**OUTER HOUSE, COURT OF SESSION**

**[2020] CSOH 14**

**CA104/18**

OPINION OF LORD DOHERTY

in the cause

(FIRST) A & E INVESTMENTS INC. and (SECOND) ROBERT KIDD

Pursuers

against

(FIRST) LEVY & McRAE SOLICITORS LLP and (SECOND) JONATHAN BROWN

Defenders

**Pursuers: Sandison QC; Davidson Chalmers Stewart LLP**
**First Defender: Duncan QC, E Campbell; DWF LLP**
**Second Defender: Ellis QC; Brodies LLP**

29 January 2020

**Introduction**

[1] The principal issue in this case is whether the success fee elements of two agreements are *pacta de quota litis*. The first agreement was between the pursuers and Levy & McRae. The first defender has succeeded to the business of Levy & McRae. The second agreement was between Levy & McRae and junior counsel instructed by them, the second defender.

**Background**

[2] In 2015 the second pursuer was pursuing a commercial action ("the Kidd action") in the Court of Session against a firm of solicitors who had acted for him in a substantial commercial transaction. The solicitors were Paull & Williamson LLP, and their successors, Burness Paull LLP (which firm and successor firm are hereinafter referred to as "P & W"). The second pursuer averred that as a result of negligence, breach of contract, breach of fiduciary duty and fraudulent misrepresentation on the part of P & W he had suffered substantial losses. When the action was raised the sum sued for was US $65,000,000. During the course of the action the sum sued for was increased. Ultimately, it was US $210,000,000. In mid-2015 the first pursuer instructed Levy & McRae to take over agency in respect of the Kidd action and to provide it with certain further advice.

**The agreements**

[3] By a letter to the first pursuer dated 1 July 2015 Levy & McRae set out the terms upon which it proposed to accept instructions. On 2 July 2015 the first pursuer accepted those terms. The letter provided:

> "Robert Kidd,
> A & E investments Inc.
>
> ...
>
> **2. Identity of Client**
> Our client in this engagement will be A & E Investments Inc....[A]lthough A & E Investments Inc is our client we acknowledge a duty of care owed to Robert Kidd to the extent, if any, that he has an interest distinct to that of A & E Investments Inc ..."
>
> **3. Individuals from whom we may accept instructions**
> Unless advised in writing to the contrary we shall be entitled to accept instructions from Robert Kidd, Mike Forbes or Chris Smylie. Each of A & E Investments Inc and Robert Kidd warrants to us the authority of each of Robert Kidd, Mike Forbes and

Chris Smylie to bind A &E Investments Inc. in respect of the matters covered by this letter.

**4. Basis of calculation of fees**

You acknowledge that the exceptional nature and value of this case and the level of commitment and responsibility involved would ordinarily justify a significantly enhanced hourly rate. We have agreed to charge on the basis of the discounted hourly rates set out below, such fees to be rendered at monthly intervals on an ongoing basis and to be paid within 30 days of rendering ("the basic fee").
The basic fee will be calculated based on the hourly rates set out below. Those hourly rates will be subject to review no more frequently than once a year. We will notify any reviewed rates to you in advance of incurring any charge at those rates.

Partner - £300
Associate - £230
Solicitor more than 4 years qualified - £210
Solicitor less than 4 years qualified - £190
Trainee - £120

In recognition of the fact that the basic fee represents a discount to the fee which the instruction would ordinarily command, in the event of a successful outcome which produces a result in excess of the value specified below ("the success fee threshold") we shall be entitled to charge an additional fee ("the success fee") calculated on the basis set out below.

The value of the result will be calculated according to the monetary value (expressed in Sterling as at the date of payment) of either (i) a final judgment of any competent court in your favour (or in favour of Mr Kidd); or (ii) a negotiated settlement of any claim. In either event the value will be calculated on the basis of the sum for which judgment is granted or the settlement sum as the case may be together with any interest accrued thereon down to the date of payment. In this context final judgment shall mean a judgment in respect of which all UK rights of appeal have been exhausted.

We will have no authority to accept any offer in settlement other than on your specific instructions.

The success fee threshold shall be TEN MILLION POUNDS (£10,000,000.00) STERLING, or such other sum as we may from time to time agree with you in writing. In the event that the value of the result is equal to or less than the success fee threshold then no success fee shall be payable.

In the event that the value of the result exceeds the success fee threshold, then we shall be entitled to charge a success fee.

The success fee will be calculated as a percentage of the basic fee. The percentage will be calculated as follows:

For every £100,000.00 by which the value of the outcome exceeds the success fee threshold, we shall be entitled to payment of a success fee equal to 1% of the basic fee. If the outcome exceeds £50,000,000 then the multiplier applied to the basic fee for every £100,000 over £50,000,000 will drop to 0.75%. If the outcome exceeds 75,000,000 [sic] then the multiplier applied to the basic fee for every £100,000 over £75,000,000 will drop to 0.5%. If the outcome exceeds £100,000,000 then the multiplier applied to the basic fee for every £100,000 will drop to 0.25%.

For the avoidance of doubt the reduced thresholds only apply to the portion of the outcome over a given threshold, so that 1% of the basic fee will always be payable for every £100,000 over the success fee threshold for the first £50,000,000, 0.75% for every £100,000 on the £50,000,000 to £75,000,000 portion etc.

…

**6. Instruction of Counsel**
You acknowledge that we will instruct senior and junior counsel on your behalf. We will propose and agree with counsel's clerks the basis upon which they will be paid. The terms of those agreements are set out as appendices to this letter, and by your signature you acknowledge that we have agreed those terms on your behalf and with your authority…

**7. Judicial expenses**
… In the event of a successful outcome it would be common also to receive an award of judicial expenses… In the event of a negotiated settlement, settlement may be offered either on the basis of a principal sum together with an award of judicial expenses, or on the basis of a global sum inclusive of expenses. We will advise you clearly as to the terms of any offer…We will account to you for the sums recovered by way of judicial expenses …

…

**12. Incorporation of General Terms of Business**
We attach as an appendix to this letter a copy of our General Terms of Business, which will apply to the work which we do for you…

…"

[4] Clause 3.8.1 of the first defender's General Terms of Business provided:

"Where we receive sums which belong to you, we shall be entitled to deduct from those sums all outstanding fees, disbursements and expenses before remitting the balance to you."

[5] The second pursuer signed the letter of 1 July 2015 on behalf of the first pursuer. In addition, he countersigned the following docquet:

> "I hereby guarantee the obligations of A&E Investments Inc. in connection with their engagement of Levy & McRae as detailed above. I acknowledge that in the event of A&E Investments defaulting in payment of fees and outlays that I will be personally liable for those. I also agree to indemnify Levy & McRae in terms of clause 6 above."

[6] By a further letter dated 1 July 2015 Levy & McRae wrote to junior counsel's clerk setting out proposed terms of instruction:

> "…
>
> **A & E Investments Inc**
> **Robert Kidd v Paull & Williamson LLP and others**
> **Jonathan Brown, advocate**
>
> …
>
> **Basis of fee charging: basic fee**
> For all incidental work such as drafting, consultations, phone calls, reviewing papers, research and hearings of an incidental or procedural nature counsel will charge a basic fee based on a rate of £300 (Three hundred pounds) per hour.
> For debates, proofs or other substantive hearings the basic fee will be calculated at the rate of £3,000 (Three thousand pounds) per day.
> Preparation days for proof will be charged at £2,400 (Two thousand four hundred pounds) per day.
>
> …
>
> **Basis of fee charging: success fee**
> In addition to the basic fee counsel will also be entitled in certain circumstances to charge a success fee. There will only be an entitlement to charge a success fee in the event that the outcome of the case is a final judgement… in favour of the pursuer or a negotiated settlement in either case with a value (as defined below) of more than £10,000,000.00 (Ten Million Pounds). For the purposes of assessing whether there is any entitlement to a success fee:
>
> …
>
> (iii) The value will be calculated on the value of the judgment or settlement…
>
> …

> The success fee will be calculated on the basis of a percentage of the total basic fee. The percentage will be calculated as follows: 1% (one per cent) for every £100,000.00 (One Hundred Thousand Pounds) by which the value of the final judgment or settlement (calculated as set out above) exceeds the sum of £10,000,000 (Ten Million Pounds) up to a maximum final judgment or settlement of £50,000,000 (Fifty Million Pounds). In the event that the value of the final judgment or settlement exceeds £50,000,000 (Fifty Million Pounds) the percentage will reduce in respect of the balance of the final judgment or settlement in excess of that sum. The reduced percentages will be as follows. In respect of sums between £50,000,000 (Fifty Million Pounds) and £75,000,000 (Seventy Five Million Pounds) the percentage will be 0.75% (three quarters of one per cent). In respect of sums between £75,000,000 (Seventy Five Million Pounds) and £100,000,000 (One Hundred Million Pounds) the percentage will be 0.5% (one half of one per cent). In respect of sums in excess of £100,000,000 (One Hundred Million Pounds) the percentage will be 0.25% (one quarter of one per cent).
>
> … "

**The Kidd action**

[7] On 3 February 2017 following a debate and a summary decree motion Lord Tyre pronounced an interlocutor which *inter alia* (i) dismissed the pursuer's case in so far as based on fraudulent representation; (ii) granted summary decree to the extent of finding that P & W were in breach of their fiduciary duty to the pursuer; (iii) allowed a proof before answer on the pursuer's claims of negligence and breach of contract, contributory negligence, and the losses said to have been caused by the P & W's breach of fiduciary duty, negligence and breach of contract (*Kidd* v *Paull & Williamsons LLP* 2018 SC 193). On 26 September 2017 Lord Tyre ordered P & W to make an interim payment to the pursuer to account of expenses of £1 million (*Kidd* v *Paull & Williamsons LLP* 2018 SC 221). The proof before answer was due to proceed in January 2018. However, the action was compromised shortly before the proof was due to commence.

**The present action**

[8] The pursuers aver that the Kidd action was settled with P & W agreeing to pay the second pursuer a global sum of £19 million in addition to the £1 million sum which had already been paid as interim expenses. They further aver that senior counsel negotiating the settlement with P & W on the second pursuer's behalf was not informed by the defenders of the success fee arrangements:

> "and accordingly he made no attempt to agree … an allocation of the global sum payable as between damages and expenses , which agreement could and would have been arrived at had [senior counsel] been made aware of those arrangements."

[9] The pursuers also aver that the global settlement sum was paid to the first defender who remitted it to the second pursuer under deduction of £5.6 million; that the first defender claimed that £5.6 million was the unpaid balance remaining due in respect of its basic fee of £2.1 million and success fee of £1.89 million (being 90% of that basic fee), and junior counsel's basic fee of £1.1 million and success fee of £0.99 million (being 90% of the basic fee).

[10] The pursuers aver that the success fee elements of the agreements:

> "are *pacta de quota litis* being agreements entered into with a client in contemplation of litigation by the firm of solicitors having conduct of the cause and the advocate instructed in the cause, whereby the quantum of payment due to the solicitors and advocate is tied to and depends upon the quantum of the sum recovered by way of the action. Such an arrangement is *contra bonos mores* and as such illegal and unenforceable."

[11] The first and second conclusions of the summons seek declarators that the success fee elements of each agreement are illegal and unenforceable. The first part of the third conclusion seeks payment by the first defender to the first pursuer of the sum of £2,925,000, which sum the pursuers aver that the first defender wrongly withheld from the first pursuer

on the erroneous basis that the success fee arrangements were not *pacta.* The second part of the third conclusion is in the following terms:

> "and in the meantime, for decree ordaining (a) the first defender to restore the sum of £940,384 to its client account in name of the first pursuer; (b) the second defender to make repetition to the first defender of the sum of £1,752,375; and (c) the first defender to restore the said sum of £1,752,375 to its client account in name of the first pursuer."

In support of the "interim" remedies in the second part of the third conclusion the pursuers aver that by letter dated 19 February 2018 they indicated to the defenders that no amount should be paid out of the settlement sum without their specific permission; that the defenders knew that the fees they claimed were disputed by the pursuers and that it was the first defender's fiduciary duty not to use funds held in the client account "other than as directed by the client... or as otherwise justified by law"; that the first defender held the sum in the client account on trust for the first pursuer; that on or around 4 May 2018, in breach of its fiduciary duties, the first defender paid itself £940,384 from the account and it paid the second defender £1,752,375 from the account; and that each defender has retained the sum paid to it in the knowledge that it was paid in breach of the fiduciary duties which the first defender owed to the first pursuer.

[12] Each of the defenders denies that the success elements of the agreements are *pacta de quota litis.* The first defender avers that on 22 February 2018 the pursuers and the first defender reached agreement as to the level of the first defender's fees including the success fee. It avers that it was entitled to make the payments of £940,384 and £1,752,375 and that it was not in breach of any of its fiduciary duties in doing so, standing, *inter alia*, the terms of clause 3.8.1 of the General Terms of Business; and that, in any event, in light of the agreement of 22 February 2018 the pursuers are personally barred from challenging the amounts of the first defender's basic fee and success fee. It also avers that the pursuers are

barred from asserting that the success fee arrangement is not valid "by their approbation of the arrangement, including the reduced hourly rate for which they claim the benefit, and the operation of approbation and reprobation." It further avers that even if the success fee arrangements were *pacta de quota litis,* in the whole circumstances the pursuers are not entitled to repayment; and that, at worst for the first defender, the court should remit the first defender's account to the auditor of court to assess the appropriate fee in terms of rule of court 42.7. The second defender avers that when the terms of the agreement with him were proposed his clerk sought advice from the Faculty of Advocates as to the propriety of the success fee, and that by email of 23 March 2015 the Dean of Faculty advised in relation to it:

> "I am content with this. It is of the essence of a speculative fee that the amount of the fee will be linked to the outcome. We crossed that rubicon (*sic*) long ago. The key point is that the percentage uplift is applied to the base fee and not to the sum awarded."

The second defender further avers that the first defender was not in breach of its fiduciary duty in paying the second defender's fees; that it had been obliged to pay the second defender's fees because they were reasonable and they had been charged at the agreed rates; that prior to accepting payment the second defender had been advised by the Dean of Faculty that he could properly accept payment in the circumstances; and that the pursuers are personally barred (a) from asserting that they are not bound by the agreement set out in the second defender's letter of instruction; (b) from seeking repayment from the second defender. He avers that if the disputed fee was paid by the first defender to the second defender in breach of the former's fiduciary duties, the second defender was not aware of that. He also avers that the second pursuer has no title and interest to sue the second defender.

[13] The pursuers deny that the first defender's General Terms of Business were incorporated in the agreement with the first defender. The parties are also in dispute as to who initially proposed the basic and success fee structure. The pursuers aver that it was the first defender, but the defenders aver that it was a representative of the pursuers. Whereas the agreement between the pursuers and Levy & McRae states that the basic fee represents a discount to the fee which the instruction would ordinarily command, the agreement with the second defender contains no such statement. However, both defenders aver that the basic fee rates under each agreement were discounted rates; that the pursuers obtained a substantial benefit from that and that they are not entitled to retain that benefit and also obtain repayment of the success fees; and that the pursuers were keen that the pursuers' legal team had incentives to pursue the litigation vigorously and to maximize recovery. None of those matters are admitted by the pursuers.

[14] I heard a debate on the commercial roll. In advance of the hearing counsel lodged written notes of argument. I heard oral submissions over the course of two days.

**Counsel for the first defender's submissions**

[15] Mr Duncan submitted that the court should hold that the success fee elements of the agreements were not *pacta de quota litis.* It should sustain the first defender's first and third pleas-in-law and pronounce decree of absolvitor, failing which, decree of dismissal. However, if the court considered that the success fee elements of the agreements were *pacta*, a proof before answer would be required in order to determine whether the first defender had breached its fiduciary duties and whether the pursuers are entitled to the pecuniary remedies which they seek.

***Pactum de quota litis?***

[16] The *pactum de quota litis* principle is a prohibition on arrangements which make provision for solicitors or advocates to be remunerated by way of a share in the fruits of a litigation. Stair (*Institutions* 1.10.8) said it is a promise or contract "whereby advocates, in place of their honorary, take a share of the profit of a plea. Bell (*Principles* (10th ed), para 36(2)) was to similar effect: "a bargain by an advocate or law agent to receive, in remuneration of his professional services, a share of the subject in contest". Begg (*The Law of Scotland relating to Law Agents* (2nd ed), pp 123-124) described it as "an arrangement that he should receive, instead of the usual honorarium, a share of the property forming the subject of the litigation"; and Gloag (*The Law of Contract* (2nd ed), p 578) referred to it as "A bargain by a law agent for a share of, or commission on, property to be recovered by litigation." *Johnston* v *Rome* (1831) 9S 364 was a paradigm case of a *pactum de quota litis.*

[17] *Pacta de quota litis* are restricted to arrangements whereby lawyers receive a share of, or commission on, the fruits of the litigation. Mr Duncan accepted that it is not necessary for there to be an actual sharing of the fruits. It is sufficient if the lawyer's fee entitlement is calculated by reference to a share of the proceeds even if he is paid from a different source (*Quantum Claims Compensation Specialists Ltd* v *Powell* 1997 SCLR 242, per Sheriff Principal Risk at p 250). The "bright line" is that what is prohibited is a sharing of the fruits, or the calculation of a fee by reference to a share of the fruits.

[18] The success fee elements of the agreements are not such arrangements. They are the product of the application of a multiplier to a multiplicand, but only the multiplier is tied to and depends upon the sum recovered in the action. The multiplicand is the basic fee. The success fees here are not contingency fees. They are a species of speculative or conditional fees.

[19] None of the authorities - including the Opinion of the Court in *Quantum Claims Compensation Specialists Ltd* v *Powell* 1998 SC 316 - support the proposition that the present success fee arrangements are *pacta de quota litis.* The court should be mindful that the only point at issue in *Quantum* was whether the *pactum de quota litis* principle applied to non-lawyers. That was the only aspect of the scope of the principle which was in dispute: it was the only matter which required to be decided. The court's other observations on the scope of the principle were *obiter dicta.* They had been based upon concessions by counsel for the pursuers.

[20] There is no justification for the court extending the scope of the *pactum de quota litis* principle to cover the success fee elements of the agreements. The principle is a limited exception to the general principle of freedom of contract (*Quantum Claims Compensation Specialists Ltd* v *Powell* 1998 SC 316, per the Opinion of the Court at p 319E-F). Freedom of contract ought not lightly to be interfered with (see eg *Photo Production Ltd* v *Securicor Transport Ltd* 1980 AC 827, per Lord Diplock at p 848; *Homberg Houtimport BV and Others* v *Agrosin Private Ltd and Another* [2004] 1 AC 715, para 57; McBryde, *The Law of Contract in Scotland* (3rd ed), para 19-05; *Printing and Numerical Registering Company* v *Sampson* (1874-75) LR 19 Eq 462, per Sir G Jessel MR at p 465).

[21] In essence the arrangement between the pursuers and the first defender was an arm's length commercial agreement entered into between solicitors and experienced commercial clients who had their own advisers. It was very far removed from the situation where a client had to be guarded against his solicitor taking advantage of ignorance or inexperience. The arrangement represented a sensible way of funding a very difficult and challenging litigation.

[22] In any case, any consideration of public policy in the context of contractual obligations ought to reflect changes in modern-day society's attitudes (McBryde, *supra*, para 19-04). A number of matters suggest that the court ought to find that the success fee arrangements do not conflict with public policy. First, "the amount or value of money or property involved in the cause" is one of the factors which the court takes into account in determining, when taxing a solicitor's account, whether an item charged is fair and reasonable (rule of court 42.7(6)(c)(vii)); and in deciding whether to award an additional fee in terms of rule of court 42.14(3)(f). Second, payment of a speculative fee depends upon success in the litigation (*X Insurance Company Limited* v *A and B* 1936 SC 225, per Lord President Normand at pp 238-239); and where an action is on a speculative basis section 61A(3) of the Solicitors (Scotland) Act 1980 ("the 1980 Act") permits a solicitor and client to agree that in the event of success the solicitor's fee may be increased by an agreed percentage. Third, when it is brought into force section 2 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 ("the 2018 Act") (which followed the recommendations of the *Review of Expenses and Civil Funding in Litigation in Scotland* (the "Taylor Review"), Ch 9, para 30) will permit solicitors to enter into a success fee agreement even if at common law it would have been a *pactum de quota litis.* The Taylor Review had been preceded by the Jackson Review in England and Wales (*Review of Civil Litigation costs: Final Report*, December 2009). Jackson LJ had seen no objection to clients making success payments to solicitors provided that the extra payment was reasonable (Ch 10, section 1(ii), para 1.8). Fourth, while para 3.3.1 of the CCBE *Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers* ("the CCBE Charter") prohibits *pacta de quota litis*, para 3.3.3 clarifies that a *pactum de quota litis* does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer

if this is in accordance with an officially approved fee scale or under the control of the Competent Authority having jurisdiction over the lawyer. The CCBE Charter is incorporated in the Faculty of Advocates' Guide to Professional Conduct of Advocates.

[23] It is accepted that the relevant date for determining whether an agreement is a *pactum de quota litis* is the date that it was entered into. However, it is clear that by July 2015 public policy considerations favoured success fee arrangements of the sort entered into here. Looking at the arrangements fairly, they are "no-win lower fee" arrangements, with a "win" being recovery of more than £10 million. They are a species of speculative fee arrangements.

[24] It is doubtful whether any real assistance may be obtained from examination of the common law of England and Wales relating to maintenance and champerty or the history of statutory reform of the law in that jurisdiction. In that regard reference is made to *Awwad* v *Geraghty & Co* [2001] QB 570 and *Giles* v *Thomson* (CA) 1993 WL 963259; and to the summaries in the Taylor Review at Ch 7, paras 12-20, and Ch 9, paras 8-18.

***Consequences if the arrangements are pacta de quota litis?***

[25] If, contrary to Mr Duncan's submission, the success fee elements of the agreements are *pacta de quota litis,* Mr Duncan accepted that it would be necessary to have an inquiry into the circumstances surrounding the agreements, including the averments of personal bar, in order to determine what the consequences should be (*Patel* v *Mirza* [2017] AC 467).

***Breach of fiduciary duty***

[26] The pursuers' averments of breach of fiduciary duty by the first defender concern the remedies sought in the second part of the third conclusion. The first defender's primary position is that there was no breach of fiduciary duty because the first defender was

contractually entitled (in terms of clause 3.8.1 of the first defender's General Terms of Business) to make the payments which it made to itself and to the second defender. However, for present purposes the court had to proceed on the basis that there is a dispute as to whether that term formed part of the contract between the pursuers and the first defender. Nevertheless, there were other reasons for concluding that the pursuers' averments of breach of fiduciary duty are irrelevant.

[27] First, it was submitted that the fees were due and that paying them was not a breach of any fiduciary obligations which the first defender owed to the first pursuer. The fact that the first pursuer disputed the amounts did not change the fact that it was liable to pay them. Reference was made to *Bristol and West Building Society* v *Mothew* [1998] Ch 1, per Millet LJ at paras 16-22; *FHR European Ventures LLP* v *Mankarious* [2015] AC 250 at para 5; *Commonwealth Oil & Gas* v *Baxter* 2010 SC 156 at paras 2-3, 71-74; *MacRoberts LLP* v *McCrindle Group Ltd* 2017 SC 1, at paras 47-51; *Clark Boyce* v *Mowat* [1994] 1 AC 428 at pp 437F-437G. When transferring funds to pay its own fee the first defender had not been acting in the course of its agency for the first pursuer.

[28] Second, Rule B6.5.1 of the Solicitors (Scotland) Practice Rules 2011 permitted the first defender to make the payments. That is inconsistent with the payments having been made in breach of fiduciary duty. The rule provides:

> "6.5.1 So long as money belonging to one client is not withdrawn without his written authority for the purpose of meeting a payment to or on behalf of another client, there may be drawn from a client account:
>
> …
>
> (b) money required for or to account of payment of a debt due to the practice unit by a client or in or to account of repayment of money expended by the practice unit on behalf of a client;
>
> …

> (d) money properly required for or to account of payment of the practice 's professional account against a client which has been debited to the ledger account of the client in the practice unit books and where a copy of the said account has been rendered:
>
> …"

[29] Third, the first defender was professionally obliged to pay the second defender's fee because its terms had been agreed and authorized by the pursuers (*Begg on Law Agents*, (2nd ed), p 342). A solicitor is permitted to use a client's funds to discharge counsel's fees where he regards them as being properly due (*Rhodes* v *Fielder Jones & Harrison* [1918-1919] All ER 846). Failure by a solicitor to pay counsel's fees when due can be professional misconduct.

**Counsel for the second defender's submissions**

[30] Mr Ellis moved for decree of *absolviter,* failing which for decree of dismissal.

***Pactum de quota litis***

[31] Mr Ellis adopted Mr Duncan's submissions on *pactum de quota litis.* The essential feature of a *pactum de quota litis* is that remuneration is to be calculated as, or by reference to, a share of or commission on the proceeds. The success fee arrangements here were for uplifts in fees, not a share of or commission on the proceeds. The success fee arrangements with each defender are fundamentally different from a *pactum de quota litis.*

[32] The public policy considerations which led to the prohibition of *pacta de quota litis* are no longer of such weight as they were in the past: *Giles* v *Thomson* [1994] 1AC 142; the 2018 Act. There is no reason to extend the categories of unacceptable fee arrangements beyond the long recognised prohibited category. Reference is made to the views expressed by an

Extra Division of the Inner House in *Quantum Claims Compensation Specialists Ltd* v *Powell* 1998 SC 316, particularly at p 323D of the Opinion of the Court. The court in that case was not intending to extend the category of what would be an unacceptable fee beyond the categories previously recognised. There was no suggestion that an arrangement which allowed for an increased fee on success, not being a share of the proceeds, was unacceptable. Speculative fee arrangements have long been accepted in Scotland: *X Insurance Co* v *AB, supra,* per Lord President Normand at p 239. It is also well recognised that a percentage uplift of a fee may be an appropriate way properly to remunerate a solicitor for his/her efforts: *Trunature Ltd* v *Scotnet (1974) Ltd* 2008 SLT 653. There is no good reason to suppose that it ought to be unacceptable for advocates. Once it is recognised that there is nothing objectionable about a fee being increased if the client wins, it is a very short step indeed to recognise that a fee may be increased according to the level of success.

[33] The very wide definition of a *pactum de quota litis* proposed by the pursuers is not supported by any authority. The policy considerations underlying the prohibition do not indicate that the wider approach contended for by the pursuers is correct. The court is being asked to extend the ambit of the principle to circumstances where it has never been applied in the past. Current public policy considerations point against any such extension. Beyond the clearly defined and narrow ambit of the *pactum de quota litis* the courts ought to leave it to competent professional and regulatory authorities to police lawyers' conduct.

***Consequences if the arrangements are pacta de quota litis?***

[34] If, contrary to his submission, the success fee element of the agreements are *pacta de quota litis,* Mr Ellis submitted that whether in the whole circumstances the sum of £2,925,000 had been wrongly withheld by the first defender, and whether the first pursuer is entitled to

payment of that sum (having regard *inter alia* to whether it was personally barred from seeking payment), are not matters which can be determined on the pleadings without inquiry. Reference was made to *Patel* v *Mirza, supra,* per Lord Toulson JSC at paras 120-121; *Ratara Potato Co Ltd* v *Taylor Joynson Garrett* [1995] 4 All ER 695 per Garland J at pp 709G-710E; *Chitty on Contracts* (32nd ed), paras 16-076 and 16-097; *Awwad* v *Geraghty & Co, supra,* per Schiemann LJ at pp 582B-C, 596B.

***No title and interest to sue***

[35] Mr Ellis also submitted that the second pursuer has no title and interest to sue the second defender. He is not the client in the agreement between the first pursuer and Levy & McRae. He merely undertook certain potential contingent liabilities to Levy & McRae. He has neither title nor interest in the subject matter of the action. He does not seek payment of any sums from either defender. Reference was made to *D & J Nicol* v *Dundee Harbour Trustees* 1915 SC (HL) 7; MacPhail, *Sheriff Court Practice* (3rd ed), paras 4.29 and 4.32.

***Breach of fiduciary duty and knowing receipt***

[36] So far as the remedies sought in the second part of the third conclusion are concerned, Mr Ellis accepted that the pursuers' averments of a breach of fiduciary duty on the part of the first defender are sufficient for inquiry. However, he submitted that the pursuers' averments of knowing receipt by the second defender are irrelevant. All that the pursuers aver is that the second defender knew that the first pursuer disputed the fees claimed. That falls some way short of averring that the second defender knew that the payment was being made to him by the first defender in breach of its fiduciary duties to the first pursuer. Reference was made to *Thomson* v *Clydesdale Bank, supra*, per Lord Chancellor

Herschell at p 60, Lord Watson at p 61, Lord Shand at p 62; *Bank of Scotland* v *McLeod Paxton Woolard & Co* 1998 SLT 258, per Lord Coulsfield at pp 258G-I, 276E-H.

***Declarator sought in second conclusion academic?***

[37] Mr Ellis submitted that the declarator sought in the second conclusion is academic. That declarator would have no practical effect for either pursuer. Apart from the second part of the third conclusion, no remedy is sought against the second defender. The court ought not to entertain academic questions which have no practical effect (*Wightman* v *Secretary of State for Exiting the EU* 2018 SLT 959, per the Opinion of the Court at paras 22-25).

**Counsel for the pursuers' submissions**

[38] Mr Sandison moved for decree *de plano* in terms of the first and second conclusions, and the first part of the third conclusion. If, contrary to his submissions, the court determines that the success fee elements of the agreements are not *pacta de quota litis,* dismissal rather than absolvitor would be the appropriate disposal. That is because all that the court would have decided would be that the pursuers' averments are irrelevant.

***Pactum de quota litis?***

[39] The prohibition on a *pactum de quota litis* is not restricted to cases where a lawyer may actually obtain a share of the fruits. It is sufficient that his entitlement is calculated by reference to the proceeds of the litigation (*Quantum Claims Compensation Specialists Ltd* v *Powell* 1997 SCLR 242, per Sheriff Principal Risk at p 251). An agreement to remunerate the lawyer by paying a commission on the proceeds is within the ambit of the prohibition (*Farrell* v *Arnott* (1857) 19 D 1000; *Gloag on Contract* (2nd ed), p 578).

[40] The rationale of the principle is that the risks to the proper administration of justice, by the creation of a potential conflict between the self-interest of the lawyer and his duties to the client and the court, are too great to be acceptable where remuneration varies in proportion to the amount recovered or preserved (*Quantum Claims Compensation Specialists Ltd* v *Powell* 1998 SC 316, per the Opinion of the Court at pp 319H-320C, 320H-322A, 322C, 322H-323A).

[41] Whether an arrangement is a *pactum de quota litis* depends upon its substance rather than its form. Cases where the amount recovered informs the multiplier of a formula used to determine remuneration fall within the ambit of the prohibition. No sensible distinction can be drawn between such cases and cases where the amount recovered informs the multiplicand of the formula used to calculate remuneration. Both categories of case fall within the ambit of the rule.

[42] The ambit of the *pactum de quota litis* principle encompasses situations where there is an attempt by a lawyer to make an arrangement whereby his remuneration is to vary, directly or indirectly, in proportion to the amount recovered or preserved by the litigation, regardless of the particular form which the arrangement may take, or the manner in which it may be expressed.

[43] In the present case the success fee elements of the agreements are paradigm cases of *pacta de quota litis*. They would be champertous at common law in England and Wales (*Awwad* v *Geraghty & Co, supra,* per Schiemann LJ at pp 575H-576, 589E, 590C-G). The English law of champerty and the Scots *pactum de quota litis* principle have very different roots, but the underlying policy considerations of the common law are the same in both jurisdictions. The common law of champerty looks at the substance as well as the form of the arrangement. In Scots law the *pactum de quota litis* principle does likewise.

[44] The success fee elements are not conditional fee arrangements. They do not provide that a certain fee will be paid in the event of success. They are contingency fees. The amount payable varies depending not just upon success but also upon the amount recovered. They are not speculative fee arrangements. At common law such fee arrangements involve no fee being due if the litigation does not succeed, but payment of an ordinary fee in the event of success. By contrast, here the amount of the success fee varies not merely according to whether the litigation is successful, but in proportion to how successful it is.

[45] It is wrong to suggest that the law applying to the arrangements ought to be different because the pursuers are commercial clients. Fee agreements with both commercial and non-commercial clients may give rise to an unacceptable conflict of interest and duty.

[46] The pursuers' case does not depend upon the court extending the reach of the *pactum de quota litis* principle. On the contrary, the success fee arrangements here fall squarely within the prohibition, and squarely within the mischief which the principle is intended to prohibit. In any case, it is wrong to suggest that concerns about the mischief which the *pactum de quota litis* addresses have diminished in modern times.

[47] Rules of court 42.7(6)(c)(vii) and 42.14(3)(f) are not indicative of diminished concern. Rule 42.7(6)(c)(vii) provides that the "amount or value of money or property involved in the cause" is a factor which shall be taken into account in determining, when taxing a solicitor's account, whether an item charged is fair and reasonable. In terms of rule 42.14(3)(f) the same factor is to be taken into account in determining whether an additional fee is to be awarded. A solicitor's fee may be increased in the circumstances provided for in the rule. In each case the factor is taken into account whether the client has won or lost. These rules do not give rise to unacceptable conflicts of interest. A critical difference between the operation

of these provisions and a *pactum de quota litis* is that the amount of any fee increase is regulated and decided upon by the court. With a *pactum de quota litis* the lawyer and the client agree in advance that the lawyer's fee will be calculated by reference to the sum recovered.

[48] Likewise, the legality of speculative fee arrangements does not undermine the rationale behind prohibiting *pacta de quota litis*. The critical difference is that with speculative fees the fee does not vary according to the amount recovered. There is provision for up to 100% increase in elements of party and party expenses, but that matter is regulated by the court. The conflict of interest is not as great as with contingency fees. In light of that, and of the greater access to justice which they promote, speculative fee arrangements are considered to be manageable and acceptable.

[49] The Taylor Review contained recommendations for changes in the law in this area, and some of those recommendations found their way into the 2018 Act, but the legality of the success fee arrangements here has to be determined on the basis of the law as it was on 1 and 2 July 2015. If in the future the relevant provisions of the 2018 Act are brought into force, and the regulations contemplated are made, there will be a regulated regime which strikes a balance between increasing access to justice and the mischief which the *pactum de quota litis* principle addresses.

***Consequences if the arrangements are pacta de quota litis?***

[50] The consequences of the success fee arrangements being *pacta de quota litis* are that they are unenforceable and that the first pursuer is entitled to obtain payment from the first defender of the sums which have been wrongly withheld.

[51] The argument that the consequences of the arrangements being unenforceable is that the first pursuer cannot recover the payments which the first defender made from the client account - and that those monies must simply remain where they lie - is unsound. *Bolden* v *Fogo* (1850) 12 D 798 does not support such an outcome. The correct approach is that discussed in *Patel* v *Mirza, supra.* Applying those principles, it is plain that the first defender ought not to be permitted to profit from its wrongdoing.

[52] The defenders' pleas of personal bar should be repelled. To sustain them would deny any effect to the legal policy underlying the prohibition on *pacta.* The law does not regard a client's change in position in declining to implement prohibited fee arrangements as either relevant or unfair for the purposes of personal bar.

[53] There is no need for proof on either of these issues. The facts which inform the relevant matters are already patent.

***The second part of the third conclusion***

[54] The issue at this stage is whether the case based upon breach of fiduciary duty (and, in relation to the second defender, knowing receipt) is bound to fail even if the pursuers prove all that they aver (*Jamieson v Jamieson* 1952 SC (HL) 44). It is not bound to fail.

[55] The hypothesis upon which the pursuers' averments proceed is that the General Terms of Business were not incorporated into the agreement with the first defender. In the circumstances averred, moving monies from the client account to the first defender's own account and then moving part of them on to the second defender was infidelity of the sort described in *Bristol and West Building Society* v *Mothew, supra*. Here the first defender knew that the first pursuer's liability to pay was disputed on reasonable grounds. In those circumstances it was not entitled to pay itself the disputed sum, nor should it have paid the

second defender the disputed element of his fees. The monies ought to have been retained (as trust monies) in the client account or in a separate account until the dispute was resolved.

[56] The pursuers' averments are sufficient to entitle it to inquiry on the issue of knowing receipt by the second defender. The second defender admits he was aware from a time shortly after February 2018 that the pursuers disputed the fees. It is a reasonable inference (cf *Thomson and Others* v *Clydesdale Bank Limited, supra,* per Lord Shand at p 62) that he was aware that payment to him had been made by the first defender from the client account contrary to the first pursuer's wishes.

***Title and interest of the second pursuer***

[57] As a party to the contractual arrangements who (a) guaranteed the obligations of the first pursuer to the first defender, (b) undertook personal liability to the first defender in default of payment by the first pursuer and (c) indemnified the first defender in relation to the second defender's fees, the second pursuer has title to seek at least the declarators sought in the first and second conclusions. Given the variety of possibilities that have been raised by the matters in dispute, he also has an interest in participating in the determination of those matters. Since he has title, little by way of interest is required. He has a clear interest (i) in having his position articulated before the court; and (ii) in being able to rely on the ultimate judgment as a party to the litigation (as opposed to a non-party to whom the plea of *res judicata* would not be available in any future litigation).

***Bare declarator***

[58] It is wrong to suggest (as the second defender suggests) that the declarator sought in the second conclusion is a bare declarator which has no practical consequences. Both declarators have practical, financial consequences. If they are pronounced the pursuers say that the sum sought in the first part of the third conclusion requires to be repaid by the first defender; and if the case is not finally determined by the court when it issues its judgment following this debate, then the pursuers may need to insist upon the orders sought in the second part of the third conclusion. In any case, even bare declarators could have further practical consequences. Complaints have been made to the Scottish Legal Complaints Commission about the conduct of Levy & McRae, the first defender and the second defender. Declarators would be likely to have consequences on that front - including the possibility of compensation being awarded.

**Decision and reasons**

***Pactum de quota litis***

[59] Speculative fee arrangements have been permitted in Scots law for centuries. The practice was recognised by Bankton IV.3.22, and by the Act of Sederunt of 19 December 1835 regulating the Fees and Charges of the Practitioners before the Court of Session for 3 years from 12 January 1836, VI (General Rules in relation to the Taxation of Accounts) (see Stair Encyclopaedia Reissue, *Legal Profession*, para 175, footnote 2). Customarily, the solicitor and/or counsel accepted instructions on the basis that no fee was to be payable if the action was unsuccessful, but that in the event of success the solicitor/counsel was entitled to any expenses recovered from the losing party (see eg Maxwell, *The Practice of the Court of Session*, pp 20-21, 26).

[60] Section 36 (1) and (2) of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 ("the 1990 Act") made provision in relation to advocates' speculative fees, and section 36(3) amended the 1980 Act to make similar provision in relation to solicitors' speculative fees:

> "36.— Solicitors' and counsel's fees.
> (1) An advocate and the person instructing him may agree, in relation to a litigation undertaken on a speculative basis, that, in the event of the litigation being successful, the advocate's fee shall be increased by such percentage as may, subject to subsection (2) below, be agreed.
> (2) The percentage increase which may be agreed under subsection (1) above shall not exceed such limit as the court may, after consultation with the Dean of the Faculty of Advocates, prescribe by act of sederunt.
> (3) After section 61 of the 1980 Act there shall be inserted the following section:
>
> "61A.— Solicitors' fees.
>
> (1) Subject to the provisions of this section, and without prejudice to—
>
> (a) section 32(1)(i) of the Sheriff Courts (Scotland) Act 1971; or
>
> (b) section 5(h) of the Court of Session Act 1988,
>
> where a solicitor and his client have reached an agreement in writing as to the solicitor's fees in respect of any work done or to be done by him for his client it shall not be competent, in any litigation arising out of any dispute as to the amount due to be paid under any such agreement, for the court to remit the solicitor's account for taxation.
>
> (2) Subsection (1) is without prejudice to the court's power to remit a solicitor's account for taxation in a case where there has been no written agreement as to the fees to be charged.
>
> (3) A solicitor and his client may agree, in relation to a litigation undertaken on a speculative basis, that, in the event of the litigation being successful, the solicitor's fee shall be increased by such a percentage as may, subject to subsection (4), be agreed.
>
> (4) The percentage increase which may be agreed under subsection (3) shall not exceed such limit as the court may, after consultation with the Council, prescribe by act of sederunt.""

[61] Sections 36(1) to (3) were commenced during July 1992. On 23 July 1992 the court exercised its section 36(2) power to prescribe the limit of the percentage increase which could be agreed between an advocate and the person instructing him by making the Act of Sederunt (Fees of Advocates in Speculative Actions) (SI 1992/1897). The Act of Sederunt came into force on 17 August 1992 (and it remains in force). Article 2 thereof provides:

> "2.— Speculative fee charging agreement
>
> (1) Where-
>
> (a) an advocate is instructed to undertake any work for a client in a litigation; and
>
> (b) the advocate and his instructing solicitor agree that the advocate is to be paid a fee only if the client is successful in the litigation,
>
> the advocate and the solicitor may agree that the advocate's fee shall be increased by a figure not exceeding 100 per cent.
>
> (2) The client of the solicitor shall be deemed to be successful in the litigation where-
>
> (a) the litigation has been concluded by the pronouncing of a decree by the court, which, on the merits, is to any extent in his favour;
>
> (b) the client has accepted a sum of money in settlement of his claim in the litigation; or
>
> (c) the client has entered into a settlement of non-monetary nature by which his claim in the litigation has been resolved to any extent in his favour.
>
> (3) In sub-paragraph (1) above the *`advocate's fee'* means the fee for each item of work undertaken by the advocate in the solicitor's account of expenses for which the other party to the litigation has been found liable, taxed as between party and party or agreed, before the deduction of any award of expenses against the client."

[62] On 23 July 1992 the court also exercised the power conferred on it by section 61A(4) of the 1980 Act to make the Act of Sederunt (Fees of Solicitors in Speculative Actions) (SI 1992/1879) and the Act of Sederunt (Rules of the Court of Session Amendment No.8) (Fees of Solicitors in Speculative Actions) (SI 1992/1898). SI 1992/1879 made provision for

sheriff court actions and SI 1992/1898 made provision for Court of Session actions.

SI 1992/1898 came into force on 17 August 1992. Rule 2 of SI 1992/1898 inserted a new rule of court 350A dealing with the fees of solicitors in speculative actions. From 5 September 1994 the same provision (with immaterial changes) became rule of court 42.17 (Act of Sederunt (Rules of the Court of Session 1994) (SI 1994/1443):

> "42.17.— Fees of solicitors in speculative causes
>
> (1) Where–
>
> (a) any work is undertaken by a solicitor in the conduct of a cause for a client,
>
> (b) the solicitor and client agree that the solicitor shall be entitled to a fee for the work only if the client is successful in the cause, and
>
> (c) the agreement is that the fee of the solicitor for all work in connection with the cause is to be based on an account prepared as between party and party,
>
> the solicitor and client may agree that the fees element in that account shall be increased by a figure not exceeding 100 per cent.
>
> (2) The client of the solicitor shall be deemed to be successful in the cause where–
>
> (a) the cause has been concluded by a decree which, on the merits, is to any extent in his favour;
>
> (b) the client has accepted a sum of money in settlement of the cause; or
>
> (c) the client has entered into a settlement of any other kind by which his claim in the cause has been resolved to any extent in his favour.
>
> (3) In paragraph (1) *"the fees element"* means all the fees in the account of expenses of the solicitor–
>
> (a) for which any other party in the cause other than the client of the solicitor has been found liable as taxed or agreed between party and party;
>
> (b) before the deduction of any award of expenses against the client; and
>
> (c) excluding the sums payable to the solicitor in respect of–

(i) any fees payable for copying documents and the proportion of any session fee in the Table of Fees and posts and incidental expenses under rule 42.11

(ii) any additional fee allowed under rule 42.11 to cover the responsibility undertaken by the solicitor in the conduct of the cause; and

(iii) any charges by the solicitor for his outlays."

[63] Whatever else they may have been, the success fee elements of the agreements were not speculative fee agreements of the customary type. The agreements did not make provision for a fee being paid only in the event of success in the litigation. Moreover, the litigation to which the pursuers' agreement with Levy & McRae related was not a speculative cause in respect of which rule of court 42.17 authorised a percentage increase in the solicitor's fee. Nor was the agreement with the second defender a speculative fee charging agreement in respect of which SI 1992/1897 authorised a percentage increase in the second defender's fee. The defenders accept that the success fee elements of the agreements are not speculative fee agreements of the customary type. They maintain that they are not contingency fee agreements but are "a species of" speculative or conditional fee agreement.

[64] Since the sole basis upon which the pursuers maintain that the success fee elements are illegal and unenforceable is that they are *pacta de quota litis*, I am not asked to consider the legality and enforceability of speculative agreements which are not *pacta*, but which do not conform to the customary model and which do not comply with the regulations which make provision for percentage increases in fees. Some commentators (eg Taylor Review, Ch 7, paras 3, 33 and 65; W. Semple, *Written Fee Charging Agreements,* 1993 JLSS 395; Paterson and Ritchie, *Law, Practice and Conduct for Solicitors* (2nd ed), p 337) seem to assume that such agreements may indeed be lawful and enforceable. Whether or not that is correct may turn upon the correct construction of section 36(1) of the 1990 Act (which is stated to be

subject to section 36(2)) and of section 61A(3) of the 1980 Act (which is stated to be subject to section 63A(4)). As the point is not a live issue in the present case I prefer not to express any views on it.

[65] The prohibition on *pacta de quota litis* is not restricted to cases where a lawyer may obtain an actual share of the fruits. It is sufficient that his entitlement is calculated by reference to a share of the fruits (*Quantum Claims Compensation Specialists Ltd* v *Powell* 1997 SCLR 242, per Sheriff Principal Risk at p 251). An agreement to remunerate the lawyer by paying a commission on the proceeds is within the ambit of the prohibition (*Farrell* v *Arnott, supra*; *Gloag on Contract* (2nd ed), p 578).

[66] The principal issue raised at the debate is whether an agreement which provides for fees to be increased by a percentage which is calculated by reference to the fruits of the litigation is a *pactum de quota litis*.

[67] The older authorities on *pactum de quota litis* all involved agreements where remuneration was to be by way of a share of the proceeds or calculated by reference to such a share. An apparent exception is *Bolden* v *Fogo, supra.* The structure of the agreement in that case bears comparison with the success fee agreements here.

[68] In *Bolden* v *Fogo* the defender wished to assert a claim to an estate in Perthshire. On 1 May 1837 he entered into an agreement with the pursuer, an English solicitor, in terms of which the pursuer was to bear the cost of the litigation and to indemnify the defender in respect of any liability for expenses. If by means of the pursuer's services the defender should become entitled to the estate before 12 August 1840 he was to pay the pursuer eight times his costs and charges; and if he became so entitled after that date he was to pay the pursuer ten times those costs and charges. While the terms of the agreement are not set out in full in the Session Cases report, they are reproduced in the Session Papers. One of the

terms was that if the defender compromised with the person in adverse possession of the estate the sum to be paid to the pursuer as reimbursement of costs and expenses and as remuneration for his services should be reduced:

> "...That a reduction should be made from the said proportions of eight to one, or ten to one (as the case may happen) ... equal to the amount such compromise may bear to the whole value of the estate, as for example - taking the estate of the value of £20,000, and supposing the [defender] to pay the sum of £5,000 for such compromise which is equal to one quarter of the value of the whole estate, then one quarter is to be deducted from the said proportions of eight to one and ten to one (as the case may happen), which will then be as six to one or seven and half *(sic)* to one, as the case may happen... "

Thus, the multiplier to be applied might depend not just upon success, but also upon the degree of success. In pursuance of the agreement an action was raised against the person in possession of the estate, but it was unsuccessful. The pursuer then raised an action seeking payment of his costs and charges in the unsuccessful litigation. The defender maintained that in terms of the agreement the pursuer was not entitled to any payment. The pursuer argued that the agreement was a *pactum de quota litis* and that its terms could not be relied upon by the defender to exclude the pursuer's claim. The Lord Ordinary (Lord Wood) repelled that defence and assoilzied the defender. The primary ground of the Lord Ordinary's decision was that the agreement was not a *pactum de quota litis* because the pursuer was not the defender's legal adviser in the litigation. He went on to opine that if, contrary to his view, the agreement was a *pactum de quota litis,* the pursuer would not have been entitled to obtain decree for payment of the costs and charges because (i) the only basis upon which he had been employed had been the agreement; and (ii) it had been agreed that he was to be paid nothing if the action was unsuccessful. The pursuer reclaimed. The Second Division refused the reclaiming motion, but their reasoning did not wholly coincide with that of the Lord Ordinary. While Lord Justice-Clerk Hope expressed the opinion that

the agreement was a *pactum de quota litis* (he described the stipulated payment as an "exorbitant return" and an "extortionate profit"), he did not think it was necessary to decide the point. He preferred to rest his decision on the ground that, whether or not the agreement was a *pactum de quota litis*, the pursuer's engagement had been on the terms set out in the agreement - one of which was that the pursuer was to be paid nothing if the action was unsuccessful. Lord Moncrieff opined that the agreement was a *pactum de quota litis*. He described it as stipulating that the pursuer should obtain "a portion of the gain expected from the suit", "a portion of the estate to be recovered" (p 806). However, the ground upon which he ultimately found for the defender was that the costs and charges were incurred on the footing that they would be borne by the pursuer if the cause was unsuccessful.

Lord Cockburn was not prepared to hold that the agreement was a *pactum de quota litis* (because the pursuer did not act as a legal adviser in the litigation) - but he was clear that, whether or not it was such a *pactum*, the pursuer was not entitled to payment.

[69] Accordingly, even though the pursuer's entitlement in the event of the estate being recovered was not expressed as being a share of, or commission on, the estate, Lord Justice Clerk Hope and Lord Moncrieff opined that the agreement was a *pactum de quota litis*. Those opinions were *obiter dicta*. They do not form part of the *ratio* of the court's decision. Nonetheless, in my view they do provide a measure of support for the proposition that an agreement to increase fees by a multiplier which depends upon the degree of success is a *pactum de quota litis*.

[70] The leading modern authority on *pactum de quota litis* is *Quantum Claims Compensation Specialists Ltd* v *Powell* 1998 SC 316. In that case an Extra Division of the Inner House observed:

"As a starting point, we would emphasise, as the sheriff principal does, the basic principle, that parties of full legal capacity may enter into whatever contract they please, provided that the contract is not made illegal by statute or by some rule of common law. The prohibition against a *pactum de quota litis* is thus a restriction upon the normal freedom of contract..." (p 319E-F).

"The unenforceability of a *pactum de quota litis* does not ... flow from any unacceptable characteristic of the bargain as such. What the law treats as unacceptable, and therefore renders unenforceable, is the presence of a stipulation of this type in a contract which regulates the rights and obligations of a claimant or litigant on the one hand, and on the other hand, a third party whose particular function or role differentiates him from third parties in general, and provides a basis for saying 'others may enter into bargains such as this - but not you'"
(pp 319H-320A)

"What one may call the original or narrow *ratio* for the prohibition against the *pactum de quota litis* is closely tied to those actually conducting litigation, and the possible mischief of 'stirring up too much eagerness in pleas'. As the sheriff principal points out, advocates and solicitors so engaged in litigation are officers of the courts in which they plead, and have duties, not only to their clients, but also to the courts. In such a context of public duties, it is understandable that the *pactum de quota litis*, giving the pleader a financial interest in the outcome of the case which he is presenting, may be seen as objectionable. But the prohibition has apparently been seen as applicable not merely to this category, who are officers of court, but also to the 'country' solicitor instructing them. It does not appear to us nor was any concession made by counsel for Quantum, that the various expressions used in the decided cases, such as Writer, Law Agent, Legal Advisor and the like are being used to denote anyone other than a qualified legal practitioner; nor does it appear (nor is it conceded) that unenforceability is envisaged as arising in any context other than that of a client engaging such a qualified practitioner, for professional services"
(pp 320H-321B).

"...the point [the appellant] is making appears to us essentially to be the undesirability of a practising solicitor combining his solicitor's role, in relation to a claim or litigation, with a pecuniary interest in the amount eventually to be recovered. That is indeed the *ratio* underlying the unenforceability of a *pactum de quota litis*, when entered into by a solicitor who has such a professional role in relation to a claim or litigation." (p 322C).

"Considering the law as it is, and starting with the relatively broad restriction on freedom of contract acknowledged by counsel for Quantum, it appears to us that the *ratio* for that restriction is indeed specific to professional lawyers who have taken on a professional role for their clients in relation to a claim or litigation, and who are debarred from combining that function with a pecuniary interest in the amount to be recovered." (pp 322I-323A).

[71] I agree with counsel for the defenders that the only issue in controversy in *Quantum Claims Compensation Specialists Ltd* v *Powell* was whether the *pactum de quota litis* principle applied to a person who was not a qualified legal practitioner. The scope of the principle as it applies to legal practitioners was not in issue - the court proceeded in that regard on the basis of a series of concessions made by counsel for Quantum. Nonetheless, in my opinion the identification of the *ratio* of the principle was a necessary and material part of the court's analysis. It was not mere *obiter dicta.*

[72] The success fee elements of the agreements did not provide in terms that the success fee should be a share of the proceeds or be calculated by reference to a share of the proceeds. However, success fees were to be triggered by an award or settlement of more than £10,000,000. The amount recovered determines the multiplier used to calculate the success fee. As the amount recovered increases, so does the multiplier and the resultant success fee. With an award or settlement of £20,000,000 the success fee was to be 100% of the basic fee. If recovery was £50,000,000 the success fee was to be 400% of the basic fee. If recovery was £75,000,000 the success fee was to be 587.5% of the basic fee. If recovery was £100,000,000 the success fee was to be 775% of the basic fee. If recovery was £150,000,000 the success fee was to be 900% of the basic fee. If recovery was £200,000,000 the success fee was to be 1025% of the basic fee.

[73] The mischief which the *pactum* principle is intended to prohibit is the conflict of interest which arises when a lawyer has a pecuniary interest in the amount which the client may recover. The conflict is between, on the one hand, the lawyer's pecuniary interest; and, on the other hand, his duties to the client and to the court. The rationale of the *pactum* principle is that such conflict gives rise to an unacceptable risk that the proper administration of justice may be obstructed.

[74] In my opinion the success fee elements of the agreements are *pacta de quota litis*. The substance of what was agreed was that the defenders' remuneration would increase in proportion to the sum recovered. That gave them a clear pecuniary interest - a stake - in the amount recovered. In my view that pecuniary interest contravened the *pactum* principle. It created a conflict of interest which gave rise to an unacceptable risk that the proper administration of justice might be obstructed. I do not consider that in reaching that conclusion I am extending the principle's scope. On the contrary, in my opinion my conclusion is consistent with the court's explanation of the ratio of the principle in *Quantum Claims,* and with the opinions which were expressed by Lord Justice-Clerk Hope and Lord Moncrieff in *Bolden* v *Fogo.* However if, contrary to my view, my conclusion represents a development of the *pactum* principle, in my opinion it would be an appropriate incremental development of the common law. Without it, the prohibition could easily be elided.

[75] It follows that I respectfully disagree with the Dean of Faculty's advice of 23 March 2015. In my opinion neither fee agreement was a speculative fee agreement. In a speculative case it is the payment of a fee rather than the amount of the fee which is linked to the outcome; and, in certain circumstances, a lawyer may agree that in the event of the action succeeding his fee may be increased by a percentage. That is quite a different thing from a lawyer agreeing prospectively that his remuneration will be increased in proportion to the sum recovered. Whatever the position may be in the future if and when the reforms envisaged in the 2018 Act are given effect to, in my view as at July 2015 such agreements were *pacta de quota litis.*

[76] Before leaving this chapter of the case I should say something about other considerations which the defenders prayed in aid, but which I found unconvincing.

[77] The "amount or value of money or property involved in the cause" is a factor which shall be taken into account (i) in determining, when taxing a solicitor's account, whether an item charged is fair and reasonable (rule of court 42.7(6)(c)(vii)); and (ii) in determining whether to allow an additional fee (42.14(3)(f)). I agree with Mr Sandison that the critical difference between the operation of these provisions and a *pactum de quota litis* is that with the provisions the relevant question is determined by the court, whereas with a *pactum de quota litis* the lawyer and the client agree in advance that the lawyer's fee will be calculated by reference to the sum recovered. Taking account of the amount of money or property involved for the purposes of each of the provisions does not give rise to an unacceptable risk of conflict between the solicitor's personal interests and his duties to the client and the court.

[78] It is true that speculative fee arrangements may give rise to a degree of conflict between the lawyer's interests in being paid and the lawyer's professional duties to the client and to the court. However, here too I think that Mr Sandison is correct in saying that in the case of speculative fees the law treats those risks as being manageable and acceptable in view, *inter alia,* of the restrictions which apply to them (*cf* the *CCBE Charter*, para 3.3.3).

[79] In recent years there have been substantial changes in the available sources of litigation funding. As the Taylor Review notes, there have been reductions in the availability of legal aid and trade union funding. In order to maintain and increase access to justice alternative funding methods are required. The Taylor Review considered that the time had come to permit contingency fee arrangements, subject to appropriate controls and to caps on the amount of the fee. Ultimately, following further consultation, the 2018 Act has been enacted. It received Royal Assent on 5 June 2018. Part 1 makes provision in relation to success fee agreements, but many of its provisions are not yet in force. In terms of section 2(1) a success fee agreement will not be unenforceable by reason only that it is a

*pactum de quota litis.* Section 4 empowers the Scottish Ministers to make regulations capping success fees, and section 7(3) empowers them to make regulations containing other provisions about success fee agreements.

[80] The changes which the 2018 Act will enable are not dissimilar to changes which have occurred in other jurisdictions, including England and Wales (see Taylor Review, Ch 9, paras 7 to 18; Boon, *The Ethics and Conduct of Lawyers in England and Wales* (3rd ed), Ch 12), and South Africa (see, *Christie's The Law of Contract in South Africa* (6th ed (Christie and Bradfield)), pp 367-369; Hutchison and Pretorius, *The Law of Contract in South Africa* (3rd ed), pp 189-190; *Price Waterhouse Coopers Inc* v *National Potato Co-operative Ltd* 2004 6 SA 66 (SCA)). In those jurisdictions contingency fee arrangements are controlled and regulated in much in the same way as success fees will be if and when the relevant provisions of the 2018 Act are brought into force and appropriate secondary legislation is promulgated and takes effect.

[81] The defenders submit that the legislative changes in Scotland are demonstrative of a public policy shift and of a lessening of concern about conflict of interest. There is no doubt that the regime which is likely to be introduced when the reforms envisaged under the 2018 Act come into effect will involve a significant change in the law relating to contingency fees. However, in my opinion two matters have to be kept firmly in view. First, for present purposes it is the applicable law and any other relevant circumstances as at the date of the agreements which are important. Second, the 2018 Act envisages a regulatory regime under which success fees may be capped and further provision may be made as to the terms and contents of success fee agreements. It seems to me that what is proposed is very far from being an unregulated regime where the parties will be free to agree any terms they may please.

***The other issues***

[82] The advantage of having the debate was that the pursuers' case was predicated upon the success fee elements of the agreements being *pacta de quota litis*. If they were not *pacta*, that would have been an end of the action and there would have been no need to consider any of the other issues raised in the pleadings (eg personal bar, and the pursuers' remedies if they were not personally barred from challenging the legality of the success fee elements). If it had not been for that advantage the logical course might have been to consider the issue of personal bar before, or together with, the *pacta de quota litis* issue. Given my conclusions on the *pacta* issue it is now necessary to proceed to consideration of the other issues.

[83] I am not persuaded that the defenders' averments of personal bar are so clearly irrelevant that probation is unnecessary. The question is, can it be said at this stage, without inquiry, that this defence is bound to fail (*Jamieson* v *Jamieson, supra*, per Lord Normand at p 50, Lord Reid at p 63; *Henderson* v *3052775 Nova Scotia Ltd* 2006 SC (HL) 85, per Lord Rodger of Earlsferry at para 16)? In my opinion it cannot.

[84] If the defenders' pleas of personal bar are not well founded and the pursuers are entitled to rely upon the illegality of the success fee elements of the agreements, it will be necessary to determine what, if any, financial consequences follow (*Patel* v *Mirza, supra*; MacQueen and Thomson, *The Law of Contract Law in Scotland* (4th ed), paras 7-01 to 7-24; McBryde, *supra,* paras 19-17 to 19-27). In my view that too is a matter in relation to which material matters are disputed and inquiry will be required.

[85] On both of these issues I consider that to accept Mr Sandison's submissions would be going too far too fast.

[86] I turn to the second defender's plea that the second pursuer has no title or interest to sue the second defender. I am not persuaded that I should sustain it without further

inquiry. One of the factors which I have had regard to in reaching that view is that had the first defender not yet made the contentious payments to itself and to the second defender, I think that the second pursuer would have had title and interest to seek both declarators (in view of the guarantee and indemnity which he provided under the agreement with Levy & McRae). It would be odd if because the payments have been made he does not have title and interest, even though he maintains that the first defender was wrong to make the payments. A second factor is that I am conscious that the sum held by the first defender in the client account came from the payment made to settle the second pursuer's action against P & W. Clause 2.2 of the Confidential Settlement Agreement narrates that settlement was on the basis that £19 million be paid to the second pursuer "such payment to be made to the client account of [the second pursuer's] solicitors, Levy & McRae... " In article 6 of condescendence the pursuers aver:

> "The settlement sum was in due course paid to the first defender, which ... released the majority of the funds to the second pursuer."

While it appears that there was an agreement between the pursuers relating to sums recovered in the action, I do not know the terms of that agreement. At present I am not clear whether, if the success fee payments had not been paid, further funds may have been due by the first defender to the second pursuer.

[87] I am also not persuaded by Mr Ellis' submission that the declarator sought in the second conclusion is a bare declarator which the court should not entertain. In my view the declarators that the success fee elements of both agreements are *pacta de quota litis* are stepping stones on the way to establishing the financial redress which the first pursuer seeks in the first part of the third conclusion.

[88] That brings me to the relevancy of the pursuers' averments in support of the second part of the third conclusion - that the first defender acted in breach of its fiduciary duties to the first pursuer when it made the payments complained of (£940,384 to itself and £1,752,375 to the second defender), and of knowing receipt on the part of the second defender.

[89] In my opinion the pursuers' averments of breach of fiduciary duty by the first defender are sufficient to entitle the pursuers to inquiry. The pursuers aver that they had instructed that further payments should not be made until the fee dispute was resolved, but that despite that the contentious payments were made without the pursuers' consent and without legal justification. The defenders do not dispute that the pursuers did not wish the payments to be made, but they take issue with the lack of legal justification. However, in my opinion it cannot be said at this stage that the pursuers are bound to fail to establish lack of legal justification. They aver that the success fee arrangements were illegal and unenforceable, and that not all of the basic fees paid were properly due. They also aver that they are not personally barred from maintaining that position or from seeking recovery of the payments made in breach of fiduciary duty. I have concluded that the success fee arrangements are *pacta*, but establishing the consequences of that necessitates inquiry. In my opinion whether the first defender placed itself in a position where its own interests and its duty to its client conflicted, and whether doing what it did was infidelity to the first pursuer for its own benefit and for the benefit of the second defender, are also matters for inquiry.

[90] Finally, I am not prepared to hold, without inquiry, that the claim for repetition from the second defender is irrelevant. The pursuers aver that the second defender knew his fees were disputed. Whether in the whole circumstances he had grounds for suspecting that the payment (or part of it) was made by the first defender in breach of its fiduciary duties to the first pursuer is a matter which is better determined after inquiry. Moreover, I am mindful

that a party ought not to profit from another party's breach of fiduciary duty (*Macadam* v *Grandison* [2008] CSOH 53, per Lord Hodge at para 35; *Bank of Scotland* v M*acLeod Paxton Woolard & Co*, *supra*, per Lord Coulsfield at p 272). In so far as the payment to the second defender represented the success fee, or exceeded a proper basic fee, it may be arguable that the second defender may have obtained a gratuitous benefit from a breach of fiduciary duty by the first defender. I am conscious that the matter was not focussed in this way in submissions and that I have not had the benefit of argument on it. In those circumstances, while I think it right to mention it, I reserve my opinion on the point.

**Disposal**

[91] I shall put the case out by order (i) to discuss an appropriate interlocutor to give effect to my decision; (ii) to discuss further procedure; and (iii) to consider any motions for expenses which may be made.