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Supreme Court rules that paying party has to pay £562k success fee and ATE premium for appeal started after LASPO commencement

Plevin v. Paragon Personal Finance Limited (No 3) [2017] UKSC 23

Article by David Bowden

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Executive speed read summary

The Supreme Court determined this appeal in November 2014 and decided that there was an 'unfair relationship' under section 140A of the Consumer Credit Act 1974 between Plevin and Paragon. As Plevin won on this narrow issue, a costs order in her favour was made. Master O'Hare assessed the bill of costs. He referred one issue to a Supreme Court justice and it was decided to have a full hearing to resolve it. The Plevin appeal to the Supreme Court could only have started after the Court of Appeal handed down its ruling in December 2013. Plevin needed a new conditional fee agreement for the Supreme Court. The ATE was provided throughout by DAS. Paragon said that the Supreme Court appeal and any funding arrangement started after 1 April 2013 when the new LASPO rules took effect. LASPO prevents success fees or ATE being recovered by a successful party from an unsuccessful one – these can now only be deducted from any damages recovered. Lord Sumption JSC ruled that the costs were 'wholly disproportionate to the relatively modest amount at stake, in the event just £4,500'. The Supreme Court has unanimously rejected a submission that there were no profit costs due caused by 2 restructures of legal entities trading as 'Miller Gardner' that represented Mrs Plevin. By a 4-1 majority, the Supreme Court has ruled that properly interpreted the transitional provisions in LASPO do not prevent Mrs Plevin from recovering either success fee or ATE premiums from Paragon even though the Supreme Court proceedings started after LASPO came into force. Lord Hodge JSC dissents on this ruling that he failed to see this intention in the words which Parliament used.

Plevin v. Paragon Personal Finance Limited (No 3)
[2017] UKSC 23 *29 March 2017*
Supreme Court of the United Kingdom (Lady Hale DPSC, Lords Clarke, Sumption, Carnwath and Hodge JJSC)

What are the details of the underlying loan transaction?

A broker (Loan Line) put an unsolicited leaflet through an end-user customer's letter box. The broker offered to arrange refinancing at competitive rates. The broker assessed the customer's 'demands and needs' for payment protection insurance as it was required to do under the FSA (now FCA) Insurance Conduct of Business Rules. The broker was one of 11 brokers that Paragon as lender dealt with. Paragon accepted the business and conducted money laundering checks (in a 'speak with' telephone call) but did not conduct any assessment of the suitability of the insurance itself.

The loan was for £34,000 at a competitive APR of 7.3% with loan payments spread over 10 years. The loan agreement was on the lender's standard documentation. It was regulated by the Consumer Credit Act 1974 and secured by a second legal charge over her home. Single premium PPI was arranged which cost £5,780 of which 71.8% was retained as commission. The insurance was provided by Norwich Union. The broker received 32% commission, the lender 39% and the balance went to the insurer.

What happened in the County Court?

In Plevin 1, proceedings were brought in 2009 by the customer's solicitors against both the lender and the broker alleging initially that there were breaches of fiduciary duty and then subsequently that the PPI had been mis-sold in some way. A number of other claims were made which were either abandoned or dismissed at trial. The broker went into insolvent liquidation. The claim against the broker was settled for £3,000. This was paid by the Financial Services Compensation Fund.

This left the claim against the lender. The trial judge in Manchester County Court (Recorder Yip QC) dismissed all claims after a four-day trial - **[2012] EW Misc 24 (CC)**. The judge found there was not an '*unfair relationship'* and made an indemnity costs order in the lender's favour.

What happened on the Plevin 1 appeals?

The customer appealed and in December 2013 the Court of Appeal allowed that appeal **- [2013] EWCA Civ 1658**. It found that the insolvent broker had acted on the lender's behalf, there was an '*unfair relationship'* and remitted it all back to the county court to determine compensation and costs.

Paragon appealed to the Supreme Court. On 12 November 2014 Paragon succeeded in overturning the Court of Appeal's ruling in relation to agency (so that Loan Line was not its agent) and in relation to the findings on the FISA and FLA codes - **[2014] UKSC 61**. Plevin lost on all these issues and only succeeded on 1 issue on the narrow point that the relationship between Plevin and Paragon was unfair under section 140A of the Consumer Credit Act 1974 because the commission that Paragon retained was beyond a '*tipping point*'.

What happened in Plevin 2 when the case went back to the County Court?
In Plevin 2 the Supreme Court sent the case back to the County Court. As a concession the lender refunded all the commission and on 2 March 2015 HHJ Platts made no further award of remediation in Mrs Plevin's favour - **[2016] CCLR 6.** An application for permission to appeal this ruling was refused by Sir James Munby in the Court of Appeal on 18 November 2015 – **[2016] CCLR 7** principally on the basis that Judge Platts correctly set out the various factors to apply in his judgment and that Mrs Plevin had a free choice as to what to do.

How was this claim funded?
Mrs Plevin's solicitors (Miller Gardner of Manchester) acted for her in all courts under *'no win, no fee'* conditional fee agreements ('CFAs'). Miller Gardner arranged for '*after the event*' ('ATE') insurance to be placed on risk to cover Paragon's costs in the event that her claim or appeals failed. This ATE was '*self-insured*'. This meant that Mrs Plevin did not have to pay for the ATE premiums at all. The ATE insurer (DAS Legal) would only collect the ATE premiums from Paragon in the event that Mrs Plevin won and in the amount that the premiums were agreed or assessed at by a costs judge.

Which legal entities used the trading name of 'Miller Gardner'?
Three different companies incorporated in England and Wales have traded or trade as '*Miller Gardner'.* 3 different firms of licensed insolvency practitioners have been instructed by the businesses:

- Company Number **03723525**. This was incorporated as '*Miller Gardner Limited'* on 1 March 1999. On 22 June 2009 it changed its name to '*MGS1 Limited*'. It was initially place into administration on 31 July 2009 with Philip Duffy and Stephen Muncaster of Manchester firm MCR (later acquired by Duff & Phelps) acting. A winding up petition was presented on 22 May 2012. The company was placed into compulsory liquidation and licensed insolvency practitioner Georgina Eason of London firm MHA McIntyre Hudson is dealing with its affairs.
- Company Number **OC346530**. This was incorporated as '*Miller Gardner Solicitors LLP'* on 19 June 2009. On 8 March 2012 it changed its name to '*Miller Gardner Partnership LLP*'. It was placed into creditor's voluntary liquidation on 18 January 2013 and licensed insolvency practitioners Dean Watson and Paul Stanley of Manchester firm Begbies Traynor (Central) LLP were appointed to deal with the liquidation. This company was eventually dissolved by the Registrar of Companies on 24 May 2016.
- Company Number **07830080**. This was incorporated as '*Miller Gardner Limited'* on 1 November 2011. It is presently an active company. It latest abbreviated accounts for the period up to 30 April 2016 were filed late on 28 March 2017. They show a current asset figure of £868,367.

What happened when Mrs Plevin submitted her bill of costs in the Supreme Court?
On 5 February 2015 the Supreme Court made a costs order awarding Mrs Plevin her costs. This order is disputed by Paragon because Mrs Plevin lost on all issues other than the 1 narrow one on commission disclosure. Miller Gardner submitted its bill of costs for work undertaken on Mrs Plevin's behalf in the Supreme Court. Paragon served its points of dispute. A detailed assessment of Plevin's bill was carried out by Master O'Hare and Registrar Louise di Mambro acting as a Supreme Court costs officers. Miller Gardner then applied for a variation of the original costs order and also for a review of the costs officer's decisions on a number of grounds.

What order did Master O'Hare make in Plevin 3?
A detailed assessment of costs was carried out by Master O'Hare sitting as a costs office of the Supreme Court on 29 and 30 October 2015 and he handed down his judgement on the issues raised in that assessment on 5 February 2016 – Plevin 3. At the handing down hearing, Miller Gardner raised further issues and Master O'Hare gave a further short judgment on 17 February 2016. Master

O'Hare assessed total costs for the Supreme Court alone at £751,463.84. Profit costs and counsels' fees were assessed at £220,228.84 which included a success fee for the solicitors of £31,378.92

How much was claimed by way of ATE premiums?
At the hearing on 6 February 2017, leading counsel for Mrs Plevin gave these figures for the ATE cover that DAS provided:

- £262,350 premium for the Court of Appeal,
- £797,650 premium for the main Supreme Court hearing (which was reduced on assessment by Master O'Hare to £531,235), and
- £550,000 including insurance premium tax just to cover the 1 day hearing in the Supreme Court to resolve the ATE issue on 6 February 2017.

The total ATE claimed for the appeals is £1,610.000.00. Lord Sumption JSC prefaced his judgment with the comment '*it need hardly be said that these sums are wholly disproportionate to the relatively modest amount at stake, in the event just £4,500'*.

What issue was referred to this hearing?
Rule 53 of the Rules of the Supreme Court 2009 provides for a party dissatisfied with an assessment of costs made at an oral hearing to apply for any question of principle arising from an assessment to be reviewed by a single Justice, who may refer the matter to a panel of Justices. Paragon applied for a review of the costs assessment on two grounds both of which raised questions of principle. This was referred to Lord Sumption JSC. He decided to refer it to the full panel which sat on the original Plevin 1 appeal because it raised questions of general importance.

There were 3 points that the Supreme Court had to decide:

- Had the CFAs been validly assigned between the 3 different legal entities which all traded as '*Miller Gardner'*?
- Was the success fee for the Supreme Court appeal recoverable from Paragon?
- Was the ATE premium for the Supreme Court appeal recoverable from Paragon?

Are there any prior authorities of relevance?
Although a bundle of authorities was prepared for the hearing, in the end the Supreme Court found assistance from only 3 of these - 1 recent judgment given by Lord Sumption JSC himself in the Supreme Court, 1 from the Court of Appeal and century old judgment from the House of Lords. These authorities are:

Morris v. Bacon & Co **[1918] AC 1** (House of Lords – Lord Dunedin, Lord Parmoor and Viscount Haldane)
Whether a variation amends the principal agreement or discharges and replaces it depends on the intention of the parties. To establish a discharge and replacement, 'there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which are still subsisting'.

Hawksford Trustees Jersey Ltd v. Stella Global UK Ltd **[2012] EWCA Civ *987*** (Court of Appeal – Lords Justices Rix, Etherton and Patten)
Rix LJ - the cost of an ATE premium arises only in the appeal and can be justified only to the extent that it is the price of insuring against the risk of a costs liability in the appeal, when in truth it is the price of insuring against a costs liability in the trial. The costs liability in respect of which the respondent has insured remains a costs liability in the trial.
Etherton LJ – It is perfectly possible to give the word '*proceedings*' in section 29 of the Access to Justice Act 1999 a wide or a narrow meaning. The section would make sense and could work whether the appellants' interpretation or the respondent's interpretation were adopted. Section 29 must be interpreted in a way that will best reflect the legislative purpose which is the improvement of access to the courts for members of the public with meritorious claims.
Patten LJ (dissenting) - I am not persuaded that it would be right for us to give the word '*proceedings*' in s.29 a restricted meaning. It is important to bear in mind that this was legislation designed to expand access to the courts via the use of CFAs and ATE. The purpose of s.29 was to reverse the existing state of the law under which such premiums were not recoverable as costs.

BPE Solicitors v. Gabriel **[2015] UKSC 39** (Lords Mance, Sumption, Carnwath, Toulson and Hodge JJSC)

> Lord Sumption JSC declared that in the event that the Trustee adopts the appeal to the Supreme Court he will not be held personally liable for any costs incurred by the respondent in relation to this action up to and including the order of the Court of Appeal dated 22 November 2013, by virtue only of the fact of his office as Trustee of Mr Gabriel's estate in bankruptcy or of his adoption of the appeal. A trial and the successive appeals from the order made at trial are '*distinct proceedings for the purposes of costs'*, albeit distinct proceedings in the same action. A distinct order for costs will be made in respect of each of them.

What does the Civil Procedure Rules 1998 say?
CPR part 48 deals with Part 2 of LASPO relating to civil litigation funding and costs and provides for '*transitional provision in relation to pre-commencement funding arrangements'*. In particular, CPR part 48.2 provides as follows:

> **'48.2** (1) *A pre-commencement funding arrangement is—*
> *(a) in relation to proceedings other than insolvency-related proceedings, ….–*
> *(i) a funding arrangement as defined by rule 43.2(1)(k)(i) where –*
> *(aa) the agreement was entered into before 1 April 2013 specifically for the purposes of the provision to the person by whom the success fee is payable of advocacy or litigation services in relation to the matter that is the subject of the proceedings in which the costs order is to be made; or*
> *….*
> *(ii) a funding arrangement as defined by rule 43.2(1)(k)(ii) where the party seeking to recover the insurance premium took out the insurance policy in relation to the proceedings before 1 April 2013'*.

What is the significance of LASPO 2012?
The Legal Aid Sentencing and Punishment of Offenders Act 2012 ('LASPO') has a critical date for costs of 1 April 2013. After that date, success fees and ATE premium are not recoverable by the winning party from the loser but rather they have to be taken out of any damages recovered. There are some complex transitional provisions. In relation to Plevin's case in the County Court, then the CFA is clearly pre-LASPO. The Court of Appeal case straddles the commencement of LASPO. However the Supreme Court appeal could only have started when the Court of Appeal handed down its judgment in December 2013 and so any CFA in relation to that appeal would be post-LASPO with the result that '*additional liabilities'* be they success fee or ATE are not recoverable by Plevin from Paragon unless saved by any transitional provision to the contrary.

On this LASPO provides in section 46(3) that:

> '*46(3) The amendments made by this section do not apply in relation to a costs order made in favour of a party to proceedings who took out a costs insurance policy in relation to the proceedings before the day on which this section comes into force*.'

The Supreme Court has now construed '*in relation to the proceedings'* and decided that ATE insurance (provided throughout by DAS with the same policy number in all courts) was *'taken out'* before the county court case started and was not *'taken out'* when a decision was made to resist a Supreme Court appeal.

What ruling did the Supreme Court give on whether the CFAs been validly assigned between the 3 different legal entities who all traded as 'Miller Gardner'
All 5 judges were unanimous that the CFAs had been validly assigned.

Despite the fact that 3 different legal entities had all traded as '*Miller Gardner'*, Lord Sumption JSC brushed any difficulties that this caused aside saying it was merely '*two technical changes of solicitor'*. Disingenuously he expands on this saying '*they were technical because they both arose out of organisational changes within the same firm*'. He says that in July 2009, '*the partners of Miller Gardner reconstituted themselves as an LLP*' and that this '*was done by appointing administrators of the old partnership, who entered into an agreement with a new firm, Miller Gardner LLP, transferring specified assets to it*'. He goes on to note that in April 2012 '*Miller Gardner LLP transferred its business to a limited company, Miller Gardner Ltd, under an agreement in similar terms'*.

Paragon submitted that on neither occasion was the CFA validly assigned to the new firm with the result that there was '*no effective retainer at the time when costs were incurred in the Supreme*

Court', but Lord Sumption rejects this submission saying brusquely '*in my view it has no merit'*. Lord Sumption correctly observes that '*the CFA was in principle assignable'*. He analyses the defined terms '*work in progress*' and '*contracts'* in the 2009 and 2012 transfer agreements. Paragon submitted that '*work in progress'* included only work already done at the transfer date and did not cover further work on the same matter done thereafter. Lord Sumption's conclusion on this is that '*if this were correct, it would mean that the only right of the successor firm was to bill the clients for work done before the transfer date, leaving them with no solicitor to act for them other than the defunct shell of the old firm*' and he remarks that '*this plainly cannot have been intended'*.

It is a matter of public record that Mrs Plevin did not attend either the hearing in the Court of Appeal or Supreme Court and did not go to the handing down of judgments in those courts. This was quite surprising given the amount that was at stake for her. Again Lord Sumption brushes this aside referring to copy correspondence submitted by the receiving party which ostensibly showed that on 30 July 2009 and 30 April 2012 the latest iteration of the firm trading as '*Miller Gardner'* wrote to Mrs Plevin saying it would '*continue to represent you on the same terms and conditions as previously*.' For Lord Sumption this was enough to amount to an assent by Mrs Plevin to them continuing to act for her. Lord Sumption rejects the submission that the deeds of variation were an '*artificial device'* saying shortly '*there is nothing in this point'* and ruling that these deeds '*were not a sham'*.

What ruling did the Supreme Court give as to whether the success fee for the Supreme Court appeal was recoverable from Paragon?

Section 44(6) of LASPO provides as follows:

> '*(6) The amendment made by subsection (4) does not prevent a costs order including provision in relation to a success fee payable by a person (*"P") *under a conditional fee agreement entered into before the day on which that subsection comes into force (*"the commencement day"*) if—*
>
> *(a) the agreement was entered into specifically for the purposes of the provision to P of advocacy or litigation services in connection with the matter that is the subject of the proceedings in which the costs order is made, or*
>
> (b) *advocacy or litigation services were provided to P under the agreement in connection with that matter before the commencement day*.'

Lord Sumption JSC applies an awkward mixture of the literal and mischief rules of statutory interpretation when interpreting LASPO. Paragon had made the obvious submission that in relation to the proceedings in the Supreme Court the January 2014 variation was a new agreement entered into **after** 1 April 2013 for the provision of litigation services after that date. Lord Sumption JSC stretched the statutory envelope to breaking point ruling that this CFA variation was '*not therefore covered by the transitional provisions of section 44(6) of LASPO'* and tersely dismisses Paragon's submission as '*a bad point'*. For Lord Sumption it is back to the kindergarten, with him ruling that the '*matter that is the subject of the proceedings'* is to mean the '*underlying dispute'*. He twists this further by ruling that Miller Gardner's 2 deeds of variation provided for '*litigation services in relation to the same underlying dispute as the original CFA, albeit at the appellate stages'*.

Lord Sumption JSC rules that '*the success fee may properly be included in the costs order'* and that '*whether a variation amends the principal agreement or discharges and replaces it depends on the intention of the parties'*. He endorses the approach of Lord Haldane in *Morris v. Bacon* on this and goes on to rule that '*at the time when the 2 deeds of variation were executed, the CFA still subsisted'*. Further Lord Sumption noted that '*both deeds are expressly agreed to be a variation of the CFA, leaving all of its terms unchanged except for the addition to the coverage of a further stage of the litigation and a change in the amount of the success fee'*. Finally on this point Lord Sumption rules that whilst '*the description given to the transactions by the parties would not necessarily be conclusive*', the said that this '*cannot be said of either of the deeds of variation'* in this case.

What ruling did the Supreme Court give as to whether the ATE premium for the Supreme Court appeal was recoverable from Paragon?

The ruling on this point might have been different if Paragon had not made a concession earlier in the costs proceedings which it now wanted to withdraw. Paragon had earlier conceded before costs officers that the ATE premium was recoverable as part of the costs. Lord Sumption permitted it to resile from this concession because of its '*novelty and importance'* but ordered that Paragon should pay the costs of the issue in any event.

The ATE policy was issued on 29 October 2008 covering legal expenses and liability for the other side's costs up to and including trial. Miller Gardner claimed the ATE had been '*topped up'* for the 2 appeals. Lord Sumption ruled that these '*top-ups did not give rise to fresh contracts'* because he said '*they were true amendments to the policy which continued in effect subject to the same terms as amended'* and this was the case even though '*on both occasions the amendment was made after LASPO came into force*'.

Section 46(3) of LASPO provides as follows:

> '***46. Recovery of insurance premiums by way of costs****.....*
> *(3)The amendments made by this section do not apply in relation to a costs order made in favour of a party to proceedings who took out a costs insurance policy in relation to the proceedings before the day on which this section comes into force*.'

Lord Sumption notes the difference in wording between s46(3) and 44(6) comparing the phrases '*is the subject of the proceedings*' [s44(6)] and '*in relation to the proceedings'* [s46(3)]. His view is that the '*requisite link'* is with the '*proceedings*' and not '*with the subject matter of the proceedings'*. He says that '*before 1 April 2013, there was an ATE policy in place, but it was not a policy in relation to the appeal to the Court of Appeal or the Supreme Court'*. For Lord Sumption he says '*the critical question is whether the two appeals constituted part of the same "*proceedings*" as the trial'* or were '*distinc*t "proceedings"'.

For Lord Sumption this question has an easy answer with him ruling that '*it is clear that for some purposes the trial and successive appeals do constitute distinct proceedings'* and that '*they are distinct proceedings for the purpose of awarding and assessing costs*'. Lord Sumption starts by endorsing the majority view in *Hawksford Trustees* that '*the costs incurred in respect of an ATE premium were recoverable only in the proceedings to which the policy related'.*

However Lord Sumption JSC notes that the word '*proceedings*' is '*not a defined term in the legislation, nor is it a term of art under the general law'* and so '*its meaning must depend on its statutory context and on the underlying purpose of the provision in which it appears, so far as that can be discerned'*. So this leads Lord Sumption to apply these 3 factors in interpretation:

- the phrase as a matter of ordinary language,
- the purpose of the transitional provisions of LASPO, and
- the effect to be given to the differences between the 2 slightly different expressions in LASPO sections 44(6) and 46(3).

On the first, Lord Sumption said that these '*proceedings were brought in support of a claim, and were not over until the courts had disposed of that claim one way or the other at whatever level of the judicial hierarchy'* and that the word '*proceedings*' was '*synonymous with an action'*. However he goes on to observe that the question posed by section 46(3) of LASPO is '*whether the fact of having had an ATE policy relating to the trial before the commencement date is enough to entitle the insured to continue to use the 1999 costs regime for subsequent stages of the proceedings under top-up amendments made after that date'*. For Lord Sumption the fact that costs are separately awarded and assessed for each stage '*does not assist in answering that question'*.

On purposive interpretation, Lord Sumption observes that the transitional provisions of LASPO were '*to preserve vested rights and expectations arising from the previous law*'. He rules that this purpose '*would be defeated by a rigid distinction between different stages of the same litigation'*. He goes on to notes that an insured claimant can end up '*locked into the litigation'*. For Lord Sumption the topping-up of ATE policy for an appeal is '*in reality part of the cost of defending what he has won by virtue of being funded under the original policy'* and that the effect if top-up ATE was not recoverable, '*would be retrospectively to alter the balance of risks on the basis of which the litigation was begun*'.

Finally on the linguistic differences between the 2 phrases, Lord Sumption notes that '*there is a presumption that the same expression used in different provisions of a statute has the same meaning wherever it appears*' but also that there is a '*presumption that differences in the language used to describe comparable concepts are intended to reflect differences in meaning*' but he says the latter

presumption is '*generally weaker*'. However a presumption can '*readily be displaced if there is another plausible explanation of the difference*'. He goes on to note the use of the word '*matter*' in the SRA Code of Conduct. Expanding on this, Lord Sumption opines that the word *'proceedings'* in LASPO s44(6) is used '*because the solicitor will commonly have been retained to provide a wider range of services in relation to a '*matter*' than just advocacy and litigation services'*.

Lord Sumption notes also that LASPO s46(3) relates to '*costs insurance policies which by their nature are concerned with specific litigation*' and he ruled that he did '*not regard the difference of language as being any more significant than that*'. He also reminded himself that at the hearing counsel was '*unable to suggest any rational reason why the legislature should have wished to limit the transitional provisions in section 46(3) to a particular stage in the litigation, while extending the transitional provisions in sections 44(6) and 47(2) to arrangements relating to the underlying "*matter*"*'.

Accordingly Lord Sumption's conclusion on ATE recoverability was that if there had '*been ATE cover in respect of liability for the costs of the trial, the insured is entitled after the commencement date to take out further ATE cover for appeals and to include them in his assessable costs under the 1999 costs regime.*'

What reasons did Lord Hodge give for dissenting?
Before becoming a judge, Patrick Hodge QC specialised in tax law and so not surprisingly Lord Hodge JSC applies the golden rule of statutory interpretation. It is submitted that Lord Hodge's approach is the correct one because it correctly reflects what the Ministry of Justice intended when it promoted the Bill that led to LASPO through Parliament. In particular clear statements were given by Ministers at the Committee and Report stages of the Bill in the House of Lords on these issues.

Lord Hodge JSC dissents on whether ATE and success fees are recoverable holding that Paragon has no liability to pay these for appeal proceedings in the Supreme Court. Lord Hodge said that he interpreted '*the transitional provisions as protecting only the pre-existing contractual rights of the party to the proceedings and her expectation to recover the success fee, for which she and her lawyers had contracted before the commencement day, from the losing party'*. He said that he did '*not construe the provisions as protecting any wider expectation of how the litigation may be funded thereafter'* and that '*the subsequent amendments of the CFA to cover the appellate proceedings and the top ups of the costs insurance policy did not, in my view, fall within the transitional provisions'*.

He arrived at this dissenting conclusion for these 3 reasons:

- The s44(6) protection applies only in so far as the pre-existing CFA covers the appeal proceedings and not otherwise. If Parliament had wanted to allow the litigant to say "I've started so I'll finish", it would not have made the transitional protection depend upon the success fee being payable under the pre-existing contract,
- The word '*proceedings*' can bear a broad or a narrow interpretation, covering either the proceedings at one level of the court hierarchy or the proceedings in the case at all levels of the hierarchy. In applying the subsection the question to be asked is '*what are the proceedings in relation to which the party has obtained a costs insurance policy?*' and
- The public policy expressed in each of the transitional sub-sections can be reconciled if the words '*the proceedings'* in section 46(3) are construed as '*referring to such proceedings as were covered by the pre-commencement day insurance policy'* and that '*each transitional provision protects the pre-existing contractual rights and the pre-existing expectations, arising from those rights, as to recovery from the losing party*'.

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