Case No: 1999 Folio No. 943, [2002] EWHC 2130 (Comm)

IN THE HIGH COURT OF JUSTICE
IN THE QUEENS BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 18th October, 2002

B e f o r e:

THE HONOURABLE MR JUSTICE CRESSWELL

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(1) PAPERA TRADERS CO. LIMITED & OTHERS

Claimants

– v –

(1) HYUNDAI MERCHANT MARINE CO. LIMITED
(2) THE KEIHIN CO. LIMITED

Defendants

EURASIAN DREAM No.2

– – – – – – – – – –

Mr. C. Priday instructed by Richards Butler for the Claimants.
Mr. S. Rainey QC and Mr. G. Charkham instructed by Hill Taylor Dickinson for the Defendants.

J U D G M E N T
APPROVED

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.

1. I refer to my first judgment herein.

2. This further judgment is concerned with the claimants' claim, as part of their damages, in respect of fees said to be payable to W. K. Webster & Co ("Websters") for 5% of the recovery by way of principal and interest made in respect of vehicles insured by Allianz Insurance Ltd of South Africa ("Allianz"). Alternatively the claimants contend that they are entitled to an award of costs in respect of the recovery work which has been and/or will be done by Websters (on the grounds more specifically set out in Richards Butler's letter to Hill Taylor Dickinson dated 7 June 2002), such costs to be assessed. The issues raised are novel and important. There is no reported case which has considered a claim in marine litigation (either before the Commercial Court, the Admiralty Court or in London arbitration) for a fee based on a percentage of damages/recovery in the action, allegedly payable to a claims and recovery agent (such as Websters) or to other marine loss adjusters.

3. On 23 July 1998, a fire broke out aboard the "Eurasian Dream" which resulted in very extensive damage to the vessel and her cargo of new and second–hand cars.

4. The majority of the new cars, which in terms of value represented about 90% or more of the total value of the cargo, were insured by Allianz. These cars were being imported into South Africa by Hyundai Motor Distributors of South Africa.

5. Some of the second–hand cars were insured by other insurers including:

   a. Yasuda
   b. Sumitomo
   c. Mitsui
   d. Nippon
   e. Chiyoda
   f. Adamji
   g. Dowa
   h. First Marine (Fedgen).

6. Websters is a long–established company, which provides (among other things) services in relation to marine casualties, including work in relation to salvage and general average issues ("Salvage/GA Work") and recovery services being work to obtain a recovery from the appropriate party, usually the contractual carrier or owner of the vessel ("Recovery Work").

7. Shortly after the fire, Websters were approached by various of the cargo underwriters, to represent their interests. For example,

   Yasuda contacted Websters on 27 July 1998, asking for information. This was provided by Websters who suggested that Yasuda contact other Japanese insurers.

Sumitomo contacted Websters on 28 July 1998, asking Websters to protect their interests including salvage and recovery.

8. Websters carried out Salvage/GA Work on behalf of these underwriters. In accordance with their usual practice (and market practice) in relation to such work, it was charged on a time and trouble basis.

9. Websters were contacted by Allianz on about 29 July 1998, asking for details of Websters' involvement and for assistance with a surveyor. Allianz also asked for assistance in protecting their recovery/legal interests.

10. Thereafter Websters rendered services to Allianz in the nature of Salvage/GA Work, focussing in particular upon the salvage and sale of the cargo.

11. These services were rendered between July and December 1998 and are summarised in the narrative to Websters' invoice to Allianz dated 14 December 1998. This invoice has been paid by Allianz and the defendants have admitted that this is an item recoverable from them in damages (under a letter reserving the contention that the defendants remain unsatisfied that these invoices were reasonable and/or that there was no duplication of work/cost between the three invoices – see below).

12. Invoices were also rendered by Websters to Sumitomo and Yasuda in respect of Salvage/GA Work and these have also been paid by the respective insurers and admitted by the defendants as recoverable from them in damages. Websters also did Recovery Work for insurers other than Allianz. In no case, other than Allianz, was that work charged on a contingency fee basis, but always on a time and trouble basis.

13. On 28 August 1998, Allianz sent a fax, which invited Mr. Sharma of Websters' General Average and Casualty Department to cease his involvement and to pass his file to Websters' recovery department in order that they might pursue recovery on behalf of Allianz. Allianz asked for Websters' recovery department's fee structure.

14. Websters replied on 28 August pointing out the consequences of stopping involvement on the salvage aspect. The letter stated:–

> "Regarding the recovery aspect, ... although (the writer) works in the General Average and Casualty Management Department, his background is in liability claims ... Normally in this department we deal with cases on a time and trouble basis, and it is on that basis that we will be pursuing the recovery for all the other cargo interests we represent. However, if you wish our involvement to be on a "no cure, no pay" basis, with disbursements for your account, we are prepared to do this. Our fee structure will be sent separately."

15. By fax dated 2 September 1998 Websters advised Allianz of their recovery fee scale. The fax stated "...

if solicitors are involved ... their charges are a disbursement that will be invoiced to underwriters at cost".

16. By fax dated 11 September 1998, Allianz provided Websters with a copy of the Lloyd's scale of fees for recovery purposes and asked whether Websters were prepared to conduct the recovery as per the Lloyd's scale. The fax stated:

> "Enclosed herewith is a copy of the Lloyd's scale of fees for recovery purposes which when calculated is slightly less than that you have quoted. In view (of) the amount of money that we are dealing with, kindly advise whether you are prepared to conduct the recovery as per the Lloyd's scale."

The enclosed Lloyd's scale of fees "applicable to recoveries affected by Lloyd's Agents themselves from third parties" provided that in cases where recoveries are effected through solicitors or other parties, Lloyd's Agents' fees were to be assessed on a time and trouble basis, with a minimum fee of £40. I refer to the Lloyd's scale below.

17. By fax dated 14 September 1998 Websters replied:–

> "... There is a slight difference in our scale of fees and ... Lloyd's ... Our fee scale is less than other London market competitors and is of course significantly less than the contingency fee arrangements which may be available with law firms in certain parts of the world ... On this occasion only we confirm that we are prepared to pursue this particular recovery on a no cure no pay basis with our fees of 5% of the recovered amount, with disbursements in addition for your account."

18. Allianz did not reply to the fax dated 14 September 1998. There is however a reference in a fax dated 9 December 1998 addressed to Associated Marine "With regard to the recovery, Websters will be conducting same on a ‘no cure no pay basis' as per their facsimile message (of 14 September 1998) attached".

19. The parties have agreed that the terms of the fax of 14 September 1998 were accepted by Allianz by conduct on about 9 December 1998.

20. The defendants accept that Websters rendered recovery services to Allianz from 1998 to the present day and continuing on the terms set out in the fax dated 14 September 1998.

21. Websters continued to work on matters relating to the salvage aspects of the casualty after September 1998.

22. In April 1999 Websters negotiated and agreed a letter of undertaking provided by the defendants. Among other things, it was agreed that the claims against the defendants were to be subject to English

law and jurisdiction. The first defendant's bills of lading had stipulated for Korean law and jurisdiction. The second defendant's bills of lading provided for Japanese law and jurisdiction.

23. On 15 July 1999, Richards Butler was instructed on behalf of the claimants.

24. On 23 July 1999, the present action was commenced.

THE RECOVERY SERVICES WHICH WEBSTERS ALLEGE THEY PROVIDED TO ALLIANZ.

25. The recovery services which Websters allege they provided to Allianz are set out in Mr Sharma's third witness statement as follows:–

> "1. Participating in investigations leading to the obtaining of statements given by the crew to the local police
>
> 2. Discussing with Hill Taylor Dickinson the question of security for the loss, and a mechanism for dealing with the freight forwarders' Bills of Lading. Securing agreement as to jurisdiction and proper law with the defendants.
>
> 3. Receiving a declination of liability from Hill Taylor Dickinson dated 17 June 1999, and an indication that a time extension would not be granted.
>
> 4. Instructing Richards Butler on 15 July 1999, securing a time extension from the shipowners themselves and demise charterers and maintaining that extension throughout.
>
> 5. Reviewing the claim form before issuance; providing a Power of Attorney on behalf of our Principals for Richards Butler to present to the Sharjah authorities in respect of their investigations there; getting Power of Attorney notarised; providing copies of the statements obtained in Sharjah to the fire expert for comment; reviewing draft Particulars of Claim; reviewing schedules of documents obtained and documents outstanding; conducting extensive searches of files for these documents including the cargo claims settlement files.
>
> 6. Reviewing further correspondence from the fire expert regarding the fire extinguishers; reviewing the Points of Defence and the Reply thereto; discussing further the impact of package limitation; considering obtaining security from the shipowners and/or demise charterers; searching files for, and obtaining direct from cargo owners and/or insurers, cargo documents evidencing title to sue and the quantum of the loss for more than 125 bills of lading and more than 1,000 vehicles for at least seven underwriters. Discussing with our Principals a claim for security for costs.
>
> 7. Attending conference with Counsel in November 2000; reviewing fire expert's further comments and request for further information in relation to the Defence and the response to the request for further information.

8. Identifying and making contact with Sten–Erik Haakonsson, car carrier expert. Attending a meeting in our office with Hyundai Merchant Marine to discuss settlement, which was unsuccessful.

9. Obtaining confirmation from Hyundai that they do not require security for costs. Obtaining return of the salvage security lodged for second–hand cars. Obtaining details of the availability of the surveyor from International Surveyors and Adjusters to give evidence. Providing two statements in respect of the salvage settlement and our involvement in the case. Forwarding questionnaire to local cargo surveyor in Dubai. Carrying out a search for documents in all of the files contained in our offices, including cargo claims settlement files. Approaching Allianz regarding disclosure of their files, and Maritime Brokers and Consultants, sorting same forwarding to Richards Butler.

10. Advising Allianz that they may need to provide a statement clarifying why the claim was paid on C&F basis rather than FOB value. Providing copies of all the casualty reports available. Attending various meetings with the experts. Assisting in resolving the quantum of the claim, including the values of the cargo in various zones.

11. Discussing the question of the currency of the claim, pointing out Hyundai Motor Distributors were based in the British Virgin Islands, obtaining a company search on them to try and establish the currency of the account. Determining the status of the other cargo claim brought. Clarifying the charterers' liability cover for the Eurasian Alliance. Advising underwriters of without prejudice offers made.

12. Receiving correspondence direct from More Fisher Brown during the trial regarding the identity of carrier. Obtaining details of settlement for salvage made in respect of the other cargo on board.

13. Extensive investigations as to the mechanical arrangement relating to Toyota Hiace vans, careful examination of all of the chassis numbers in the manifest to determine which of those vans were petrol, which were diesel and which type they were, including discussions with Toyota UK and visits to the dealer. Attending when judgment was given to be available for any cross–examination required by HTD."

MARKET PRACTICE

26. The following account of market practice was agreed to the extent identified below.

27. In casualty cases, Salvage/GA Work and Recovery Work will often be carried out concurrently and by the same individuals or departments. However, there may also be different departments or separate branches or companies dealing with Salvage/GA Work and Recovery Work respectively. In cases where there has been no casualty and cargo has simply been damaged, Recovery Work will usually be carried out by a Recovery Department or Company.

28. Salvage/GA Work will include some, or all, of the following:–

(i) Obtaining cargo interests' instructions as to the nature of the cargo carried, the carriage arrangements, the parties to the contract of carriage, the ownership of the cargo at the relevant time and the insurance arrangements applying to this;

(ii) Contacting the carrier (or the owner of the carrying vessel if different) to obtain information as to the precise nature of the casualty and its effects on the cargo interests represented;

(iii) Arranging for survey of the cargo to assess its condition and retained value;

(iv) Where possible arranging survey of the carrying vessel in order to investigate the cause of the casualty and the extent, if any, to which the carrier's liability is involved;

(v) Obtaining the interests' represented instructions and arranging for the discharge, on–carriage, if necessary, and delivery of cargo or if its damaged condition precludes this, to arrange for a salvage sale, if possible, in order to realise any remaining residual value;

(vi) If salvage services have been provided, contacting the salvors in order to negotiate salvage security and subsequently attempting to negotiate cargo's proportion of salvage;

(vii) If general average has been declared, contacting and negotiating with the adjuster the provision of GA security;

(viii) Determining contributory values for salvage and GA;

(ix) Where appropriate, instructing lawyers to represent the cargo interests in advising, dealing with salvage security, defending salvors' claims, resisting claims for contribution in GA proceedings (although some agents have legally qualified staff and may conduct Arbitrations themselves).

29. Recovery Work will include some or all of the following:–

(i) Where appropriate, advising the interests represented, including their underwriters, on the prospects of recovery of their losses, including identifying the party with title to sue, the relevant contract of carriage, the identity of carrier, the proper law of the contract of carriage, the appropriate jurisdiction in which to pursue claims, the potential bases of liability and the prospects of success;

(ii) Where appropriate, advising on the obtaining of security for a recovery action, including negotiating the form and amount of security, alternatively advising on the prospects of obtaining this by arrest;

(iii) Where appropriate, negotiating settlement of claims;

(iv) Where appropriate, instructing lawyers to represent the cargo interests in advising, obtaining security, bringing recovery proceedings (although some recovery agents have legally qualified staff and may conduct Arbitrations themselves);

(v) Co–ordinating all of the above, reporting regularly to the interests represented and obtaining their further instructions.

30. There is no rigid market practice as to the basis of remuneration for claims and recovery agents' services. These are usually matters of negotiation between the agent and the interests represented. However:–

(1) Salvage/GA Work is usually charged on a time and trouble basis. The agent will charge on the basis of an hourly rate for the individual claims handler, according to the amount of time spent. These hourly rates vary, but will certainly be less than London City Solicitors' fees for doing the same work. They will be in the approximate region of £40–£175 per hour depending on the firm of agents instructed and the seniority of the claims agent involved. Where salvage security is provided under the terms of Lloyd's Open Form, it is market practice for the agent also to charge a bail bond fee for Guarantees given to the Corporation of Lloyd's on behalf of cargo interests. This fee is calculated as a percentage on the amount of security provided. This tends to be about 1–2% of the security, plus about 0.5% of the amount of the security for the indemnity premium. As far as general average is concerned, it is market practice for agents to raise a charge for each Guarantee provided to GA adjusters. This is usually on a fixed fee basis per Guarantee (which will be in the region of £100) or on a time and trouble basis.

(2) For Recovery Work the agent will charge on one of two bases:–

(a) Time and trouble as for Salvage/GA Work; or

(b) A percentage fee, calculated on the amount of the eventual recovery. Payment of this is therefore contingent on success. It is often referred to within the market as "no cure no pay". This is probably the commonest basis for charging for general recovery work.

31. The method of remuneration depends on the individual circumstances, which may include, inter alia, the practice of the insurer involved, the prospects of making a recovery and the potential complications (such as jurisdictional or procedural matters) and whether solicitors will have to be instructed or other expenses incurred. Where a percentage fee is agreed, there is no rigid practice as to the amount of that percentage. Ordinarily however, the percentage negotiated will decrease proportionately to the size of the claim. Between 5 and 25% of the recovery are the normal percentages.

32. The great majority of claims are compromised without the need for instructing lawyers or commencing litigation. Where a contingency fee arrangement is agreed and the agent does not succeed in settling the claim, lawyers may be instructed but the agent will continue to be instructed unless otherwise agreed. In this situation, cargo interests will be responsible for paying the lawyers' fees and disbursements regardless of the eventual outcome.

33. Although the above account of market practice was agreed, no agreement was reached as to market practice where–

(a) It is contemplated from the outset that litigation and the instruction of solicitors will be necessary;

(b) The necessity for litigation and instruction of solicitors arises.

34. According to the document enclosed with Allianz's fax of 11 September 1998

> "The scale of fees applicable to recoveries effected by Lloyd's Agents themselves from third parties is on a 'no cure no pay' basis and is to be calculated as follows:–
>
> 1. When no solicitors or other parties are employed:
> Recoveries up to £200
>
> | | |
> |---|---|
> | 25% with a minimum of | £40 |
> | 20% on the next | £300 |
> | 10% on the next | £500 |
> | 7œ% on the next | £25,000 |
> | 5% on the balance | |
>
> 2. In cases where recoveries are effected through solicitors or other parties, Lloyd's Agents' fees to be assessed on a time and trouble basis, with a minimum fee of £40."

THE EVIDENCE OF MR. SHARMA

35. Mr Sharma gave oral evidence. Mr Sharma is employed by Websters in the General Average and Casualty Management Department. Mr Sharma said that in the normal course of events in the department in which he works there are certain common tasks which impact on both the salvage side and recovery, so it is easier to have one person dealing with all of these issues and charging on one basis.

36. Mr Sharma was not, of course, in a position to provide independent evidence of market practice. His account is to be contrasted with the evidence contained in the third witness statement of Mr David Hoyes of Hill Taylor Dickinson, paragraphs 20 and 21.

37. I should record my concern about a sentence in Richards Butler's letter dated 15 November 2001 (apparently written on Mr Sharma's instructions) - "Thereafter [i.e. after 14.12.98] Websters' fees are on a contingency basis, details of which are set out in their letter to Allianz dated 2 September 1998". The reference to the letter dated 2 September 1998 was an error. Mr Sharma said that the reference to "Thereafter" [i.e. after 14.12.98] was also an error. On the material I have seen I am not persuaded that it was. (This is a point which should, if necessary, be investigated by the Costs Judge – see below.)

THE AMOUNT AT STAKE

38. The arrangement between Websters and Allianz as to the 5% fee (according to the defendants) produces, depending on what base figure the 5% is applied to (on Allianz's case), a fee of some US$400,000 to 500,000. According to Mr Sharma of Websters, their fee is likely to be between US$350,000 and 400,000.

39. The issues raised are novel and important. There is no reported case which has considered a claim in marine litigation (either before the Commercial Court, the Admiralty Court or in London arbitration) for a fee based on a percentage of damages/recovery in the action, allegedly payable to a claims and recovery agent (such as Websters) or to other marine loss adjusters.

40. The costs of the claimants' solicitors (Richards Butler) inclusive of disbursements have been agreed at £400,000.

THE RESPECTIVE CONTENTIONS OF THE PARTIES

41. The defendants' case on the claim by Allianz in respect of the 5% fee payable to Websters is as follows:–

(1) The agreement between Allianz and Websters relating to the 5% fee is champertous and accordingly unenforceable; and no claim can be founded on it against the defendants.

(2) If the agreement is not champertous and is enforceable, then any sum payable under it by Allianz can only be recovered from the defendants as costs of the action and subject to ordinary principles of costs assessment. The claim should therefore be referred to a Costs Judge for a detailed assessment.

(3) If the sum payable under the agreement is recoverable from the defendants as damages in principle, then there can be no recovery by Allianz in this case because:

(i) it has no cause of action against the defendants in respect of it;

(ii) the loss is too remote and unforeseeable; alternatively

(iii) it flows from failure by Allianz to mitigate its loss, alternatively

(iv) there can only be a partial recovery since some work done under the agreement was not caused by the defendants' breach.

42. The claimants' case is as follows:

(1) The allegation of champerty is unfounded.

(2) The "no cure, no pay" fee is recoverable as damages, alternatively costs. The fee is

recoverable as damages because it is a loss or expense which flows from the defendants' breach of contract, in the same way as the other fees and expenses of third parties. Even if the fee is to be characterised as costs rather than damages, it was proportionate and reasonably incurred and proportionate and reasonable in amount (and should be allowed without any assessment).

CHAMPERTY

43. I set out below some of the relevant principles of law as to champerty, drawn from the judgment of the Court, presided over by Lord Phillips MR, in *Factortame Ltd & Others v The Secretary of State for Transport* [2002] EWCA Civ 932.

1. Champerty is a variety of maintenance. Section 14(2) of the Criminal Law Act 1967 provided that "the abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal." Champerty survives as a rule of public policy capable of rendering a contract unenforceable.

2. ‘A person is guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse' – Chitty 28th Ed, vol 1, 17–050. Champerty ‘occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit' – ibid 17–054. Because the question whether maintenance and champerty can be justified is one of public policy, the law must be kept under review as public policy changes.

3. The introduction of conditional fees shows that the requirement of public policy that officers of the Court should be inhibited from putting themselves in a position (by agreement) where their own interests may conflict with their duties to the Court, is no longer absolute.

4. Where the law expressly restricts the circumstances in which agreements in support of litigation are lawful, this provides a powerful indication of the limits of public policy in analogous situations. Where this is not the case, the Court must today look at the facts of the particular case and consider whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for personal gain, to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice.

5. In any individual case, it is necessary to look at the agreement under attack in order to see whether it tends to conflict with existing public policy that is directed to protecting the due administration of justice, with particular regard to the interests of the defendant.

6. There is good reason why principles of maintenance and champerty should apply with particular rigour to those conducting litigation or appearing as advocates. Section 58 of the Courts and Legal Services Act 1990, as originally enacted and as amended by the Access to Justice Act 1999, applies only to agreements concluded by those conducting

litigation or providing advocacy services. The effect of the section extends more widely, however, for it reflects Parliament's assessment of the present state of public policy in this area.

7. Section 58 evidences a radical shift in the attitude of public policy to the practice of conducting litigation on terms that the obligation to pay fees will be contingent upon success. Whereas before this practice was outlawed, it is now permissible – subject to the requirements imposed by statute. The requirements appear designed to protect the litigants conducting conditional fee agreements who, when the section was first enacted, were required to pay any ‘uplift' out of their recoveries. Conditional fees are now permitted in order to give effect to another facet of public policy – the desirability of access to justice. Conditional fees are designed to ensure that those who do not have the resources to fund advocacy or litigation services should nonetheless be able to obtain these in support of claims which appear to have merit.

8. To give evidence on a contingency fee basis gives an expert, who would otherwise be independent, significant financial interest in the outcome of the case. As a general proposition, such an interest is highly undesirable. It would be in a very rare case indeed that the Court would be prepared to consent to an expert being instructed under a contingency fee agreement.

To the above principles I add a ninth (drawn from the judgment of Steyn LJ in *Giles v Thompson* [1993] 3 All ER 321 at 332).

9. The doctrine of champerty is further limited in application to the extent that it only applies to agreements governing English litigation: see *Re Trepca Mines Ltd* [1963] Ch 199 at 218. An agreement of a champertous nature made in England is valid if it relates to litigation in a country where champerty is lawful. This again illustrates that the Court is not dealing with an overriding public policy, which applies wherever the agreement is made or to be performed, such as an agreement to pay a bribe abroad. It is designed to protect the integrity of the English judicial system.

44. The application of the law of champerty requires an analysis of the facts of the II particular case.

45. I do not consider that the agreement under attack in the present case tends to conflict with existing public policy directed to protecting the due administration of justice in England and Wales, with special regard to the interests of the defendants. In reaching this conclusion I have had regard in particular to the following facts and matters.

(i) The first defendant's bills of lading had stipulated for Korean law and jurisdiction. The second defendant's bills of lading provided for Japanese law and jurisdiction. The terms of Websters' fax of 14 September 1998 were accepted by Allianz by conduct on about 9 December 1998. It was not until April 1999 that it was agreed that the claims against the defendants were to be subject to English law and jurisdiction (although the possibility of such an agreement had been suggested in without prejudice correspondence prior to December 1998).

(ii) A contingency fee agreement which entitles those providing litigation services to a percentage of anything recovered may give rise to particular objection on the ground that it poses a temptation to act in an unethical manner in order to achieve the maximum recovery. It is necessary to consider the role played by Websters in order to see whether the nature of their interest in the outcome of the litigation carried with it any tendency to sully the purity of justice on the facts of this case.

(iii) On my view of the agreement (for the reasons set out below) the defendants are protected to the extent that they are only liable to pay reasonable costs in accordance with the order set out below. I refer in particular to the protections and limitations included in paragraphs 1, 2 and 4 of the order set out below. The detailed assessment under CPR 47 will no doubt be on an hourly rate basis. The 5% will of course operate as an upper cap, but I anticipate that the assessment of costs in accordance with the order set out below will produce a sum far less than that which is admittedly payable by Allianz to Websters.

(iv) Mr Rainey QC for the defendants referred to the role played by Websters in relation to

(a) disclosure

(b) evidence as to quantum

(c) the instruction of a fire expert and

(d) instructions to Richards Butler.

I do not consider, however, that there was much scope for Websters to influence the outcome of the litigation. The litigation was conducted by Richards Butler, a well known and highly experienced firm of commercial solicitors. Richards Butler instructed counsel. Thus the litigation was actually being conducted by solicitors and counsel. The activities of Websters were subject to the control of Richards Butler (and counsel). The interest that the rule of champerty exists to protect (the individual interest) is that of the opposite party. In the present case that was protected by the involvement of the solicitors (and counsel) actually conducting the action.

(v) The great majority of claims of this type are compromised without the need for instructing lawyers or commencing litigation.

(vi) Websters were already acting for other underwriters, and for this reason there was good commercial sense behind the decision of Allianz to retain Websters. The initial retainer was to provide GA/Salvage Services on a time and trouble basis.

(vii) The relevant agreement was not exclusively concerned with litigation.

DAMAGES OR COSTS?

46. In my judgment to the extent that Websters provided services to Allianz under the agreement in question in relation to or incidental to this action, the claim by Allianz to recover in respect thereof from the defendants is recoverable as costs, as defined in CPR 43.2(1)(a), to be assessed (if not otherwise agreed) on the standard basis and as further set out in the order below. It is clear from the recovery services which Websters allege they provided to Allianz set out in the extract from Mr Sharma's third witness statement quoted above, that (to the extent that any sum is recoverable in respect of the same) the same is recoverable by way of costs not damages. I reject Mr Priday's submission that the claim in respect of Websters' fees was such as might fairly and reasonably be considered either as arising naturally i.e. according to the usual course of things, from the breach of contract itself, or such as might reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it (see *Hadley v Baxendale* (1854) 9 Exch 341, 354–355 Alderson B). The principles laid down in *Hadley v Baxendale* have been interpreted and restated by the Court of Appeal in 1949 in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2KB 528 and by the House of Lords in 1967 in *Koufos v C. Czarnikow Ltd (the Heron 2)* [1969] 1 AC 350. A type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in f question), it was within their reasonable contemplation as a not unlikely result: of that breach (Chitty supra paragraph 27–042). The claim for damages in the present case does not satisfy this test. The claim when properly characterised is in the nature of a claim for costs.

THE APPROPRIATE FORM OF ORDER

47. The appropriate form of order in the present case is as follows.

1. To the extent that Websters provided services to Allianz (under the agreement made on about 9 December 1998 and evidenced by the fax dated 14 September 1998) in relation to or incidental to this action, Allianz's claim to recover in respect thereof from the defendants is recoverable as costs, as defined in CPR 43.2(1)(a), to be assessed (if not otherwise agreed) on the standard basis and as further set out below.

2. Allianz is entitled to claim a reasonable and proportionate amount for services provided by Websters, being services for which costs are in principle recoverable in accordance with CPR 44.4(2).

3. Allianz will serve a Bill of Costs in respect of the services performed by Websters for which it claims to recover costs in accordance with CPR 44.4(2), such Bill to comply with section 4 of the Costs Practice Direction (43PD.4) and to set out in particular; (a) the items of services claimed for; (b) the amount of costs claimed for each item of the services claimed for; (c) the time spent on each item and (d) the hourly rate claimed to apply to such time.

4. Allianz's claim for costs shall be subject to a detailed assessment under CPR 47. The Costs Judge shall determine on that assessment (a) what services provided by Websters to Allianz are properly recoverable in costs; (b) what is the appropriate amount to allow in respect of the same.

5. The defendants are to pay to Allianz such costs as are so assessed as costs of the action.

6. Allianz shall serve a Notice of Commencement of detailed assessment proceedings under CPR 47.6(1) and the Bill of Costs referred to in paragraph 3 within 4 weeks from the date of this judgment; thereafter the usual timetable for detailed assessment and CPR 47 will apply.