, AE has brought an application against the solicitor defendants in which it seeks inspection of documents over which the solicitor defendants assert privilege on behalf of their clients. The central issue on this application is whether the documents are protected by privilege or whether the so-called "iniquity exception" defeats any claim for privilege.

9. Secondly, the Morgan Cole defendants and the Lyons Davidson defendants apply for disclosure of documents held by solicitors who were instructed to pursue claims in the names of AE's clients to recover credit hire charges. Here the central issues are whether the documents are in the control of AE, and whether AE's clients have privilege in the documents that protects them from inspection by the solicitor defendants.

AE's application

10. The Morgan Cole defendants opposed AE's application, but they explained that they did so because, while they were for their own part content for the documents to be inspected, none of their clients was represented (and thus they were in a different position from the other solicitor defendants) and they considered that in these circumstances they should make submissions to protect their clients' interests. The Keoghs defendants' position was that they were unable to consent to the application because of the duties that they owe to their clients and former clients: they adopted a neutral position. The Lyons Davidson defendants made some observations about practical problems that might arise from the order sought by AE, but otherwise they too adopted a neutral position. I also heard submissions from two insurance companies who underwrote defendant drivers. Direct Line Group ("DLG"), who instructed (whether on its own behalf or for its insureds) both Lyons Davidson and Keoghs in relation to claims where AF provided evidence during the relevant period, adopted the submissions of the Morgan Cole defendants and made submissions of its own. Royal & Sun Alliance Insurance Plc ("RSA"), who or whose insureds instructed Lyons Davidson on similar claims, also adopted the submissions of others opposing AE's application, but the focus of its submissions was that, if any order were made in AE's favour, it should be limited so as to minimise intrusion into commercially sensitive information.

11. The AF Defendants did not appear and were not represented at the hearing. An order made by HHJ Waksman QC on 26 July 2017 is intended to ensure that they are not therefore prejudiced at trial. It records that they are not parties to any of the applications before me and therefore did not intend to take any part in them, and went on to record that: "(a) the non-participation by the AF Defendants [in AE's application] shall not constitute any admission on their part of the allegations made against them in [Mr Bowker's witness statement] or otherwise; and (b) the fact that,

for the purposes of [AE's application] only, the court may decide that there is a strong prima facie case against the AF Defendants shall not be used against them thereafter".

12. AE put forward several different drafts of the order that it seeks in the course of the hearing. Originally it sought primarily a declaration that "all communications or other documents in the control … of the Solicitor Defendants made or intended to further the Fraudulent Purpose of Autofocus Ltd are not subject to privilege by reason of Autofocus' alleged iniquity". By the end of the hearing, it primarily sought what would, to my mind, have been a more conventional form of order, in that it would at least have been directed to what inspection the respondents should give: an order that "The Solicitor Defendants shall give inspection of all and any communications or other documents within their control … furthering the Fraudulent Purpose of AF", the fraudulent purpose being defined as AF's "intention of producing dishonest evidence and data which could be deployed by the Solicitor Defendants and the Underlying Defendants", that is to say defendant drivers or their insurers. However, the point was well made by Mr Miles Harris, who represented the Lyons Davidson defendants, (and by other counsel) that each form of order proposed would leave the respondents with little guidance about what documents should be provided for inspection and would leave them with a difficult and onerous task, one which to my mind would be disproportionate to the likely importance of the documents notwithstanding the large sums at stake in this litigation. But I need not engage with that because I have concluded that the application, however formulated, fails on a point of principle, which means that the problems associated with the formulation of the order do not arise.

13. In support of its application AE submits that it has shown a strong (or, if necessary, a very strong) prima facie case that AF's employees were guilty of iniquity of the kind and on the scale that I have described. The submission is well supported by detailed evidence given by Mr Bowker, there was no contrary evidence, and the submission was not challenged either in skeleton arguments or orally. It is sufficient to state that I am satisfied that AE has made out this part of its argument.

14. AE does not allege any dishonesty or impropriety against the clients of the solicitor defendants against whom credit hire claims were made, nor against DLG, RSA or any other of their insurers. Further, notwithstanding its pleaded allegations against them, AE does not rely on this application upon any dishonesty or iniquity on the part of the defendant solicitors, although in the end it was common ground before me that this would in any case be immaterial to what I have to decide.

The "iniquity exception" to privilege

15. It is clear law that there is no legal professional privilege in respect of documents which are in themselves part of an iniquitous proceeding or in communications made in order to obtain advice for the purpose of carrying out iniquity. The reason was explained in R v Cox and Railton, (1884) 14 QBD 153, in which Stephen J, giving the judgment of the Court of Crown Cases Reserved, said (at p.167) that the rule affording legal professional privilege does not "include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal

purpose does not 'come into the ordinary scope of professional employment'". The expression "the ordinary scope of professional employment" derives from the judgment of Lord Brougham in Greenough v Gaskell, (1833) 1 My & K 98, who said that legal advisers are not only justified but bound to withhold from disclosure communications received "touching matters that come within the ordinary scope of professional employment" or matters committed to paper if they know of them "only through their professional relation to their client". Lord Brougham observed that the rule has many apparent exceptions to it, which do not truly fall within its terms. I need hardly say that the general principle enunciated by Lord Brougham, legal advice privilege, is now, together with litigation privilege, recognised as "a fundamental human right long established in the common law" (R (Morgan Grenfell & Co Ltd) v Special Commr of Income Tax, [2002] UKHL 21 at para 7 per Lord Hoffmann), which is established beyond argument as an absolute privilege which, absent waiver and unless displaced by statute, cannot be overridden by any supposedly greater public interest: Three Rivers DC v Bank of England (No 6), [2004] UKHL 48 at para 25 per Lord Scott.

16. The so-called "iniquity exception" does not depend upon whether or not the lawyer is party to any iniquity. Stephen J explained (loc cit at p.168) that, "In order for the rule recognising professional privilege to apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If the criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud".

17. Before leaving the judgment of Stephen J, I should refer to the last paragraph, on which Mr Robert Anderson QC, who represented AE, relied: it records (at p.175) that the Court had been "greatly pressed with the argument that, speaking practically, the admission of any such exception to the privilege of legal advisers as that it is not to extend to communications made in the furtherance of any criminal or fraudulent purpose would greatly diminish the value of that privilege. The privilege must, it was argued, be violated in order to ascertain whether it exists. The secret must be told in order to see whether it ought to be kept". Although the Court had been urged to state how this might be avoided, Stephen J simply said (at p.176) that the courts must "In every instance judge for themselves on the special facts of each particular case …". However, he also observed that the exception "ought to be used with the greatest care not to hamper prisoners in making their defence and not to enable unscrupulous persons to acquire knowledge to which they have no right, and every precaution should be taken against compelling unnecessary disclosures".

18. With regard to the law about when the protection of privilege is lost by a lawyer's client who is himself or herself guilty of wrongdoing, I need only add that:

    i) R v Cox & Railton was a criminal case, but the iniquity exception applies in civil cases: O'Rourke v Darbishire, [1920] AC 581.

ii) The iniquity exception applies not only in cases of fraud, but more generally where wrongdoing or iniquity is sufficient to set aside legal professional privilege: Barclays Bank plc v Eustice, [1995] 1 WLR 1238, 1249C-G.

iii) The iniquity exception applies to both litigation privilege and legal advice privilege: Kuwait Airlines Corpn v Iraqi Airways Co (No 6), [2005] EWCA Civ 286.

Third party iniquity and the iniquity exception

19. I have already said that in this case it is not alleged that the defendant solicitors' clients (whether they be the persons whose cars were damaged or their insurers or both) were involved in any impropriety. AE relies on the decision of the House of Lords in R v Central Criminal Court ex p. Francis & Francis [1989] 1 AC 346, which extended the exception to a case where the client was taken to have had no criminal purpose, but was used "as an innocent tool" of a criminal. I must consider the case in some detail because the issue on this application is, in essence, whether the reasoning of the majority in the House of Lords is applicable here.

20. The case concerned an order obtained by the police under the Drug Trafficking Offences Act, 1986 that a firm of solicitors produce documents relating to a client, who was referred to as "Mrs G", on the grounds that a relative of hers, who was suspected of drugs trafficking, was laundering the proceeds by assisting members of his family, including Mrs G, with property purchases. It was assumed both in the Divisional Court and on appeal to the House of Lords (i) that the suspected drugs trafficker intended to further a criminal purpose by acquiring the property for Mrs G, (ii) that Mrs G was innocent of complicity in that purpose, and (iii) that the solicitors acted throughout with complete propriety.

21. The 1986 Act provided that a circuit judge could order production of material that "does not consist of or include items subject to legal privilege". The expression "items subject to legal privilege" was defined in the Act by reference to the Police and Criminal Evidence Act, 1984, which provides at section 10(2) that "Items held with the intention of furthering the criminal purpose are not items subject to legal privilege". The order, in its final form after modification, was directed to documents relating to the purchase of one particular property, and it covered both documents that could not be the subject of legal privilege, such as copy deeds and documents constituting abstract of title, and documents for which there might be legal privilege, such as correspondence and attendance notes. On an application for judicial review to quash the order in so far as it related to the second category, the Divisional Court, Lloyd LJ and Macpherson J, accepted a submission that the statutory exception went wider than the common law stated in R v Cox & Railton in that the relevant criminal purpose need not be that of the adviser's client and might be that of a third party "at any rate if the client is the innocent instrument or beneficiary of the third party's criminal purpose" (per Lloyd LJ at [1989] 1 AC 346, 355). It therefore rejected the challenge to the order, and the solicitors appealed to the House of Lords.

22. The Divisional Court certified that this point of law of general public importance was involved in its decision: "whether upon the true construction of section 10(2) [of the 1984 Act] …, items which would otherwise fall within the definition of 'items subject to legal privilege' are excluded from that definition if, but only if, the solicitor or

other person holding the item in question has the intention of furthering a criminal purpose or whether the relevant intention may include the intention of the client or of a third party?" Thus, the question was presented as one of statutory interpretation, rather than about the common law about legal professional privilege. The appeal was dismissed by a majority of three (Lords Brandon, Griffiths and Goff) to two (Lords Bridge and Oliver). Lords Bridge, Brandon and Oliver considered the appeal turned wholly on a question of statutory interpretation, and their reasoning did not turn on the common law position. Indeed, in the course of argument, Lord Bridge, presiding over the Judicial Committee, intervened to say that the Committee was "of the view that this matter is one of construction and therefore they do not wish to hear at this stage the common law aspect of the appeal" (loc cit, p.359C). (It is not clear from the Law Report that counsel were later told otherwise.)

23. However, the common law position was considered in the speech of Lord Goff. On the question of statutory interpretation he concluded that "the intention of the legislature was to encapsulate in section 10 the common law principle relating to what used to be called legal professional privilege", and therefore he looked to the common law for guidance (loc cit at p.395D/E). He acknowledged that there was no authority directly on point, and so the matter was one of first impression. Citing the words from Lloyd LJ's judgment which I have set out at para 21 above, he identified this as the crucial question: "whether the third party's criminal intention should have the effect of excluding the privilege of the client whom the third party is using as an innocent tool". He answered it by reference to the purpose behind legal professional privilege and the reason for the iniquity exception as explained by Stephen J. Accordingly, he considered it to be "immaterial whether it is the client himself, or a third party who is using the client as his innocent tool, who has the criminal intention. In either case, to adopt the words of Stephen J, the communications are intended to further a criminal purpose. In either case, the protection of such communications cannot be otherwise than injurious to the interests of justice; and in either case, the communications are in furtherance of a criminal purpose, and so cannot come within the ordinary scope of professional employment" (p.396E/F). Therefore he held that "the criminal intention of the third party will, in the circumstances under consideration, exclude the application of the principle of legal professional privilege at common law, even though the privilege, if it attached, would be the privilege of the client and not the third party" (p.396G).

24. Lord Goff referred, both in his formulation of the crucial question and in his answer to it, to the client being used as an "innocent tool" by a person pursuing a criminal purpose. This leads to the core issues on this application: whether in cases of wrongdoing by a third party the client loses the protection of privilege only if (s)he is the wrongdoer's innocent tool, and if so whether the clients of the defendant solicitors (whether they be defendant drivers or their insurers) are to be so regarded. Mr Anderson argued that AF is to be regarded as using the defendant solicitors' clients as its "tools" because an integral part of the fraudulent scheme was that its reports and evidence be deployed so as to achieve favourable results for its clients, whether in court or through claims being settled, and the reports and evidence could be so deployed only by the defendant drivers or rather by the defendant solicitors acting on their behalf. This scheme is reflected in the definition of "Fraudulent Purpose" in the final version of the proposed order, which specifically accepted that the solicitor defendants should "only be required to give inspection of those documents or parts of

documents which directly evidence the commissioning, production, deployment or effect of AF's evidence…". AE maintained that, once the fraudulent purpose of AF was established sufficiently for the application, the only question was whether the communication or other document is in fact one that evidenced the furtherance of that purpose, regardless of the purpose of the persons who were party to the communication.

25. Before I consider the Francis and Francis case further, I shall refer to other authorities on which counsel relied. The first is a decision of the Court of Appeal that was decided before the House of Lords decision, Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd, [1986] 1 Lloyd's Rep 336. It was not mentioned in the speeches in the House of Lords, but it was cited in argument, and in the Divisional Court Lloyd LJ said that it was "too far removed from the facts of the present case for the decision to be of any assistance" (loc cit at p.355H). In the Keyser Ullmann case some banks had been defrauded by their borrowers and sued insurers who had issued policies to cover them against the borrowers' default: the insurance had been taken out by the borrowers and assigned to the banks. The banks claimed legal professional privilege for documents passing between themselves and their lawyers in which they had taken legal advice at the time that the loans were made and when the default occurred. The insurers challenged the claim for privilege on the basis of the borrowers' fraud: it was said that, since the assignees of the policies could not be in a better position than the fraudulent assignors, the iniquity exception overrode the banks' privilege; and that, although the banks as well as the insurers were victims of the fraud, this application of the iniquity exception would put the Court in a better position to decide the issue of fraud. The Court of Appeal upheld the claim for privilege: Parker LJ said (loc cit at p.338/1) the insurers' submission depended "for any validity at all on the [insurers] succeeding in the proposition that the rationale of the fraud exception is that by breaching the protection of legal professional privilege the Court will be in a better position to decide on the issue of fraud. There is nothing in the authorities which have been cited to us which suggests that the rationale put forward is in truth the rationale of the fraud exception. The rationale appears to be perfectly plain, namely, first, that a fraudulent party who communicates with his solicitor for the purposes of the furtherance of a fraud or crime is both communicating with his solicitor otherwise than in the ordinary course of professional communications, and secondly that in any event it would be monstrous for the Court to afford protection from production in respect of communications which are made for the purpose of fraud or crime. Where, as in the present case, it is sought to contend against a perfectly innocent party that a privilege does not exist, whether as assignee of the fraudsman or not, it is not in accordance with the law as previously laid down …". He went on to say that he saw no ground upon which the exception could be extended.

26. There is some doubt about the standing of the Keyser Ullmann decision after Francis and Francis: see, for example, Thanki, The Law of Privilege (2nd Ed, 2011) para 4.60 and the judgment of Burton J in the The Owners and/or Demise Charterers of the Dredger "Kamal XXVI" and the Barge "Kamal XXIV" v The Owners of the Ship "Ariela", [2010] EWHC 2531 (Comm), to which I refer below. But, as I see it, nothing casts doubt on Parker LJ's rejection of the argument that privilege should be overridden on the basis that disclosure of the documents which are the subject of the

claim will assist the court to determine the allegation of iniquity. This reasoning has been reinforced by Three Rivers DC v Bank of England (No 6) (cit sup).

27. In Dubai Aluminium Co Ltd v Al Alawi, [1999] 1 WLR 1964 the claimant had been granted a freezing order against the defendant, and the defendant sought to discharge it on the grounds that the claimant had used against him evidence obtained in breach of the Data Protection Act, 1984 and Swiss laws on banking secrecy. He applied for an order that the claimant disclose reports and other documents relating to its investigation, relying on the iniquity exception to challenge the claimant's claim that they were privileged. The information had been obtained by the claimant from investigators engaged on its behalf who arranged for a third party to make so-called pretext calls. It was argued by the claimant that the iniquity exception had never been extended beyond cases in which lawyers became involved, whether innocently or not, with planning or carrying out iniquitous acts that had become the subject of litigation. Nevertheless, Rix J rejected the claim for privilege, observing that otherwise "the party employing the criminal or fraudulent agent would have it entirely within his own power to decide which of the criminally or fraudulently acquired information he was willing to rely on and which he was not" (at p. 1969G-H). He concluded (at p.1970A-B) that "criminal or fraudulent conduct for the purpose of acquiring evidence in or for litigation cannot properly escape the consequence that any documents generated by or reporting on such conduct and which are relevant to the issues in the case are discoverable and fall outside the legitimate area of legal professional privilege".

28. Although in that case the criminal acts were not done by the claimant, it appears that the claimant was aware of them and deployed the material that had been obtained. Moreover, Rix J regarded the investigators as the claimant's agent and the person who made the pretext calls as its sub-agent: see p.1967F-G. He did not treat the case as one about extending the iniquity exception to cover wrongdoing of a third party: otherwise he would surely have referred to the Francis and Francis case, and he did not do so.

29. As far as counsel before me were aware, the only case where Francis and Francis has been specifically applied so as to uphold a challenge to a claim to privilege on the basis of iniquity of a third party is a decision of Burton J in what I shall call the Kamal XXVI case (loc cit). The litigation concerned a collision between ships in Goa, India. Kamal (as I shall call the claimants) made a claim against the Owners of the Ship "Ariela" (to whom I shall refer as "Ariela") for damages of some $1.3 million by way of repair costs, towage and loss of use. They demanded corresponding security shortly after the collision, and brought proceedings in England. At a trial on liability Kamal succeeded in their claim that the collision was wholly the fault of the "Ariela", and were awarded costs. However, at a trial on quantum, Burton J found that the claim was almost wholly unfounded and was fraudulent from the outset, and he awarded damages of only $6,245. He then set aside the costs award made after the liability trial and made other costs orders against Kamal. The judgment of Burton J that is relevant for present purposes concerned an application under the Senior Courts Act, 1981, section 51(3) for a costs order against Kamal's insurers, and in this context Ariela applied for disclosure of communications between the insurers and Ince & Co, who had acted for Kamal. It is not clear from the judgment quite what the

documents were, but the insurers claimed that they were protected by their (not Kamal's) privilege, both legal advice privilege and litigation privilege being invoked.

30. Ariela did not allege that the insurers were party to Kamal's fraud, but they argued that the iniquity exception applies where both a solicitor and his client who gave him instructions were innocent but were "being used as instruments by third parties to facilitate a fraud". Burton J observed that this submission was supported by academic writers, based as it was on the Francis and Francis case, and he accepted it. He rejected the argument that the underwriters were not the "tools" of Kamal because they had an "independent and legitimate interest in the claim against Ariela pursuant to [their] rights of subrogation". Describing the use of the word "tool" as having "an unnecessarily pejorative or emotive aspect", he concluded that Kamal had used the underwriter as a "mechanism" to achieve the fraud "arguably from the outset". He also rejected a submission that on analysis the Keyser Ullmann case was not overruled by the House of Lords in Francis and Francis but remained good law, and that the underwriters were protected by privilege in their communications because they, like the banks in the Keyser Ullmann case, were victims of the fraud: he was satisfied that "the common law is as stated by Lords Goff and Griffiths in Francis, and whatever the precise status of the Court of Appeal decision, on the facts or otherwise, in Keyser Ullmann, in this case the innocent underwriters and the innocent solicitors (instructed in part by the innocent underwriters and in part by the fraudulent client) were used as the *mechanism* for achieving the client's fraud, the *fraud exception* applies and there is neither legal advice nor litigation privilege available to the underwriters or the solicitors".

31. Before me, all counsel disavowed any contention that the decision of Burton J was wrong. Mr Tom Adam QC, who represented the Morgan Cole defendants, submitted at one point that the cases where third party iniquity has displaced privilege are cases in which the third party's dishonesty was (in his expression) "upstream" of the innocent client, causing the client/lawyer relationship to come into being in the first place, and so tainting it from the start: "Without the third party's fraud there simply would have been no transaction … because the fraud was the whole point of the transaction". That submission does not seem to me exactly justified in the Kamal case in that Burton J went no further than to say that Kamal were "arguably" involved in the fraud "from the outset". But if it cannot be said that in the Kamal case, as in the Francis and Francis case, the client/lawyer relationship came about at the instigation of the third party whose conduct is impugned, the client would not have instructed the lawyer in the first place but for the third party's interest in the matter. It can easily be seen why the insurers' instructions were not "within the ordinary scope of professional employment" of the solicitors.

32. As Burton J pointed out in the Kamal case, Lord Bridge considered that the majority had stated their understanding of the position under the common law about the iniquity exception in a case of third party fraud. Lord Bridge said this in his speech (loc cit at p.378 C-H):

> "If the decision of the majority of your Lordships stopped short at construing section 10(2) of the Act of 1984 as embracing the intention of a client who has deceived his solicitors and thus bringing the statute into line with the common law as expounded in *Reg v Cox and Railton,* 14 QBD 153, I should be

> content to indicate my dissent for the reasons I have already sought to explain. But your Lordships take the very large further step of deciding that otherwise privileged communications between an innocent solicitor and his innocent client may lose their privilege, both under the statute and at common law, by reference to the intention of some third party to further a criminal purpose. … But this development of the law goes well beyond any previous authority and, if it is a legitimate extension of previously accepted principle, it should be capable of being expressed in language sufficiently precise to make clear the boundary within which the new principle is to apply that the criminal intention of one party may operate to deprive another innocent party seeking legal advice of the protection of legal professional privilege. The answer proposed by your Lordships to the certified question on terms suggests that the relevant intention for the purposes of section 10(2) may be that of "any other person" without limitation. The only other language which I find in your Lordship's [sic] speeches to indicate the required nexus between the criminal party and the innocent party, who is to be deprived of legal professional privilege for communications with his legal adviser, is that the latter is the "innocent tool" of the former. If it is intended to serve as a sufficient definition of a new legal principle, I must say, with all respect, that I find it totally inadequate".

33. I understand from this paragraph that Lord Bridge not only thought that Lord Griffiths and Lord Goff had decided that at common law an innocent client might lose the protection of privilege because of the iniquity of a third party, but also raised a question whether their view of the common law was that privilege might be lost as a result of the wrongdoing of any third party or whether they concluded that this might result only if there was a nexus between the wrongdoer and the lawyer such as would justify the client being described as the wrongdoer's "tool".

34. Lord Griffiths did not refer in his speech to such a requirement. On the contrary, he said (loc cit at p.385B), "I am in entire agreement with the analysis of the language of the section [sc. Section 10(2) of the 1984 Act] contained in the speech of [Lord Goff] and for the reasons that he gives I would construe the words as applying to all documents prepared with the intention of furthering a criminal purpose whether the purpose be that of the client, the solicitor or any other person. I see no reason that the law should protect such a document and thus shield the criminal from detection and prosecution". However, he also said at the start of his speech (at p.381F) that he entirely agreed with Lord Goff's reasons for dismissing the appeal, and I cannot believe that he intended to dissent from any restriction on the exception that Lord Goff intended should apply.

35. In my judgment Lord Goff did hold that, in cases of third party iniquity, privilege is overridden only where the client was the wrongdoer's tool or, if it be preferred, mechanism for his wrongdoing. I have already mentioned his express references to this requirement, but this view is corroborated towards the end of his speech. Lord Goff acknowledged the argument in support of the appeal that the client's privilege

should be protected because (s)he might be making the relevant communication to his solicitor in circumstances in which (s)he was entitled to assume that it was protected by privilege and would not later be disclosed unless (s)he consented. He gave four reasons for rejecting it:

i) That the privilege is lost only in so far as it relates to "communications (or items enclosed with such communications or to which reference is made in them) made with the third party's intention of furthering a criminal purpose. No other communication will be excluded from the application of the privilege; and the client's confidence will to that extent be protected".

ii) That the client is ex hypothesi innocent of the criminal purpose and disclosure will not in that respect be to his disadvantage.

iii) That the "type of case under consideration must surely be most exceptional".

iv) That "disclosure of the third party's iniquity must, in the interests of justice, prevail over the privilege of the client, innocent though he may be".

36. The first and third of these reasons indicate, I think, that Lord Goff intended that in cases of this kind the iniquity exception applies only where there is a particular nexus or relationship between the client and the wrongdoer. The first reason is explained in terms of the communication being made by the client "with the third party's intention", suggesting to my mind that the client had no purpose of his own in communicating with his lawyer. As for the third reason, I find it difficult to suppose that Lord Goff would have regarded the "type of case" as being so exceptional if it applied regardless of the relationship between the wrongdoer and the client.

37. Moreover, the source of Lord Goff's terminology about the client being an innocent tool is surely in the judgment of Lloyd LJ, who referred (loc cit at p.355F) to the client being the wrongdoer's "innocent tool", although there it was used in the context of interpreting the statute rather than by way of exposition of the common law. Lloyd LJ was equivocal whether the position might be different if the client was not "the innocent instrument or beneficiary of the third party's criminal purpose": he clearly thought that this *might* restrict the application of the exception in third party iniquity cases. Although Lord Goff must surely have deliberately been reflecting Lloyd LJ's language, he did not echo his equivocation as to whether the iniquity exception might apply in all cases where the otherwise privileged documents further the iniquity of a third party.

38. I conclude that the answer to the question raised by Lord Bridge is that Lord Goff's authoritative enunciation of the common law in the Francis and Francis case extended the iniquity exception to cover cases where a third party is guilty of wrongdoing and a client, though innocent, has been used in his dealings with a lawyer by the wrongdoer as his "tool". This leads to the questions when the law considers that a client has been so used and whether AF so used the clients of the defendant solicitors.

39. The authorities, including the Keyser Ullmann case, show that the rationale for the iniquity exception remains that identified by Lord Brougham in Greenough v Gaskell (loc cit): that legal professional privilege attaches to communications between client and legal adviser which are confidential, and communications made for an iniquitous

purpose do not have the necessary confidential nature, which arises only out of a relationship in the ordinary course of professional engagement of a lawyer. The law was considered in detail by Popplewell J in JSC BTA Bank v Ablyazov, [2014] EWHC 2788 (Comm), who had to distinguish cases where a client enjoys privilege even though he knowingly misleads his lawyer with untruths and cases where the iniquity exception applies because the client is furthering a criminal purpose by misleading his lawyer. He said this, which I gratefully adopt:

> "It is the absence or abuse of the normal relationship which arises where a solicitor is rendering a service within the ordinary course of professional engagement which negates the necessary confidentiality and therefore the privilege. The 'ordinary run of cases' involve no such abuse: a solicitor instructed to defend his client of a criminal charge performs his proper professional role in advancing what the client knows to be an untrue case" (at para 76).

He reached this conclusion (at para 93):

> "I would conclude, therefore, that the touchstone is whether the communication is made for the purposes of giving or receiving legal advice, or for the purposes of the conduct of actual or contemplated litigation, which is advice or conduct in which the solicitor is acting in the ordinary course of the professional engagement of a solicitor. If the iniquity puts the advice or conduct outside the normal scope of such professional engagement, or renders it an abuse of the relationship which properly falls within the ordinary course of such an engagement, a communication for such purpose cannot attract legal professional privilege. In cases where a lawyer is engaged to put forward a false case supported by false evidence, it will be a question of fact and degree whether it involves an abuse of the ordinary professional engagement of a solicitor in the circumstances in question. … The deception of the solicitors, and therefore the abuse of the normal solicitor/client relationship, will often be the hallmark of iniquity which negates the privilege".

40. Popplewell J was dealing with a case about the iniquity of the client, but it seems to me that his analysis and conclusion inform the proper approach in cases of a third party's iniquity. The question remains whether the relationship between client and lawyer is properly to be regarded as one in the ordinary course of a lawyer's engagement, or, as Lord Goff put it, "within the ordinary scope of professional employment" (Francis and Francis (loc cit) at p.396G). The question therefore arises when the iniquity of a third party so took the relationship of an innocent client with his lawyer outside the ordinary course of the lawyer's engagement that the relationship was not a confidential one.

41. The driver defendants, I take it, went to the defendant solicitors so that the solicitors might advise them and act for them in relation to a claim against them arising from a motor accident. Thus far, AF was not involved, and, thus far, it could not be said

that there was anything other than a normal confidential relationship between lawyer and client, within the ordinary scope of professional employment. Mr Anderson nevertheless submitted that the position changed at some point during that relationship (it is unclear to me quite when) because AF used the defendant solicitors' relationship with the defendant drivers and their insurers to further its fraudulent scheme, and then the relationship falls (or partly falls: again, the submission was unclear to me) outside the ordinary scope of professional employment. This, Mr Anderson submitted, is because it suffices to bring the iniquity exception into play that the third party, AF, had a fraudulent purpose, and it took the opportunity of its instructions to further it.

42. I cannot accept that argument: it involves so generous an interpretation of the requirement that the wrongdoer be using the client as a tool that it will seldom, if ever, limit the iniquity exception, as I have concluded Lord Goff intended that it should. A requirement for so indirect a "nexus" (to adopt Lord Bridge's expression) as that between AF and the clients of the defendant solicitors (whether they be the defendant drivers or their insurers or both) would hardly restrict the third party iniquity exception at all, and certainly would not confine it to "most exceptional" cases.

43. I do not consider that it assists AE's argument that the proposed order, in its final draft, would restrict inspection to "those documents or parts of documents which directly evidence the commissioning, production, deployment or effect of AF's evidence, and which are relevant to the issues in these proceedings…". I do not see that that does more than restrict disclosure to relevant documents. It does not deal in any principled way with the question whether the defendant drivers' relationships with the defendant solicitors fall outside the normal relationship of lawyer and client because (and possibly in as much as) they have unwittingly consulted a dishonest expert (or purported expert).

44. Nor am I impressed with AE's submission that the order that it seeks would not involve a major extension of the iniquity exception because of the scale of AF's wrongdoing (described by Moses LJ, I was reminded, as "perjury on an industrial scale": Accident Exchange Ltd v George-Broom and ors, [2012] EWHC 207 at para 7 per Irwin J). I cannot accept that the defendant drivers should lose their privilege because there were many other cases similar to their own. Indeed, there seems to me a danger that the scale of AF's assumed wrongdoing distracts from the position of individual defendant drivers and from their rights. The "industrial" scale of the wrongdoing notwithstanding, I have seen no evidence that every single one of AF's reports produced for clients of the defendant solicitors during the relevant period of 2005 to 2010 was dishonest or produced for the purpose of forwarding the scheme. The order, however, would override the privilege of defendant drivers in any cases where AF acted honestly as well as where AF produced a dishonest report.

45. Mr Adam and Mr Jonathan Hough QC, who represented the Direct Line Group, submitted that AF was not using the clients of solicitor defendants as its tools or its mechanisms. The defendant drivers and their insurers were properly using solicitors' services, and cannot be said to be AF's "tools", even in simple cases (if there were any) in which the only issue was what credit hire charges were recoverable. The position would be even clearer in other cases: where, for example, liability or contributory negligence might be in issue, or where AE's client might have other claims (say, for personal injuries), or where the defendant driver might bring a

counterclaim. It is submitted, therefore, that, although the opportunities afforded by the defendant solicitors' relationship with their clients might (sometimes or invariably) have been exploited by AF so as to further its fraudulent purpose, this does not mean that the defendant drivers were AF's "tools" (in the sense of the expression used by Lord Goff or in any meaningful sense).

46. I accept the essence of this submission. Maybe Mr Adam overstated it when he submitted that, if AE's argument be right, any dishonesty on the part of a witness would or might remove the protection of privilege, but it will be apparent from this summary of the submissions that, in many cases where a person had a proper purpose in taking legal advice or in pursuing or defending litigation, (s)he might lose the protection of privilege because a third party exploited for improper ends the opportunity presented by his or her relationship with the lawyer.

47. As I have said, Mr Adam (and Mr Hough, who adopted Mr Adam's arguments) argued that in third party iniquity cases the iniquity exception applies only if the wrongdoer's iniquity is "upstream" of the solicitor/client relationship, so as to bring it about. I can accept that this might be the hallmark of a typical case in which the law, as developed in Francis and Francis, applies, but again I think that Mr Adam goes too far: I cannot accept that there is an acid test of this kind as to when third party wrongdoing will override privilege, and I have already observed (at para 31) that this submission does not sit readily with the judgment in the the Kamal XXVI case (loc cit). Nor, for example, can I believe that the result in the Francis and Francis case would have been different if Mrs G had already been instructing the solicitors to buy a modest property, her relative provided funds by way of drug trafficking to buy a mansion instead, and Mrs G changed the instructions to the solicitors accordingly.

48. As in cases of iniquity on the part of a lawyer's client it is, as Popplewell J concluded, a question of fact and degree whether the iniquity takes the lawyer/client relationship outside the ordinary scope of professional employment, in my judgment it is a question of fact and degree whether the nexus between the wrongdoer and client does so. This might be said to be an unsatisfactorily vague test for determining whether a client enjoys legal professional privilege, but Popplewell J's compelling analysis of cases of client iniquity in JSC BTA Bank v Ablyazov (loc cit) led him to a conclusion of which the same criticism might be made. And indeed, that is the basis on which Lord Bridge criticised the test enunciated by Lord Goff.

49. Approaching the issue on this basis, I conclude that the documents of which AE seeks inspection are protected by privilege, and that the iniquity exception does not apply to them. The essential considerations can be shortly stated: in the cases in which third party iniquity has deprived an innocent client of the protection of privilege, the wrongdoer and the client have had a relationship (or nexus) separate from the dealings with a solicitor, and that separate relationship was used by the wrongdoer to advance the wrongdoing. In my judgment, such connections between client and wrongdoer and between their relationship and the iniquity will be a hallmark of cases where an innocent client loses the protection of privilege. They might not be absolute requirements in all such cases, but I find it difficult to envisage a case in which they would not be present. This case is very different: AF's wrongdoing was properly described by Mr Adam as "parasitic" upon an existing lawyer/client relationship, which was created and continued for a normal and legitimate purpose. I accept the arguments of Mr Adam and Mr Hough that AF has not used the defendant drivers or

their underwriters as its tool, nor has it done anything that might mean that their relationship with the defendant solicitors is not of the ordinary kind. To apply the iniquity exception to this case would be a major innovation that I consider unjustified by authority, legal principle or established principles of public policy.

50. I refuse AE's application.

The applications of the Morgan Cole defendants and the Lyons Davidson defendants

51. The applications of the Morgan Cole defendants and the Lyons Davidson defendants (together, the "applicant solicitors") are about disclosure and inspection of documents in files of solicitors who were instructed to bring claims (the "underlying claims") in the names of AE's clients to recover credit hire charges from defendant drivers. I shall refer to those solicitors as the "clients' solicitors" for convenience, although it is controversial whether they were retained by and acting for AE or its clients or both. There are some 3,300 such underlying claims, but, for case management reasons to which I have referred, the parties' disclosure has been limited to about 1,000 of them, and in fact the applications are directed to the files for a smaller number of underlying claims because the clients' solicitors have told AE, and the applicant solicitors do not dispute, that the majority of files about underlying claims are no longer available: in some cases the clients' solicitors have ceased to practise or could not be contacted, and other firms of clients' solicitors, when contacted, advised that they no longer have the files: no doubt they have been disposed of because the underlying claims were resolved long ago.

52. When giving disclosure of documents concerning underlying claims, AE asserted privilege over documents. Mr Irfan Sadiq, the Group Counsel and Company Secretary of the second claimant, explained that privilege was asserted for:

    i) "Documents subject to legal professional privilege", being documents passing between AE and its (internal and external) legal advisers, including legal advisers whom it considered retained jointly with its clients.

    ii) "Documents subject to common interest and or litigation privilege", being documents about the underlying credit hire claims, including documents passing between AE or its legal advisers and its clients and the clients' solicitors.

    iii) "Documents subject to without prejudice privilege".

53. The applicant solicitors contend that under the arrangements between AE, its clients and the clients' solicitors AE had and have a right of access to the solicitors' files that is effectively unfettered, and also the right to use the material for its own commercial purposes, including the right to disclose documents and permit inspection of them. Thus, the Morgan Cole defendants apply for:

    i) A declaration that "all documents relating to the Underlying Claims held by the [clients'] solicitors … in those claims (the "Solicitors' Files") are within [AE's] control" for the purposes of rule 31.8 of the Civil Procedure Rules ("CPR").

ii) "A declaration that [AE] have the right to disclose and permit inspection of (a) the Solicitors' Files and (b) documents in their own physical possession relating to the Underlying Claims without requiring the consent of the Underlying Claimants",

iii) An order for inspection.

The Lyons Davidson defendants apply for comparable relief.

54. AE does not oppose these applications on its own behalf, and has made clear that it would waive any privilege that it has to withhold the documents from inspection. However, Mr Sadiq has explained in his evidence that clients' solicitors have taken the view that they should not release their files without the clients' consent or a Court order.

55. Further, AE considered that it should not itself disclose the documents unless its clients consented to it doing so and waived privilege in them. It wrote to them seeking their consent and waiver, and in a small number of cases it has been obtained. The applicant solicitors no longer seek disclosure of documents relating to the very few cases, however, in which the client refused consent. In the vast majority of cases there was no response to AE's letters, no doubt sometimes because it had only an old address that the client had left some time ago.

56. In these circumstances AE, while content for the documents to be disclosed and inspected and in that sense neutral on the applications, thought it right to advance arguments that might be available to a client who opposed the orders sought. I am grateful to Mr Anderson for this assistance.

The rental agreements between AE and its clients

57. After their vehicles had been involved in a traffic accident, AE's clients would enter into various contracts with AE, including a vehicle rental agreement which set out the terms on which AE would provide them with a comparable vehicle on credit terms while their own was being repaired. There were in evidence various versions of rental agreement used by AE. The applicant solicitors made submissions by reference to an agreement dated 14 August 2008 and called, because of the client's name, the "Espinoza agreement", on the basis that any variations from it were immaterial (but see para 60 below).

58. On the reverse of the Espinoza agreement there were "Terms and Conditions". They provided that AE was obliged to provide the client with a specified replacement vehicle during the period for which the client had a reasonable need of it because of the accident, subject to an upper limit of 85 days from the date of the agreement. The client undertook an obligation to pay specified hire charges for the vehicle at the end of the "Credit Period", together with interest on the hire charges. The "Credit Period" ran to the date when the client's claim against the "Third Party", that is to say against the person whom the client alleged was liable for the accident, was settled by a payment approved by AE or was decided by a court or was discontinued or abandoned with AE's approval, subject to an upper limit of 51 weeks from the date of the agreement. This credit period was subject to provisions providing for the client's

bankruptcy or insolvency and about the rental agreement being terminated because the client had provided misleading information or was in breach of it.

59. The Espinoza agreement also included the following terms, in which "You" and "Your" refer to the client and "We" or "Us" refer to AE:

> "Subject only to any right of the insurer under Your Accident Protection Policy if one is arranged for You, You grant Us the exclusive right to pursue a Claim on Your behalf": clause 4.20.
>
> "We may instruct an Appointed Representative in Your name and You authorise him to provide Us with all the information about the Claim (including copies of all relevant documents) which We reasonably require": clause 4.21.
>
> "You will provide Us with all the cooperation and assistance which is reasonably necessary for the pursuit of the Claim": clause 4.22.
>
> "You are responsible for the costs of the Claim (although these may be recoverable under Your Accident Protection Policy or from the Third Party)": clause 4.23.
>
> "You must inform us if You receive any settlement proposals from the Third Party in respect of the Claim, and must not respond to such a proposal unless We agree": clause 4.24.
>
> "In the event that We or the Appointed Representative receive a cheque in settlement of all or any part of the Claim, You authorise it to be paid to Us…": clause 4.25.
>
> "In the event that You receive any payment in respect of the Claim, You will pay the sum to us immediately. …": clause 4.26.

60. Some of the expressions in these clauses were contractually defined: "Third Party" was defined as "the person You allege to be responsible for the Accident, or a person, company or organisation which is responsible in law for such a person"; "Authorised Representative" was defined as "a solicitor appointed by Us to pursue the Claim"; the "Claim" was "Your claim for compensation for the Hire Charges against the Third Party". The Espinoza agreement also said that, while the client was responsible for the cost of hire, AE could arrange cover for any amounts not recovered from the Third Party by Accident Protection Insurance that AE could arrange.

61. In view of the conclusions that I have reached on the applications, I am content to consider them on the basis that, as the applicant solicitors submitted, the terms of AE's other rental agreements were materially similar to those of the Espinoza agreement, but in other circumstances I should have considered the variations in more detail. In particular, as Mr Adam properly observed, one of AE's standard forms did not include a provision in the form of clause 4.22, but instead provided "You agree

that the Solicitors conducting Your claim may tell Us how Your claim is progressing". Since I am dealing with the legal professional privilege of individual clients who were not represented, I would not have ordered disclosure without being satisfied about their individual contractual arrangements.

Insurance policies

62. Until about May 2008 the clients were offered the option to take out insurance indemnifying them against any liability to pay vehicle hire charges or repair charges if they were not recovered from the defendant driver and AE sought to recover them from its client. Clients were charged a fee of about £10 for the cover. Mr Sadiq's evidence on these applications is that before May 2008 some clients did not take up the option to have insurance, but I infer from the pleadings that such cases were few. In its reply, AE pleaded that the "essence" of its contractual arrangements with its clients is that the clients' liability for any shortfall between the amount of the credit hire charges and the recovery from the defendant driver was covered by insurance taken out by AE for the benefit of the client, AE paying the premium.

63. I should mention, however, that Mr Sadiq has given evidence that "it would be wrong to assume that if there was a shortfall in the amount of the credit hire charges recovered, AE automatically bore that loss and did not seek to recover the shortfall from the [client]". He explained that in cases where the client had failed to cooperate or had misled AE, it might bring a claim against the client, and that AE had judgments of over £1 million against such clients. Nevertheless, the applicant solicitors submitted that in reality the effect of the contractual arrangements was that AE alone bore any risk that the credit hire costs would not be recovered from the defendant driver (or the defendant driver's insurers), and I accept that was at least typically so.

64. It was also suggested by the Morgan Cole defendants that their contention that AE had control over the litigation against defendant drivers was supported by provisions in insurance policies that the clients who took out insurance were obliged to provide co-operation and in particular information. I do not find that suggestion persuasive: the obligation (of a kind common in policies) was simply to provide information to the insurers or to AE on the insurers' behalf.

The arrangements with solicitors

65. In those cases which are relevant for present purposes, that is to say in cases where a claim for credit hire charges was not settled without litigation, a solicitor would be appointed to pursue it. Although insurance policies arranged by AE for some clients referred to its "standard terms and conditions for solicitors", the evidence of Mr Sadiq, who has had more than ten years' experience as an in-house solicitor for AE, was that, as far as he was aware, AE never had any standard terms and conditions for solicitors. Although the reference in the policies is curious, there is no proper basis for rejecting Mr Sadiq's evidence about this.

66. The evidence about the arrangements that solicitors firms had with AE and its clients does not present a clear picture, and I am not satisfied that the arrangements were consistent either throughout the period with which this litigation is concerned or as to how different firms of solicitors pursued claims for credit hire charges. Certainly, I have seen no evidence that (as appeared to be suggested) the contractual relationships

in the rental agreements were later varied by arrangements with or through the solicitors or displaced by a contractual estoppel or otherwise. At one time Mr Adam sought to argue that evidence about these relationships provides the context within which, or factual matrix against which, the rental agreements are to be interpreted, but I reject that suggestion, which was, I think, eventually dropped, if not formally abandoned. I infer that a client would have entered into a rental agreement before any solicitor was instructed for his or her claim: there is no evidence that clients would have known about AE's usual relationship with solicitors who pursued claims, and no basis on which knowledge of this might be attributed to the clients.

67. The rental agreements, as I have said, defined an Appointed Representative as a solicitor appointed by AE, and provided that AE had an "exclusive right to pursue a Claim" and the client was to provide "all of the co-operation and assistance which is reasonably necessary for the pursuit of the Claim". Different solicitors wrote retainer letters (or client care letters) to the clients in different terms: some (for example, one sent by Blakemore) referred to the client instructing the solicitor; others (for example, one from Gorman Hamilton) referred to the solicitors receiving instructions from AE to act on the client's behalf; and others (for example, a different letter from Gorman Hamilton) referred to instructions from the client's insurers. However, all the retainer letters in evidence refer to "your" (the client's) claim.

68. According to Mr Sadiq, the solicitors were retained by AE's clients, and AE never retained them either alone or jointly with its clients. There were, he said, no contracts between solicitors and AE whereby AE could control the claims or obtain documents relating to them. While he acknowledged that some, but not all, solicitors routinely notified AE of the court timetable, and it received copies of settlement offers, Mr Sadiq did not receive any correspondence between AE's clients and the solicitors who were pursuing claims in their name.

69. At least where AE's clients took out insurance, they were not expected to bear any legal costs, and they were so assured by at least some of the solicitors whom AE appointed to pursue their claims: thus, by way of example, Blakemore wrote to clients in their retainer letters that "As the matter has been passed to us via [AE] I can advise that they have agreed to indemnify your legal expenses … including any opponent's costs in the event that the claim was unsuccessful"; and Knowles & Co wrote in these terms, "You have a full indemnity for any legal costs incurred, which is provided by [AE] and therefore if for any reason … the costs were not recoverable from the Third Party there would be no obligation on you to meet any legal costs personally". These assurances are, to my mind, entirely consistent with Mr Sadiq's evidence: the assurances were simply that the client had an *indemnity* in respect of any costs.

70. However, the applicant solicitors point out that the claim includes damages for increased litigation costs that AE says that it incurred as a result of AF's dishonest scheme. Moreover, they submit, in reality AE was deeply involved in instructing the solicitors, and controlling the pursuit of the claim. For example, sometimes, it appears, employees of AE would work as so-called "implants" in solicitor firms and manage claims, and the Morgan Cole defendants rely on a report apparently made by one such implant in 2008, in which it is said that solicitors were "confused about who is the client, is it [AE] or the person who is on the claim form". The report continued: "As Solicitors their relationship is rightly with the name on the claim form but this is no ordinary relationship and I think that this needs to be clarified that we are the

actual client. I do not think that they realise that without us they have no work and could potentially lose their jobs. We are the client that they need to please us and our requirements whilst taking the hirer into consideration".

71. The applicant solicitors submit that this view of AE's relationship with the solicitors whom they engaged is consistent with and supported by other considerations, including the following:

    i) At least in some cases AE had clients sign a form in which they authorised AE "to appoint their panel solicitors to act on [their] behalf in connection with my claim for damages arising out of the … accident", and authorised the solicitors "appointed by [AE] to draft and sign on my behalf the particulars of claim to instigate legal proceedings".

    ii) AE would, at least in some cases, request its clients to pass on all correspondence to AE.

    iii) There are documents that show that, when evidence about rates was received, solicitors sought AE's instructions whether the claim should be pursued.

    iv) AE had some 35 employees to manage claims, including by way of assistance and rebutting evidence about hiring rates served by defendant drivers.

    v) All payments received in respect of claims were channelled to AE.

72. The applicant solicitors also sought support for their argument in a document entitled Solicitors Operating Manual, which has, I understand, been disclosed by AE. It said that it was "… designed to provide Fee Earners with a comprehensive guide as to how to run files referred by [AE]", and "Fee Earners" should ensure that "they are adhering to the policies in force in the latest version of the manual". It prescribed in some detail how litigation was to be pursued: by way of example only, that a solicitor might agree an extension of time for the defence only in "exceptional circumstances", and directions about how allocation questionnaires should be completed.

73. According to a witness statement of Mr David Reston, partner in Herbert Smith Freehills LLP ("HSF"), who act for the Morgan Cole defendants, the instructions in the manual were imposed by AE on its "panel firms" of solicitors. However, the status of the manual is controversial: AE's solicitors, CMS Cameron McKenna Nabarro Olswang LLP ("CMS") wrote on 1 November 2017 that, according to their instructions, the document was one of a number of draft versions of an operating manual that was never finalised. This might explain why it is undated although the cover page contemplates that it should have a release date. In response to CMS, HSF refer to an internal email of AE dated 5 January 2009 of which the subject matter is "Re: Rate – the manual", and which appears to refer to a document at least partly in similar terms. The position remains obscure: I observe that the document on which Mr Reston relied is marked "Version 3" and it might be that the email referred to a prior version with broadly comparable wording.

74. However that might be, the applicant solicitors are, to my mind, entitled to rely on the document as evidencing that AE considered itself in a position to direct how the claims of its clients should be pursued. That said, Mr Adam was unable to indicate

how this modus operandi would work if the litigation involved anything other than a simple claim for hire charges: if, for example, the defendant brought a counterclaim or the client had a claim for personal injuries. Certainly there is no proper basis to infer that the manual, or any previous version of it, overrode or modified the solicitor/client relationship that the solicitors explained in their retainer letters.

The legal professional privilege

75. There is no dispute that AE's clients had a lawyer/client relationship with the solicitors, and that they had legal professional privilege in the solicitors' confidential communications and other documents. The dispute is about AE's rights in relation to them.

76. If AE and its clients had granted a joint retainer to the solicitors, then it and the clients would both have had a lawyer/client relationship with the solicitors, and then they would have had joint privilege (as against third parties but not against each other) in respect of confidential documents generated as a result of the joint retainer: see Ford v FSA, [2011] EWHC 2383 para 40. In those circumstances, the communications would remain protected unless both AE and its clients waived the privilege or authorised the disclosure. But to my mind it is clear that this is not a case of joint privilege. As is observed in Hollander, Documentary Evidence (12th Ed, 2015) at para 19-03, normally a solicitor's client care letter will evidence the identity of the lawyer's client. In my judgment, there is no evidence in the letters or elsewhere that AE became the client of the solicitors, and in the end no one contended that it had joint privilege.

77. Do AE and its clients have common interest privilege in the documents: that is to say, do they have the privilege developed from Lord Denning MR's recognition in Buttes Gas and Oil Co v Hammer (No 3), [1981] QB 223, 243 of "a privilege in aid of anticipated litigation in which several persons have a common interest"? Mr Anderson submitted that this is a case of common interest privilege, and Mr Adam and Mr Harris were prepared to accept this, and presented their arguments accordingly. I accept Mr Anderson's submission about this. AE and its client would clearly have a common interest in litigation against the defendant driver, and the doctrine has become less restrictive as to the interest that will attract it than when it was first recognised. However, I cannot accept either that, at least in the circumstances of this case, the privilege can be waived by one of the privilege holders alone or that AE is to be regarded as the primary privilege holder or that (therefore or otherwise) it has the power or authority to waive the common interest privilege.

The Applicant Solicitors' contractual argument

78. Mr Adam's and Mr Harris's first contention was based on the provision exemplified in clause 4.21 of the Espinoza agreement and in materially similar terms in other rental agreements that the client authorised the solicitor to provide AE "with all the information about the Claim (including copies of all relevant documents)" that it reasonably requires. Otherwise, it is argued, AE's right to require copies of documents is unqualified. While other provisions, notably the obligation to provide co-operation and assistance in clause 4.22, are qualified by reference to what is necessary "for the pursuit of the Claim" (sc. the claim against the defendant drivers) the right to require information and copies of documents is not restricted to what is

reasonably required for the pursuit of the claims. Accordingly, it is said, AE has the right to require them for the purposes of this litigation. Thus far, I accept the applicants' argument.

79. The applicant solicitors went on to submit that there is no proper basis on which privileged documents should be excluded from the ambit of the authorisation, and they are therefore entitled to require that they be produced for inspection. Mr Adam cited two authorities as illustrating that a generally expressed contractual right of access to documents will be interpreted as covering otherwise privileged documents, absent some wording to the contrary: the decision of the Court of Appeal in Brown v Guardian Royal Exchange Assurance plc, [1994] 2 Lloyd's Law Rep 325 and a judgment of Aikens J in Winterthur Swiss Insurance Co v AG (Manchester) Ltd (in liquidation), [2006] EWHC 839 (Comm).

80. The Court of Appeal case was about a dispute about disclosure between the claimant, a solicitor against whom a claim had been brought for negligence in respect of a conveyancing matter, and his professional liability insurers, who had repudiated liability. Clause 8(c) of the policy provided that, in the circumstances that had arisen, the claimant might instruct solicitors at the expense of the insurers "who may require the solicitors' reports to be submitted directly to them". The insurers sought disclosure of documents in the file of solicitors acting for the claimant on the negligence claim which would have been privileged as against anyone but the insurers. The insurers advanced an argument that no privilege could exist between parties who instructed a solicitor in a matter as to which they have a joint or common interest or who jointly instruct a solicitor in a matter in which they have different interests and communicate with him in his joint capacity. The Court of Appeal, however, did not rely on that argument, but ordered disclosure simply on the basis of the terms of policy. Neill LJ said this (loc cit at p.329): "… the solution in the present case is to be found not in any general rule relating to cases where there has been a general retainer or where two parties have a common interest, but in the terms of the policy which set out the basis on which legal representation under the policy was to be provided. The fact that insurers fund the cost of legal advice and representation and have a common interest in the defeat of a claim against their insured does not *necessarily* mean that they are entitled to see all the documents passing between the insured and his solicitors. The extent of the insurers' rights to see documents covered by legal professional privilege will depend primarily on the terms of the policy". He concluded (at p.330) that, "By accepting the benefit of legal representation made available in accordance with the terms of the policy [the claimant] waived his rights quoad the insurers to claim legal professional privilege in relation to communications about the claim between himself and [the solicitors] during the period that representation under the policy continued": there was a "waiver of privilege implicit in" the clause 8(c).

81. In the Winterthur Swiss Insurance case the insured under a policy for "after the event" legal expenses was required "to do and concur in doing and permit to be done all such acts and things as may be necessary or required by [the insurer] for the purpose of enforcing any rights and remedies or of obtaining relief or indemnity from other parties to which [the insurers] would be or would become entitled or subrogated by paying for any case or loss under the Policy". Aikens J decided that this entitled the insurers to have access to documents which would otherwise be privileged: "On the

authority of such cases as Brown v GRE, the insured cannot use "litigation privilege" to prevent the insurer using his contractual right of access to his documents" (at para 107): the contractual right "must override" privilege (at para 111).

82. These authorities are about the interpretation of provisions in insurance policies and whether the insured was entitled under the terms of the policies to assert privilege from disclosing documents to the insurers when a dispute had arisen between them. It was implicit in the insurers' contractual rights that in conducting the disputes with the insureds they might deploy the documents to which they were entitled, whether they were privileged or not. An essential ingredient of privilege is confidentiality, and the insured could argue that documents were confidential as against the insurers only by arguing that the prima facie wide words of the applicable provision was subject to implicit limitations: those arguments were rejected.

83. On the other hand, this case is about the interpretation of the rental agreements, and the context is not a dispute between the parties to them. Therefore, unlike in the Brown v GRE and the Winterthur Swiss Insurance cases, it seems to me that two distinct questions arise (and they are reflected in the two declarations sought by the Morgan Cole defendants: see para 53 above): (i) whether AE is entitled to require copies of the documents (so as to have them in its "control" within the meaning of CPR 31.8), and (ii) whether, if so, the clients would have privilege in the copies so that AE could and should properly withhold them from inspection.

84. I consider that the clauses 4.20 to 4.26 of the Espinoza agreement, which I have set out above, follow an understandable pattern, roughly reflecting the likely sequence of events if a claim is pursued against a defendant driver. Thus, clause 4.20 confers on AE the right to pursue a claim against the defendant driver on behalf of (and in the name of) the client. Clause 4.21 provides first for AE to have a solicitor appointed if that is required to pursue a claim. It also entitles AE to information to make decisions about pursuing the claim. Clause 4.22 deals with co-operation and assistance if AE's decision is to pursue the claim. Clause 4.23 deals with the costs that will arise if the claim is pursued. Clause 4.24 deals with settlement proposals that might be made in the course of any litigation before it comes to trial. Clause 4.25 deals with any payment received if a settlement is reached. Clause 4.26 deals with any payments in respect of the claim whether as a result of settlement or after a trial.

85. To my mind, read in the context of this sequence, the requirement in clause 4.21 about providing information is directed primarily to entitling AE to information that it will require to make decisions about how to conduct the claims against defendant drivers. But this does not mean that AE is entitled to information only for that purpose, or only if it is reasonably required for that purpose: the context is not sufficient reason to infer that the clause is impliedly so restricted. For example, AE might well need information about its book of pending claims for management purposes, and to monitor the performance of panel solicitors or to check whether clients had complied with other requirements such as informing AE of any settlement proposals.

86. But, as I see it, it is a separate question whether, in authorising the solicitor to provide to AE privileged information and copy documents, the client is to be understood to be waiving privilege only quoad AE may receive the information and documents or whether (s)he is to be taken to be waiving privilege altogether in any information and documents provided to AE so that AE is entitled to provide them to third parties, in

this case to the applicant solicitors. Clause 4.21 does not expressly provide for this wider waiver, and I see no reason that it should be taken to do so by implication: of course, AE might need to deploy the information or documents in pursuing the claim against the defendant driver, but it can invoke its rights under clause 4.22 to require cooperation and assistance in that regard. But clause 4.22 is only about what is reasonably necessary for the pursuit of the claim against the defendant driver: it does not assist the applicant solicitors.

87. So interpreted, while I accept that the documents that the applicant solicitors seek are within AE's control, I am not persuaded that clause 4.21 entitles them to permit inspection of them.

The Applicant Solicitors' "common law" argument

88. Mr Adam, however, advanced a secondary argument, which he labelled a "common law" argument. Although the argument was not fully developed, I understood him to submit that, since AE and its clients had a common interest privilege in documents, AE can effectively waive it alone and without the client doing so. I cannot accept that argument either.

89. In the Winterthur Swiss Insurance case (cit sup), Aikens J referred to the law about waiver of "joint interest privilege" where a lawyer is retained jointly by two or more parties, so that they are jointly entitled to any protection of legal professional privilege. In such cases, privilege is effectively waived only if both or all of the privilege holders waive it: see Matthews & Malek, Disclosure (4th Ed, 2014) at para 16.03 and Hollander, Documentary Evidence (12th Ed, 2015) at para 19.14. In his judgment (at para 133) Aikens J said,"… if legal professional privilege is held jointly, then it cannot be waived by one person alone. In my view that rule must apply equally to common interest privilege as such as to "joint privilege" where, eg, the parties jointly obtain advice from a lawyer".

90. Counsel cited, and I know of, no English judicial authority that supports the proposition that privilege in common interest can be waived by one privilege holder acting alone. I was referred by Mr Anderson to the judgment of Donaldson LJ in Lee v South West Thames RHA, [1985] 1 WLR 845, in which the claimant sought inspection of a document which had originally been prepared for Hillingdon HA. The South West Thames RHA, who had the document, refused inspection "primarily at least … advancing Hillingdon's claim to privilege". Donaldson LJ said (at p.850) that, "The principle is that a defendant or potential defendant shall be free to seek evidence without being obliged to disclose the result of his researches to his opponent. Hillingdon can certainly waive its rights and, were it to do so, the memorandum would clearly be disclosable by South West Thames. However, it has not done so". I do not understand Donaldson LJ to be considering how common interest privilege is effectively waived: indeed, I see nothing in the report that shows that South West Thames RHA was asserting that it had privilege in the document at all.

91. However, there is Australian authority that one privilege holder can effectively waive common interest privilege if "fairness" so requires. Thus, in Farrow Mortgage Services Pty Ltd v Webb, (1996) 39 NSWLR 601, 619-620, Sheller JA said, "In cases of common interest privilege, as distinct from joint privilege, I do not think it will always be necessary that all interested parties concur for the privilege to be

waived. If in principle legal professional privilege vested in a party is not lost by dissemination of the contents of confidential documents to others with a common interest, I think that fairness, in many cases, will require that the privilege not be lost because one of the parties, be it the provider or the recipient, is minded to waive it. Once parties with a common interest have exchanged or provided one to another the contents of communications with legal advisers about the subject of their common interest, the question of whether the privilege is lost with its waiver must be determined by asking whether the waiver has made it unfair for the other parties with a common interest to maintain the privilege". And in Patrick v Capital Finance Corp (Australian) Pty Ltd, (2004) 211 ALR 272, 277, Tamberlin J said, "In the case of joint interest privilege, which arises from legal advice being given to joint clients, each must join in the waiver to waive the privilege…. This is to be contracted with common interest privilege, where it will not always be necessary for all the interested parties to concur in waiving of the privilege in order for the privilege to be waived. Fairness may require that waiver by one of the parties constitutes waiver by all".

92. Mr Adam was also able to cite support from some of the textbooks for his submission that common interest privilege may be waived by one of the privilege holders. Thus, Hollander on Documentary Evidence (12th Ed, 2015) posits a case where A shows his counsel's opinion to B in circumstances where there is common interest privilege, and opines that the only party that can waive privilege is A and that it is not B's privilege to waive. It seems probable that that would generally be so, but the reason is, I would suppose, that the understanding between A and B in such circumstances would generally be that, by allowing B to see the opinion, A had no intention to fetter his right to choose how to deploy the opinion, whether or not that involved abandoning the protection of privilege. Hollander does, in any case, go on to acknowledge that in other situations it seems wrong that one holder of common interest privilege should be able to compromise the protection of both.

93. In Thanki, The Law of Privilege (cit sup at para 6.52 to 6.54) the position is discussed in some detail. After consideration of the Australian authorities, it is concluded that "the rights of the primary privilege holder ought ordinarily to be paramount", that is to say where a person who has privilege in a document shares it with another, it would ordinarily be an undue fetter on the original privilege holder to require the consent of the recipient to give an effective waiver.

94. Whether or not on the facts of the Winterthur Swiss Insurance case the privilege is to be regarded as joint privilege of the insured and insurers rather than common interest privilege, as is suggested in Thanki, The Law of Privilege (cit sup at 6-51), I agree with Aikens J that there is no good reason to distinguish the prima facie position in the two cases, or that, subject to any arrangement between the privilege holders, one party sharing common interest privilege should deprive the other(s) of the protection of privilege. I do acknowledge, however, that in cases of common interest privilege a proper inference might more readily be drawn that the parties' arrangements were such that one privilege holder might waive the protection.

95. However, in this case the arrangements between AE and its clients were set out in the agreements that they entered into, and in particular the rental agreements set out what rights AE had in and with regard to the documents. I have concluded that the agreements do not provide for AE to waive privilege in the documents, and in my judgment the law will not supplement AE's rights along the lines of Mr Adam's

secondary argument. As in Brown, the relationship between AE and its clients with regard to rights in the solicitors' documents is defined contractually rather than by any general rule of law.

96. Therefore, even if, contrary to my own view, Aikens J were wrong and the law allows one privilege holder to waive common interest privilege, I cannot accept that AE can do so in this case. If it be a question of what the court considers "fair", I see nothing unfair in the clients maintaining privilege in the documents given their contractual relations with AE and the retainer letters.

97. If, on the other hand, the primary or original privilege holder is in a position to give an effective waiver, I cannot conceive in what sense AE might be said to have some sort of priority or primacy over its clients with regard to documents in the solicitors' file or the protection afforded to them by legal professional privilege, so as to entitle it alone to decide whether or not to maintain privilege in them. Mr Adam's contention that it does seemed to be directed to AE's greater financial interest in the litigation against the defendant drivers: that it paid for the costs; that it would in practice take decisions about whether and how it was pursued; that it was pursued for AE's benefit and AE was entitled to the proceeds from any settlement or judgment. His argument diverted focus from any priority regarding the protection of legal professional privilege or the documents that were protected and turned it instead to the aim of the litigation generally. In my judgment this cannot be right: the solicitors, albeit appointed by AE, accepted AE's clients as their own, and their retainer letters recognised this. AE was entitled to receive information and documents from the solicitors only because the clients authorised this under rental agreements. To my mind, this shows that, if the expression means anything, the clients rather than AE were the "primary" privilege holders.

98. In my judgment, the so-called common law argument does not assist the applicant solicitors. I refuse the applications by the applicant solicitors for inspection.

Conclusions

99. I therefore refuse orders for inspection both on AE's application and on those of the applicant solicitors.