AN UNWARRANTED APPROACH – COSTS ORDERS AGAINST SOLICITORS ACTING WITHOUT AUTHORITY[1]

Abstract

This article traces the history of costs orders made against solicitors who have acted in litigation without the authority of the named client to demonstrate that the true basis for such orders is the exercise of the court's inherent jurisdiction to discipline its own officers for breach of their duty to the court. The author argues that the law in this area has been distorted by the erroneous introduction of principles derived from contractual warranty of authority cases either as the purported basis for the exercise of the jurisdiction or as a guide (by analogy) to the exercise of the court's inherent jurisdiction and that many of the most problematic and difficult issues addressed in recent cases can more justly be resolved by disregarding such contractual analysis in future.

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A. INTRODUCTION

1. Who should pay the costs of proceedings where solicitors purport to act for a party without having authority?

2. The circumstances in which this issue may arise are many and varied. By way of example the named client may never have existed,[2] or may have died,[3] or lack capacity,[4] or may have ceased to exist (e.g. a company dissolution),[5] or the individual giving instructions may not have had authority (e.g. without the requisite corporate authority).[6]

3. The solicitors may have honestly believed that they had authority, sometimes right up until the court determines otherwise. By that stage, however, the opposing parties (and on some occasions the person in whose name the solicitors purported to act) will

[1] A version of this article is due to be published in Civil Justice Quarterly.
[2] See *Simmons v Liberal Opinion Limited* [1911] 1 KB 966 (cf. *SEB Trygg Holding AB v Manches* [2006] 1 WLR 2276 where the client did exist but had been misdescribed).
[3] See *Kimathi v Foreign and Commonwealth Office (No 2)* [2017] 1 WLR 1081.
[4] See *Yonge v Toynbee* [1910] 1 KB 215.
[5] See *Padhiar v Patel* [2001] Lloyd's Rep PN 328.
[6] See *Re Sherlock Holmes International Society* [2016] 4 WLR 173.

commonly have incurred substantial costs in the proceedings, including dealing with any dispute as to whether the solicitors had authority.

4. In many such cases, costs orders are sought against the solicitors acting without authority. In several recent first instance decisions the court has approached this issue as if determining a claim for breach of warranty of authority.

5. I argue below that the recent decisions proceed on the wrong basis for making a costs order against a solicitor. A review of Court of Appeal and House of Lords authority demonstrates that the true basis for such orders is the exercise of the court's inherent jurisdiction to discipline its officers and that the law of contractual warranties is irrelevant to that exercise. By disregarding contractual analysis, many of the problems considered in the recent cases can be resolved in a more satisfactory manner.

B. HISTORICAL DEVELOPMENT OF COSTS ORDERS AGAINST SOLICITORS

6. The court's jurisdiction to make costs orders against solicitors long pre-dates the modern statutory jurisdiction to make non-party costs orders[7] and wasted costs orders against legal representatives.[8]

7. Since at least 1762 the courts have been making costs orders against solicitors who acted in litigation without authority.[9]

8. Before the Judicature Acts there was a divide between the Court of Chancery and the Common Law Courts as to the appropriate practice. In the former, the purported client was ordered to pay the costs of the other party to the proceedings but subject to an order that he be indemnified by the solicitor.[10] In the latter, the practice was to order the solicitor to pay the costs of the other parties directly.[11]

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[7] The statutory jurisdiction to make costs orders against non-parties was first definitively recognised in *Aiden Shipping v Interbulk* [1986] AC 965.
[8] The history of the wasted costs regime is set out in some detail in *Ridehalgh v Horsefield* [1994] Ch 205, 226D-232C. The statutory provisions dealing with wasted costs were first introduced by section 4 of the Courts and Legal Services Act 1990.
[9] See *Titterton v Osborne* (1762) 21 ER 304.
[10] See *Nurse v Durnford* (1879) 13 Ch D 764, 767.
[11] *Ibid.*, 768.

9. Ultimately, the practice in the Common Law Courts prevailed as determined in four judgments of Sir George Jessel MR delivered between 1879 and 1881.

Nurse v Durnford

10. In *Nurse v Durnford* (1879) 13 Ch D 764, the plaintiffs were Mr Nurse and two executors. It emerged that one of the executors, Mr Walker, had been unaware of the proceedings and had never authorised the solicitors to act on his behalf. Mr Walker applied to strike out his name from the proceedings and to recover his costs from the solicitors.

11. Jessel MR (sitting in the Chancery Division) adopted "*the more sensible practice*"[12] of the Common Law Courts and ordered the solicitors to pay the defendants' costs (on the party and party basis[13]) and those of Mr Walker (on the solicitor and client basis[14]). The costs order against the solicitors included the defendants' costs of Mr Walker's application, by which time the authority issue must have been known to all involved in the proceedings.

Newbiggin-by-the-sea Gas Company v Armstrong

12. The Court of Appeal took the same approach in *Newbiggin-by-the-sea Gas Company v Armstrong* (1879) 13 Ch D 310.

13. In *Newbiggin*, two men each claimed to have been appointed as the director of a company and each disputed the validity of the other's appointment. A solicitor, Mr Jacomb, was instructed by one of the men to commence proceedings in the name of the company. The other man applied successfully at first instance to have the proceedings dismissed and for an order that Mr Jacomb should pay the costs.

[12] Jessel MR went on to say that it was also "*more in accordance with the law relating to principal and agent*", presumably a reference to the fact that the previous practice in Chancery of treating the named client as being personally liable for the costs of the opposing party was inconsistent with the usual position where a person purports to act on behalf of another person without authority.
[13] Roughly equivalent to an order for costs on the standard basis: see *Bowen-Jones v Bowen-Jones* [1986] 3 All ER 163, 165c-f.
[14] Roughly equivalent to an order for costs on the indemnity basis: see *Bowen-Jones*,164e-165b.

14. The Court of Appeal dismissed Mr Jacomb's appeal. Jessel MR held that "*the appointment of Mr Jacomb as solicitor was invalid, and that although he had acted bonâ fide, he had done so at his own risk, and must pay the costs of the suit*". Mr Jacomb was ordered to pay the company's costs on the solicitor and client basis and the defendant's costs on the party and party basis. This was so even though the issue of Mr Jacomb's lack of authority had been raised by the true director at an early stage.

In re Savage

15. In 1880, Jessel MR (sitting in the Chancery Division) decided *In re Savage* (1880) 15 Ch D 557. In *Savage*, a petition had been issued in the name of several beneficiaries for the appointment of new trustees. New trustees were appointed but a year later two of the petitioners applied to set aside the order because they had not authorised the petition. In dealing with the costs, Jessel MR held that "*as a general rule, the solicitor who acts like this without authority should be made to pay the costs*" but as the applicants had behaved unreasonably in the circumstances of the particular case he ordered that they should bear their own costs. However, the solicitor was ordered to bear his own costs and those of the respondents "*to punish him for not having obtained the proper retainer*".

Cape Breton Company v Fenn

16. In *Cape Breton Company v Fenn* (1881) 17 Ch D 198 a firm of solicitors had acted for a Mr Rooney in a successful application to remove a liquidator and an order was made that Mr Rooney's costs be paid out of the company's assets. The costs were taxed but Mr Rooney became bankrupt and no costs were actually paid. In an attempt to recover their fees, the solicitors persuaded Malins VC to make an order permitting them to bring proceedings in the name of the company against its former directors for misfeasance on condition that the solicitors provided an indemnity, with the terms to be determined by the court. Without giving any indemnity, the solicitors commenced proceedings in the name of the company against the directors. The directors applied to set aside the claim for lack of authority.

17. The Court of Appeal determined that the proceedings were a nullity because the solicitors had acted without authority. The solicitors were ordered to pay the costs of the company (on the solicitor and client basis), its liquidators, and the directors (both on the party and party basis). This was so even though the issue of the solicitors' lack of authority had been raised at the outset.

18. Between 1881 and 1897 the practice applied by Jessel MR was followed in several reported cases[15] but the jurisdictional basis for making such orders was not considered. Nonetheless it is clear from the cases above that the court exercised a discretionary costs jurisdiction, albeit there was a settled practice in this regard.

C. PARALLEL DEVELOPMENT OF THE CONTRACTUAL WARRANTY OF AUTHORITY

19. In the course of the 19th century the law was also developing generally to deal with situations where a purported agent dealt with a third party without authority.

20. In the first half of the century the courts had great difficulty in identifying a juridical basis for the liability of purported agents. At one time there was a tendency to hold that the agent had contracted personally wherever they lacked authority, but this was hard to justify unless the agent could genuinely be regarded as having undertaken personal liability on the contract. An agent who had fraudulently professed authority would be liable in deceit but the basis of an innocent agent's liability (before the development of the tort of negligent misstatement[16]) was harder to explain.[17]

[15] See *John Morley Building Company v Barras* [1891] 2 Ch 386 (proceedings brought in the name of a company without the authority of its true directors), *Re Gray* (1891) 65 LT 743 (solicitor entered defence to claim for an account against a trustee without the authority of the trustee), *Fricker v Van Grutten* [1896] 2 Ch 649 (trustee in bankruptcy added as a plaintiff to proceedings without proper consent being obtained), *Gold Reefs of Western Australia, Limited v Dawson* [1897] 1 Ch 115 (proceedings brought in the name of a company without the authority of its liquidator), and *Geilinger v Gibbs* [1897] 1 Ch 479 (infant named as a co-plaintiff on the incorrect assumption that he was of full age).

[16] The tort of negligent misstatement was recognised by the House of Lords in *Hedley Byrne v Heller* [1964] AC 465.

[17] See the discussion in *Bowstead & Reynolds on Agency* (21st ed.), 9-061 and the cases there cited.

21. It was also unclear whether the liability of the purported agent was strict or fault-based. In *Smout v Ilbery* (1842) 152 ER 357 the court appeared to take a fault-based approach. In *Smout*, the plaintiff butcher sued the widow of Mr Ilbery. Mr Ilbery died while travelling abroad. After his death, but before she had been informed, the widow had ordered and received meat on behalf of her husband. The butcher claimed the price of the meat from the widow because she had no authority to place orders for her dead husband. The court dismissed the claim apparently because the death of Mr llbery was a fact equally within the knowledge of both parties and, before her husband's death, the widow had been authorised to act as his agent and had acted reasonably and in good faith because she could not have known that her husband had died when she ordered the meat.

22. Eventually, in *Collen v Wright* (1857) 119 ER 1259, the courts settled on the contractual warranty of authority, pursuant to which the agent is treated as having given a warranty to third parties that he has authority, as the juridical basis for a purported agent's liability. In *Collen*, Mr Collen had agreed with Mr Wright (who claimed to be acting as an agent) to lease a farm. Mr Wright had no authority. Mr Collen brought a claim against Mr Wright for damages. The claim succeeded (by a majority) in the Exchequer Chamber with Willes J holding that Mr Wright's honest belief that he had authority was no defence to the claim (i.e. Mr Wright was strictly liable).

23. In *Starkey v Bank of England* [1903] AC 114 the House of Lords approved *Collen* and confirmed that the purported agent could be liable wherever the third party had acted to his detriment in reliance on a warranty of authority even if the third party had not entered into a contract.

24. There is a debate about whether liability for breach of warranty of authority is contractual or tortious[18] but as a matter of authority it is clear that it is to be regarded as contractual: see *Starkey*, 118 and *P & P Property Ltd v Owen White & Catlin LLP* [2019] Ch 273, para. 35.

[18] See the discussion in *Bowstead*, 9-062 and the authorities there cited.

25. Consequently, contractual principles have been applied to claims for breach of warranty of authority[19] including that liability is strict so that it is not necessary to show that the purported agent acted negligently.[20]

D. WARRANTIES IN LITIGATION

26. In the first decade of the 20th century, courts dealing with costs in litigation began to apply reasoning from the warranty cases. The catalyst for this development seems to have been a desire to find a principled basis to determine cases where a solicitor's authority had been terminated without his knowledge.

27. In all of the cases cited in section B above, the solicitor was found never to have had authority to act in the first place but, in *Salton v New Beeston Cycle Company* [1900] 1 Ch 43, Stirling J had to consider (apparently for the first time) the position where the solicitor's initial authority to act had been terminated without his knowledge.

28. In *Salton*, solicitors acted for the defendant company in proceedings issued on 25 February 1898. On 12 November 1898 the company was dissolved so that, unbeknownst to the solicitors, their authority was terminated. The solicitors only had notice of the position on 16 March 1899, the first day of the trial, but took no steps to alert the plaintiff until sometime later.

29. Stirling J looked to the warranty cases to decide the case, holding[21] that "*[u]pon this branch of the law the case of Smout v Ilbery is the leading authority*" and that *Smoute v Ilbery* "*was a case of an agent entering into a contract for a principal, but the principle laid down is one of the general law of agency. A solicitor is an agent of a special kind. By entering an appearance on behalf of his client he represents or warrants to the opposite party that he has authority so to do; if it turns out that he has not he is liable*".

[19] *Ibid.*, and see in particular the authorities referred to therein at footnote 366.
[20] See *SEB Trygg Holding AB v Manches* [2006] 1 WLR 2276, para. 60 and *P & P Property Ltd v Owen White & Catlin LLP* [2019] Ch 273, para. 35.
[21] At 48-9.

30. Stirling J ordered the solicitors to pay the plaintiff's costs incurred after 16 March 1899 (but not earlier even though they had been acting without authority since the dissolution on 12 November 1898).

31. The result in *Salton* appears to be a just one but, as discussed below, the suggestion that a solicitor's liability for costs is based on a warranty was wrong.

32. Unfortunately, the conflation between the warranty cases and the costs cases was compounded by the Court of Appeal in *Yonge v Toynbee* [1910] 1 KB 215.

33. In *Yonge*, solicitors had acted for the defendant in a libel action but their authority had ceased (before proceedings had been issued) without their knowledge because the defendant was certified as being a person of unsound mind. The solicitors informed the plaintiff of the defendant's incapacity shortly after they had discovered it. Nonetheless, the Court of Appeal ordered the solicitors to pay the plaintiff's costs of the entire proceedings.

34. Buckley LJ approached the matter on the basis that the liability of the solicitors turned on the principles applicable to claims for breach of warranty. He therefore considered the extent to which liability for breach of warranty should be fault-based (as in *Smout*) or strict (as in *Collen*) and concluded that it should be strict with the result that that the solicitors should pay the costs based on "*an implied warranty or contract that they had an authority which they had not*".[22]

35. Swinfen Eady J identified two bases for finding the solicitors liable.

36. First, he held[23] that "*[w]here an agent represents that he has authority to do a particular act, and he has not such authority, and another person is misled to his prejudice, the ground upon which the agent is held liable in damages is that there is an implied contract or warranty hat he had the authority which he professed to have.*"

[22] At 229.
[23] At 231.

37. Second, he relied on the court's jurisdiction to discipline its own officers, holding at 234 that "*whatever the legal liability may be, the Court, in exercising the authority which it possesses over its own officers, ought to proceed upon the footing that a solicitor assuming to act, in an action, for one of the parties to the action warrants his authority.*" Swinfen Eady J also identified (at 233-4) some of the difficulties arising from solicitors acting without authority including the reliance placed by the court on solicitors, that a solicitor should not communicate directly with his opponent's client, and that it is always open to a solicitor to communicate with his own client and obtain instructions and authority where necessary.

38. Vaughan Williams LJ held that because the solicitors' authority was terminated "*as to all subsequent costs we must hold the solicitors, however innocent of knowledge, liable*". He did not refer to the warranty cases but described the relief against the solicitors as a "*summary disciplinary order*".[24]

39. Whilst the result in *Yonge* is consistent with the previous practice applied by Jessel MR, the reliance by Buckley LJ and Swinfen Eady J on a contractual warranty analysis is problematic, as explained below.

E. THE INHERENT JURISDICTION

40. In 1939 the House of Lords decided *Myers v Elman* [1940] AC 282 and took the opportunity to consider in detail the jurisdictional basis for making costs orders against solicitors.

41. In *Myers* a solicitor's managing clerk was found to have been guilty of misconduct in preparing an inadequate affidavit of documents. The solicitor (though not personally guilty of misconduct) was ordered to pay costs under the court's inherent jurisdiction to discipline its own officers for a breach of duty owed to the court.

[24] At 235.

42. Four of their Lordships considered cases where solicitors had been made liable for costs when they had acted without authority and analysed such cases as being founded on the exercise of the court's inherent jurisdiction.

43. Viscount Maugham, after noting that the existence of a jurisdiction to order solicitors to pay costs which had been improperly or unreasonably incurred was clearly established in a number of authorities, held at 289 that those cases where the solicitors acted without authority "*rest on the jurisdiction of the Court over its officers*".

44. Lord Atkin held at 303 that in making such costs orders the court was not "*exercising a kind of summary jurisdiction in contract or tort by way of awarding damages for breach of warranty of authority*" but was concerned with a "*punitive jurisdiction*" arising as a result of a "*breach of duty*" owed by the solicitor to the court.

45. Lord Wright rejected, at 320, an attempt to explain such decisions as depending on "*the doctrine of breach of warranty of authority*" and explained that "*[t]he ground was that the solicitor had committed a breach of his duty to the Court*".

46. Lord Porter held at 336 that "*the Court is not enforcing a civil right, but exercising its authority over the conduct of its officer*".

47. Initially, it appeared that *Myers* had laid to rest the warranty analysis in the litigation context. Between 1940 and 1989, *Yonge* was not cited in any reported case dealing with the costs consequences of a solicitor acting in litigation without authority[25] nor did any reported case analyse the basis of a solicitor's costs liability by reference to breach of warranty. Thus it appeared to be accepted that a solicitor's liability arose from the court's inherent jurisdiction.[26]

[25] That *Yonge* was relied on to support a claim for breach of warranty against solicitors acting for an entity whose capacity to bring proceedings was in dispute was mentioned in passing by Lord Guest in *Carl Zeiss Stifting v Rayner & Keeler* [1967] 1 AC 853, 937A but only for the purpose of explaining why the solicitors had an interest in the substantive issue raised by the appeal and without commenting on the merits of such a claim.

[26] See the discussion in *Re Fletcher Hunt* (1988) BCC 703, 706-7, citing the unreported decision of Oliver J in *New Cedos Engineering Co Ltd* dated 21 January 1977 in which it is said that Oliver J "*discusses the juridical basis for the exercise of that jurisdiction and comes to the conclusion that it is not founded on implied breach of warranty of authority but in exercise of the court's disciplinary powers over its own officers and that the matter is a matter for the exercise of judicial discretion*".

F. WARRANTY BY ANALOGY

48. Since 1989 the contractual theories espoused in *Yonge* have re-emerged in the litigation context. Thus, in modern cases the courts have attempted to resolve disputes by reference to contractual warranty principles.

Babury Limited v London Industrial PLC

49. In *Babury Limited v London Industrial PLC* (1989) 139 NLJ 1596 a claim had been brought against a landlord for illegal distress in relation to a property of which the corporate plaintiff had been a tenant. Before proceedings were commenced the tenant had been dissolved. The defendant sought a costs order against the solicitor who had acted without authority. The solicitor resisted on the basis that he had been deceived by a former director.

50. Steyn J ordered the solicitor to pay the defendant's costs, relying on the inherent jurisdiction and noting that "*[i]t has never been considered to be a bar to the exercise of this jurisdiction that the solicitor acted bona fide and in reasonable reliance upon instructions.*"

51. Unfortunately, Steyn J then muddied the waters by referring to *Yonge* in order to "*explain the rationale of these principles*", before going on to quote Buckley LJ's contractual warranty analysis.

Nelson v Nelson

52. The modern tendency to rely on contractual warranty principles really took hold in the decision of the Court of Appeal in *Nelson v Nelson* [1997] 1 WLR 233. In *Nelson* the plaintiff had brought a claim in respect of a property. It subsequently emerged that the plaintiff was an undischarged bankrupt whose interest in the property fell into his bankruptcy estate. The defendant sought to recover his costs from the plaintiff's solicitors.

53. At first instance, the judge was persuaded to order the solicitors to pay the costs of the proceedings on the basis that the solicitors were in a position analogous to that of a solicitor who acts without authority.

54. On appeal, the Court of Appeal set aside the costs order against the solicitors and held that a solicitor does not warrant that his client has a good cause of action or that his client is solvent.

55. No doubt because of the way that the case had been argued by the defendant (and despite having been referred to the relevant passages in *Myers v Elman*[27]), in analysing the case the Court of Appeal (although accepting that it was exercising a discretionary costs jurisdiction[28]) revived the contractual warranty analysis by analogy.

56. This problematic approach is most evident in the judgment of Waller LJ where he held at 240E-G that the liability of the solicitor should be determined "*on the analogy of breach of warranty of authority*" and that it was "*important to analyse precisely what warranty by analogy should be imposed on a solicitor if he is to be rendered liable in costs*".

57. Waller LJ (albeit *obiter*) thereby effectively reintroduced the contractual theories which had been rejected in *Myers*. Inevitably, this approach spilled over into cases where solicitors had acted without authority.

Padhiar v Patel

58. In *Padhiar v Patel* [2001] Lloyd's Rep PN 328 (a case where a claimant company was dissolved in the course of the proceedings without the solicitor's knowledge) the court, although recognising that it was exercising a discretion under its inherent jurisdiction, relied on *Babury* and *Nelson* and considered the issues by analogy with a breach of warranty claim. Accordingly, the court held that if the defendants had known of the solicitors' lack of authority then the solicitors could not be made liable and that it was

[27] See *Nelson* at 239B per Waller LJ.
[28] See *Nelson* at 235H-236A per McCowan LJ and 239G per Waller LJ.

also necessary to establish that the defendants had been "*induced to continue the action*" by the representations of the solicitor.

Skylight Maritime SA v Ascot Underwriting

59. In *Skylight Maritime SA v Ascot Underwriting* [2005] PNLR 25, a claim brought in the name of a Panamanian company was struck out because it had been commenced without authority and the defendant sought a costs order against the solicitors.

60. Colman J held at para. 6 (relying on *Yonge*) that the "*conceptual basis for such summary orders*" was "*breach of an implied contract or warranty given by the solicitor that he was authorised so to act by his client*" before holding at para. 7 that the exercise of the summary jurisdiction without the need to start new proceedings "*emanates from the solicitor being an officer of the court*".

61. From this premise, Colman J held at paras. 9-14 that if the case was sufficiently complicated then the party seeking costs would be left to pursue a separate claim for breach of warranty.

62. At para. 20 Colman J held, applying a contractual measure of loss, that "*a claim for breach of warranty of authority cannot be deployed to put the promisee in a better position than if the warranty had been true. Thus, if a supposed client is insolvent, substantial damages for breach of a solicitor's warranty of authority will not normally be recoverable because the promisee would not have been able to recover costs against the client even if the solicitor had authority to act*".

63. Colman J ultimately dismissed the costs application because in order to determine whether the solicitors had been acting without authority it would have been necessary to undertake a complicated factual investigation (including as to matters of Panamanian company law) [29] and also it appeared that the company had no assets. The defendant was therefore left to pursue separately whatever claim it might have for breach of warranty.

[29] It is not clear from the report why any further investigation in relation to this point was necessary given that (as explained at para. 4 of the judgment) the claim had already been struck out by Langley J "*on the grounds that Skylight had not given [the solicitors] authority to commence the proceedings*".

SEB Trygg Holding AB v Manches

64. In *SEB Trygg Holding AB v Manches* [2006] 1 WLR 2276 it was alleged that there had been a breach of warranty by a solicitor in the context of an arbitration where the claimant had been misdescribed. The Court of Appeal held at para. 67 that a solicitor does not warrant that his client has the name by which he appears in the proceedings, pointing out that otherwise a solicitor would be liable for any misnomer including typographical errors.

65. More problematically (though *obiter*), at para. 60 (and despite having been referred to *Nelson*), the Court of Appeal held[30] that the legal basis for making a solicitor liable "*was settled by this court in Yonge v Toynbee*" noting that in that case the court had "*held that the solicitors were liable to pay the plaintiff's costs on the basis of an implied warranty of authority or contract that they had authority*". The Court of Appeal then went on to say that "*[a]lthough this contractual theory presents some conceptual problems in the case of a solicitor conducting litigation, this is nevertheless the established basis for the liability*". [31]

Warner v Merriman White

66. In *Warner v Merriman White* [2008] EWHC 1129 (Ch) an unfair prejudice petition had been brought in the name of a corporate trustee. It subsequently transpired that the trustee had not authorised the proceedings. The trustee and the respondents to the petition obtained costs orders against the solicitors.

[30] Tantalisingly, at para. 59 the Court of Appeal explained that "*we were taken through the old cases in which the law about solicitors' liability for breach of warranty of authority was developed*" (according to the list of cases cited in argument this would have included *Nurse v Durnford* and *Newbiggin* but not *Myers v Elman*) but immediately thereafter commented that "*[i]nteresting though the history is, we do not think it sheds any real light on what we have to decide*". It is a shame that the Court of Appeal effectively endorsed the contractual warranty analysis without giving proper consideration to the true basis of the decisions in the older cases.

[31] To similar effect see the *obiter* comments of Tuckey LJ in *Donsland v Van Hoogstraten* [2002] PNLR 26, para. 14 (death of sole director) and Toulson LJ in *Adams v Ford* [2012] 1 WLR 3211, para.31 (consequences of a claim form being issued in the name of a claimant initially without authority but subsequently ratified).

67. However, once again the court identified (at para. 84) the test for the exercise of the jurisdiction as being the one set out "*in the authorities relating to solicitors' breaches of warranty of authority*".

Re Sherlock Holmes International Society

68. In *Re Sherlock Holmes International Society* [2016] 4 WLR 173 a company had been wound up on the insolvency ground.[32] An appeal against the winding up order was issued in the name of the company. Before the appeal was heard it emerged that the appointment of the company's sole director had lapsed. The petitioner sought to recover its costs of the appeal (including a contested application as to the status of the director) from the solicitors.

69. The court held (at para. 20) that in *Yonge* the court had "*identified the conceptual basis of the liability as compensation for breach of an implied warranty of authority given by the solicitor that he was authorised to act by his client*" albeit accepting (at para. 22) that "*the court is not actually dealing with* a *breach of contract*" but rather, as Waller LJ had suggested in *Nelson*, "*the court is exercising its authority over solicitors as its officers, but is doing so on the footing that the solicitor warrants his authority*".

70. The court then went on to analyse the issues before it by reference to contractual warranty principles, going so far as to hold (at para. 37) that "*[t]he warranty given by solicitors in litigation has never been treated as conceptually different from the warranty given in non-contentious business nor from the warranty given by other types of agent in non-legal business*" and (at para. 68) that "*I do not have to exercise a discretion in these circumstances but the contractual basis of assessment seems to me to give full effect to the merits of this case*".

71. The court held (at paras. 27-31) that there had been no "*warranty of authority*" in respect of the application concerning the status of the company's purported director because that application "*raised a new issue and a new phase in the litigation*" so that in substance

[32] It may have been that the petitioner was also the sole member of the company but it appears from the report that there was some dispute about who the company's members were.

the solicitors (though acting in the name of the company) were advancing the purported director's case as to his status so that the uncertainty as to his status was known to all parties. Therefore, the solicitors were not ordered to pay the costs of the contested application in relation to the status of the purported director.

72. As for the earlier costs, the court held at para. 39 (applying *Skylight Maritime*) that the "*measure of damages*" could not "*put the claimant in a better position than if the warranty had been true*". Since the company was insolvent it could never have paid the petitioner's costs, so as a matter of causation the petitioner had suffered no loss.

73. Lastly the court held (at paras. 64-66) that it would not in any event have made an order against the solicitors because it could not determine summarily whether that would put the petitioner in a better position than he would have been in if the solicitors had been authorised without also making findings on complex matters such as whether the appeal would have succeeded and what further costs might have been incurred thereafter.

<u>Zoya v Ahmed</u>

74. In *Zoya v Ahmed* [2016] 4 WLR 174 proceedings were issued in the name of a company (on the instructions of a Mr Haastrup) against the defendant seeking an account of moneys allegedly received by him. The defendant put in issue Mr Haastrup's authority to act on behalf of the company in his defence and directions were given for the determination of that point as a preliminary issue. The court struck out the claim because Mr Haastrup lacked authority. The defendant sought a costs order against the solicitors.

75. Once again, the court cited *Yonge* (at para. 28) and referred (at para. 30) to "*the contractual basis for the jurisdiction*" to make costs orders against solicitors acting without authority.

76. The court held (para. 39) that it was necessary for the party seeking costs to establish "*both reliance and a causal link between the breach of the warranty and the loss which is claimed from the solicitor who gives the warranty*". The court therefore refused to order the solicitors to pay the costs because the defendant had been aware of the authority

issue from the outset and therefore could not be said to have been induced by any warranty to incur costs (see paras. 60-64).

77. Applying *Re Sherlock Holmes* (para. 58) the court also held that the costs of the preliminary issue could not be recovered from the solicitors because by that stage it had become clear that in substance the solicitors were putting forward Mr Haastrup's case even though formally acting in the name of the company.

78. The court also commented (at paras. 66-7) that the policy considerations underpinning the jurisdiction to make costs orders against solicitors may no longer have the same force because of the existence of the third party costs jurisdiction and that it would often be more appropriate to make the person instructing the solicitors liable rather than making "*a solicitor strictly liable for breach of his warranty of authority*".

Griffith v Gourgey

79. In *Griffith v Gourgey* [2018] 3 Costs LR 605 Mr Griffith had presented an unfair prejudice petition against Mr Gourgey and the corporate trustee of a Jersey Trust, Truchot, in 2013. Three successive firms of solicitors instructed by Mr Gourgey had also purported to act for Truchot. In 2016 Truchot discovered the existence of the proceedings for the first time and applied successfully to have all the orders made against it in the proceedings set aside. However, that application was strenuously resisted by the petitioner who sought to maintain the orders previously made against Truchot by arguing that Mr Gourgey had been authorised to give instructions on its behalf.

80. Following the court's determination that the solicitors had no authority to act for Truchot, both the petitioner and Truchot sought to recover their costs of Truchot's application (including the costs of a disclosure application in relation to the authority issue), from the solicitors who had purported to act for Truchot.

81. The costs issues were determined pursuant to CPR 44.2 but the parties' arguments as to the exercise of the court's discretion relied heavily on analogies with breach of warranty (para. 16). The court nonetheless made clear (para. 69) that none of its conclusions in

relation to costs were intended to decide any issues arising in separate proceedings for breach of warranty.

82. The court ordered the solicitors to pay Truchot's costs of its application (and associated interim application), save for costs incurred after 15 May 2017 by which time the petitioner had received sufficient material that he ought to have conceded Truchot's application. The court held that thereafter the true cause of Truchot's costs was the petitioner's unreasonable opposition to the application. At paras. 25-27 the court accepted that, as the person on whose behalf the solicitors had wrongly claimed to act, Truchot did not act in reliance on any contractual warranty but found that Truchot could bring a tortious claim against the solicitors in such circumstances which could be determined summarily. In the event, that was not the basis on which costs were awarded and the court proceeded solely on the basis of its statutory jurisdiction to award costs (para. 28).

83. The court also ordered the solicitors to pay the petitioner's costs of Truchot's application up to 15 May 2017 because up to that point he had been acting reasonably in seeking to investigate the true position as to the authority of the solicitors.

G. THE FUTURE: UNWARRANTED LITIGATION?

84. The courts in the modern authorities are all seeking, at least to some degree, to address issues created by situations where solicitors act in litigation without authority by reference to principles which govern contractual (and in *Griffith*, also tortious) damages claims. That approach is far from satisfactory as a matter of both authority and logic.

85. In the light of the authoritative statements in *Myers* referred to in section E above, the court's inherent jurisdiction to discipline its officers is clearly established as the true jurisdictional basis for making costs orders against solicitors in such cases. Therefore, *dicta* in subsequent Court of Appeal decisions such as *SEB Trygg* suggesting that the jurisdictional basis for such orders is the summary award of damages for breach of warranty are wrong and should be disregarded.

86. The time has also surely come for a re-appraisal of the approach advocated by Waller LJ in *Nelson* (and adopted in the subsequent first instance decisions) to the effect that the court should be guided (if not bound) in the exercise of its discretion under the inherent jurisdiction by analogies with claims for breach of warranty.

87. Whilst some support for applying that analogy may be derived from *Salton* and the judgment of Swinfen Eady J in *Yonge*, it is not entirely clear that even those cases really endorse such an approach. In any event, as a matter of authority it is impossible to reconcile that approach with decisions of the Court of Appeal pre-dating *Yonge*.

88. In particular, a rule or principle that the court must exercise its inherent jurisdiction by analogy with a claim for breach of warranty cannot explain why in decisions of the Court of Appeal such as *Newbiggin*, *Cape Breton*, and *Fricker v Van Grutten* [1896] 2 Ch 649 solicitors were ordered to pay the costs of the person on whose behalf they wrongly claimed to act. As the recent cases make clear, such a person cannot (by definition) have relied on any warranty.

89. The analogy also cannot explain why in *Newbiggin* and *Cape Breton* costs were awarded on the solicitor and client basis to the named client but only on the party and party basis to the opposing party. If the court had been seeking to replicate damages for breach of warranty there is no principled reason why the basis of taxation (and hence the measure of loss for which "damages" are awarded) should not be the same for all affected parties.

90. Nor can the analogy explain why costs were awarded in *Newbiggin* and *Cape Breton* against solicitors in favour of persons who had raised the issue of authority from the outset, including the costs of contested applications to determine that very issue. As the modern cases make clear, such persons cannot be said to have relied on any warranty.

91. Thus, in so far as *Yonge* purported to establish a practice (or even a persuasive analogy) that in the exercise of the court's inherent jurisdiction solicitors should be made liable for costs in accordance with the principles applicable to claims for breach of warranty then it is a decision which is plainly *per incuriam* because it is incompatible with the

ratio of previous decisions of the Court of Appeal,[33] *a fortiori* in circumstances where there is no indication that any of these points was ever canvassed in argument in *Yonge* still less addressed in any of the judgments.

92. Equally, the decision of the Court of Appeal in *Nelson* (in which *Newbiggin* and *Cape Breton* were not cited[34]) on this point was both *obiter* (because the solicitors in that case were in fact authorised to act in the proceedings) and *per incuriam*. Likewise, the subsequent modern decisions following the *obiter* approach advocated by Waller LJ in *Nelson* are also *per incuriam*.

93. Thus, applying the principles of *stare decisis*,[35] English courts (including the Court of Appeal) are free (if not bound) to follow the approach in the earlier decisions of the Court of Appeal in *Newbiggin*, *Cape Breton*, and *Fricker* and to decline to follow the warranty by analogy approach whether derived from *Yonge* or *Nelson*.

94. Regardless of the technical position as a matter of *stare decisis*, the warranty by analogy approach is illogical and unsatisfactory.[36]

95. As explained above, the House of Lords in *Myers* definitively established that the true jurisdictional basis of a solicitor's costs liability for acting without authority is the court's inherent jurisdiction and not breach of warranty. That being so, logically it is difficult to understand why the court's discretion as to costs should be fettered in this way by an imaginary contract.[37]

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[33] See *Morelle Ltd v Wakeling* [1955] 2 QB 379, 406.

[34] The report of *Nelson* does suggest that *Fricker v Van Grutten* was cited in argument, though not referred to in the judgments of the Court of Appeal.

[35] As to which see *Young v Bristol Aeroplane Company* [1944] KB 718, 729.

[36] Indeed such analysis has been expressly rejected in New South Wales: see *Zimmerman Holdings Pty Ltd v Wales* [2002] NSWSC 447, paras. 5-10 and *Hillig v Darkinjung (No 2)* [2008] NSWCA 147, paras. 50-52. See also Evans, *'Warranty of authority in litigation'* (2010) 26 PN 96.

[37] There are situations where the court will exercise its discretion as to costs in accordance with a contractual agreement between the parties, such as where there is a contractual agreement that one party should indemnify the other for the costs of litigation: see Gomba Holdings v Minories Finance (No 2) [1993] Ch 171, 191-5 (mortgagee's contractual indemnity for enforcement costs). But in such cases one is dealing with an express agreement in relation to costs which has been entered into by the parties so it is unsurprising that, at least in a straightforward case, the court will enforce the parties' contractual agreement.

96. Moreover, Buckley LJ was careful to say in *Yonge* (at 227) that a solicitor can exclude liability for breach of warranty by indicating in advance that he does not warrant the validity of his authority. As a matter of the law of contract that analysis is impeccable but it is difficult to see why in principle a solicitor who, for example, includes a boilerplate disclaimer in every email should automatically be relieved of all liability and should not be amenable to the court's jurisdiction to make costs orders against him.

97. Once the intellectual baggage of the warranty of authority is stripped away it is possible to identify particular issues which arise where solicitors act in litigation without authority and to identify principled solutions. Some of the principal difficulties identified in the cases analysed above are considered below.

Should there be a settled practice as to costs where solicitors act in proceedings without authority?

98. On one view, once it is recognised that the court is exercising a costs discretion under its inherent jurisdiction, it may be said that judges should just be left to determine what costs order to make on a discretionary basis having regard to all of the facts of the particular case.

99. It is surely preferable, however, for the court to follow a settled practice, albeit that the court must always be able to depart from it if required to do so in the interests of justice.

100. There is nothing wrong in principle with the court developing a settled costs practice, such as the practice in the Companies Court that a debt is disputed on substantial grounds the purported creditor will be restrained from presenting a petition and must pay the company's costs on the indemnity basis.[38]

101. A settled practice promotes consistency, reduces arbitrary distinctions between similar cases, and may even encourage settlement since the outcome of contested costs applications should be relatively predictable.

[38] See *In re A Company* [1992] 1 WLR 351, 354H.

102. By contrast, if the court's discretion as to costs is left entirely at large then the parties are encouraged to make lengthy and detailed costs submissions relying on every conceivably relevant matter which will undoubtedly result in more costly and lengthy disputes about costs.

103. Relatedly, the absence of a settled practice leads to something of a vacuum and courts are likely to be invited to draw analogies from other areas of law (however imperfect). Indeed, that seems to have been the cause of the introduction of the warranty analysis in this context in the first place.

104. What should the practice be? There is much to be said for adopting the practice applied by Sir George Jessel MR namely that, absent special circumstances, solicitors who are found to have acted in proceedings without authority should be ordered to pay the costs of the opposing parties and those of the person in whose name they purported to act even where the solicitors have acted in good faith in the reasonable belief that they had authority to act.

105. Litigation is not the same today as it was in 1879 but many of the underlying policy concerns which appear to have motivated Sir George Jessel, and even the Court of Appeal in *Yonge*, still apply today. The system still relies heavily on the court being in a position to rely on solicitors actually having authority to act. Where it transpires that solicitors do not have authority it is inevitable that sorting out the mess will lead other parties to incur costs and will use up valuable court resources.

106. Moreover, there is a public interest in creating strong incentives for solicitors to proactively take responsibility for satisfying themselves (in accordance with their professional duties[39]) that they have authority. A relatively strict rule as to the costs consequences of solicitors failing in this regard (including that costs be paid on the indemnity basis) is likely to provide strong encouragement for solicitors to implement robust systems to ensure that this is the case.

[39] See para. 4.1 of the SRA Code of Conduct for Firms.

107. It is true, as observed in *Zoya*, that the availability of third party costs orders means that in modern litigation in some cases it will be possible to hold the person who was giving instructions to solicitors accountable for costs but that was never the only policy justification for making solicitors pay the costs.

108. In any event, why should the fact that another person may be made liable for the costs occasioned by the solicitor acting without authority absolve the solicitors of liability as well? Surely it would be more logical to make the solicitor and the third party jointly and severally liable for the costs so as to maximise the chances that the innocent persons who have been affected will actually recover their costs. The solicitor and the third party can fight out issues of apportionment between themselves.

109. There will also be cases (such as *Yonge* itself) where there is no one who is obviously amenable to a third party costs order, or where such third party is impecunious. Thus, it is arbitrary that the ability of an innocent affected party to recover costs should be excluded by the mere existence of the third party costs regime in circumstances where the solicitors have, by definition, failed to comply with their professional obligations.

<u>What should happen if the person who the solicitors purported to represent is impecunious?</u>

110. One injustice arising from the modern cases (such as *Skylight Maritime* and *Re Sherlock Holmes*) applying a warranty analysis is the attempt to introduce the contractual damages principle that the claimant should not be put in a better position than he would have been if the "contract" had been performed as a guide to the court's discretion.

111. It is surely arbitrary that the solicitors' costs liability should be determined by reference to the financial position of the person on whose behalf the solicitor purported to act. As a result of the solicitor acting without authority the opposing party will have had to expend costs in dealing with that solicitor which would not otherwise have been incurred. It makes no logical sense to relieve the solicitor of liability because they were lucky enough to have purported to represent an insolvent person.

112. This point also highlights how the modern interpretation of *Yonge* as advocating a rigid adherence to contractual principles has become divorced from the policy concerns underlying the strict view taken in that decision. It is quite clear from cases like *Yonge* (at 231) and *Fernée v Gorlitz* [1915] 1 Ch 177, 181 that the court's concern was to ensure that the innocent party could recover the costs to incurred as a result of having to deal with the solicitors who lacked authority rather than trying to ascertain what might hypothetically have been recovered in costs if the solicitor had been authorised.

113. Nor can the tortured causation analysis at the end of *Re Sherlock Holmes* as to whether or not further costs may have been incurred if the substantive appeal in those proceedings gone ahead be supported. It is clear that in that case the petitioner had been forced to expend costs in dealing with the solicitors who had no authority to act and the solicitors therefore ought to have been ordered to pay those costs.

<u>Should the purported client be entitled to recover their costs from the solicitors?</u>

114. In *Newbiggin* and *Cape Breton* (and *Warner v Merriman White*) the court had no difficulty in recognising that the purported client who has to become involved in the litigation to deal with the mess created by solicitors wrongly acting in their name should also be entitled to recover their costs from the solicitors.

115. Such an outcome has nothing to do with the potential existence of a cause of action in tort against the solicitors by their purported client or a summary assessment of damages in that regard but makes complete sense in its own terms as an exercise of the court's costs discretion.

116. It is only right that all innocent persons (whether purported clients or opposing parties) who incur costs because they have to deal with the consequences of solicitors acting without authority should generally be entitled to recover their costs from those solicitors.

What should happen if the opposing party is already aware that the solicitors may not have been authorised to act, or the underlying dispute will determine the issue of the solicitors' authority to act?

117. A more difficult issue arises in cases where it is clear from the outset (or at least at an early stage) that there is some doubt as to the authority of the solicitors to act in the proceedings either because the existence of such authority will necessarily be resolved as a consequence of the determination of one or more of the substantive issues in the underlying proceedings or because the opposing party happens to know that there is some actual or potential problem with the authority of the solicitors to act.

118. The courts in the older cases like *Newbiggin* and *Cape Breton* took the view that the solicitors should be ordered to bear the costs in such cases on the basis that by acting in such circumstances the solicitors had taken a risk as to their authority.

119. In recent cases, especially *Re Sherlock Holmes* and *Zoya*, the courts have declined to make costs orders against solicitors in such circumstances but their reasoning is distorted by the artificial analysis as to whether the opposing party can be said to have been induced by a warranty.

120. In practice, the problem has most commonly arisen in the context of disputes as to who was entitled to instruct solicitors to act on behalf of a company as was the situation in *Newbiggin*, *Cape Breton*, *Re Sherlock Holmes*, *Zoya*, and numerous other cases.

121. It might be argued that solicitors should not be liable for costs in such circumstances because this could have the effect of depriving parties of legal representation as solicitors would be wary of acting for parties in such disputes even though there is an underlying issue (such as the validity of a director's appointment) which is properly arguable on either side and one way or another will need to be resolved by litigation.[40]

122. This view is superficially attractive but it ignores the fact that there will almost certainly be ways of ensuring that the underlying issue is properly determined without the

[40] See for example *Carpathian Resources v Hendricks* (2012) 290 ALR 252 at [31].

solicitors having to purport to act for a person or entity which they may not have authority to act for.

123. The potential circumstances in which this sort of issue may arise are too diverse to attempt to address them comprehensively in this article but, by way of example, a director whose authority is in dispute could bring proceedings in his own name seeking declaratory relief against the company and other interested persons to determine his status, or he could seek the appointment of a receiver or manager so that the company's interests can be protected while any internal corporate dispute is resolved, or in appropriate circumstances it may be possible to take other steps such as bringing a derivative claim. It is most unlikely that there will be no way of bringing that issue before the court without solicitors having to take a risk by claiming to act for the company and if they wish to take that risk they can always seek an indemnity and security from the person instructing them.

124. All of these measures are within the control of the solicitors and those giving instructions to them but the opposing party (and the purported client) will have no oversight of such matters. It is therefore logical that the risk of getting it wrong should be borne by the solicitors who will have every opportunity to satisfy themselves that it is professionally appropriate for them to act. After all, the opposing party has to incur the costs of dealing with the solicitors even where, pending the determination of the issue, there is room for doubt as to their authority.[41]

125. The alternative approach (as reflected in *Re Sherlock Holmes* and *Zoya*) regrettably encourages solicitors to take a lax attitude to questions of authority, particularly in the corporate context.

126. It is unsatisfactory that in cases like *Re Sherlock Holmes* the use of the company's name was treated as merely being a formality because the opposing party could see that it was the purported director's case which was being advanced. The use of the company's name is not a formality. The solicitors may be using the company's funds to pay their fees

[41] See the approach taken in Hong Kong in *Grand Field Group Holdings v Tsang (No 2)* [2010] HKCU 1673, [33] – [34] and *Ho Chor Ming v Hong Kong Chiu Po Hing Buddhism Association* [2013] HKCU 2221, [27].

when they should not be doing so or using the company to pursue third parties in respect of claims that belong to the company. This will be oppressive to the opposing party. Therefore, the use of the company's name by solicitors in such circumstances should surely be discouraged, including by way of adverse costs orders.

Should the solicitors be liable for costs if their authority to act was terminated without their knowledge?

127. This was the problem which led the courts in *Salton* and *Yonge* down the rabbit hole of the warranty analysis.

128. There is a genuinely difficult policy issue which arises in such cases which is not easy to resolve but in respect of which, whatever solution is adopted, it would be helpful for the courts to take a consistent approach.

129. One point which was well made in *Yonge* is that it is arbitrary to draw fine distinctions between cases where authority is terminated before the commencement of the proceedings and cases of termination thereafter. The focus of the court's analysis should instead be on what, if anything, the solicitor should be required to do to satisfy themselves on an on-going basis that they have authority.

130. As in *Salton*, once on notice (or put on enquiry) of the termination of authority (with some allowance for the solicitor to make any necessary enquiries) solicitors ought to inform the opposing party immediately and if they fail to do so they should be liable for subsequent costs.

131. The most difficult problem is to resolve is what should happen when the solicitors had no notice at all of the termination. It may well be that the appropriate solution in such cases is to award costs only where the wasted costs jurisdiction is engaged.[42]

[42] In substance that was the approach taken by the Court of Appeal in *Geraldo Orchestras Ltd v Dale* [1991] Lexis Citation 1757 where a corporate claimant had gone into liquidation but the solicitor was only made liable for costs, under the wasted costs regime, from the date when he first had notice of the liquidation whereas on a strict reading of *Yonge* he might have been made liable from the earlier date of the liquidation (subject to the question of whether, applying *Yonge*, an "*inert*" solicitor who makes no positive assertion of authority after the cessation of authority should be liable for costs).

When should the court refuse to deal with the matter on a summary basis?

132. Subject to the points made below, there is obvious good sense in the view expressed by Vaughan Williams LJ at the end of *Yonge* that it is not appropriate for the court to act on a summary basis if extensive factual investigations are required.

133. First, normally the issue which is likely to be most contentious is the disputed question of authority itself. The court will normally have to decide that issue in any event because that will determine whether or not the proceedings should be struck out (or whether orders made previously should be set aside). The apparent difficulty in *Skylight Maritime*, where the proceedings were struck out on the basis that they were commenced without authority but the solicitors thereafter maintained that they had in fact had such authority, can surely be avoided by ensuring that in cases where authority is in issue the solicitors are before the court and bound when the court determines the substantive issue of authority.

134. Second, if the warranty analysis is rejected, whatever points the solicitors may wish to raise in their defence should usually be capable of being dealt with summarily like most other costs issues and the court should not allow solicitors to avoid liability by seeking to create complications where, on analysis, none really exist.

135. Third, the underlying assumption in cases like *Skylight Maritime* and *Griffith* is that the solicitors may be held liable for breach of warranty if separate proceedings are pursued. What the modern cases demonstrate is that breach of warranty is a very narrow doctrine and there are likely to be problems in many cases in establishing liability in the context of litigation. Accordingly, the court should be wary of the refusing to deal with costs summarily in the hope that justice will ultimately be done in separate proceedings for breach of warranty.

H. CONCLUSION

136. The problems arising from the contractual warranty analysis are firmly embedded in recent first instance decisions. This is unfortunate and unnecessary since the warranty

analysis was rejected by the House of Lords in *Myers* over 80 years ago and is also incompatible with appellate authorities pre-dating *Yonge*.

137. The preponderance of authorities relying on the warranty analysis may dissuade judges in future cases from rejecting it. Nonetheless it is strongly arguable that cases applying a breach of warranty analysis should not be followed. Otherwise, the law in this area will continue to be bedevilled by contractual principles which have no logical relevance to the costs issues which the court must decide.

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