Neutral Citation Number: [2024] EWHC 3333 (Ch)

Case No: BL-2023-000646

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20/12/2024

**Before**:

**HHJ JOHNS KC**
Sitting as a Judge of the High Court

**Between :**

**MOMENTA HOLDINGS (PPI) LIMITED** — **Claimant**

**- and –**

**(1) CHEVAL LEGAL LIMITED**
**(2) MR STEVEN McGARRY**
**(3) MR PHILIP RYAN**
**(4) DGM ADMINISTRATIVE SERVICES LIMITED** — **Defendants**

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MR ROWAN PENNINGTON-BENTON and MR ADAM RILEY (instructed by **Pinder Reaux & Associates Ltd**) for the **First Defendant**

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Hearing dates: 26 & 27 November 2024
Written submissions: 3 December 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 20th December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**HHJ JOHNS KC:**

Introduction and brief background

1. This is my judgment following a disposal hearing for the assessment of sums due to Cheval Legal Limited (**Cheval**) on its counterclaim against Momenta Holdings (PPI) Limited (**Momenta**), judgment in default having been entered in favour of Cheval on its counterclaim.

2. The counterclaim was for breach of contractual duties, including as to skill and care, owed by Momenta in conducting claims known as "Plevin" claims on behalf of Cheval, an entity licensed to conduct litigation. A contractual indemnity was also relied on by Cheval.

3. These Plevin claims related to allegedly mis-sold payment protection insurance and took their name from the Supreme Court decision *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 in which it was held that non-disclosure of large commissions rendered the consumer-creditor relationship unfair.

4. Cheval took on the Plevin claimants as clients under damages-based agreements. It outsourced the handling of the claims to Momenta under two outsourcing agreements made between the two parties and dated 26 August 2020 and 1 January 2022, the later replacing the earlier. Cheval was also party to a funding agreement dated 4 August 2020 with Spectralegal Finance 3 DAC (**Spectra**). Spectra financed the bringing of the claims in accordance with the arrangements in the funding agreement.

5. These proceedings were issued by Momenta on 5 May 2023. Among other things, it alleged sums were due to it under the outsourcing agreements. Cheval defended and counterclaimed. As to the other parties, Mr Steven McGarry is a barrister and Mr Philip Ryan is a solicitor. They are directors of Cheval and made the business arrangements for Cheval. DGM Administrative Services Limited is another company of which they were directors and which was said by Momenta to have received payments made wrongly by Cheval.

6. Momenta did not participate in the assessment hearing, having gone into liquidation. On inquiring, I was told that the liquidation is voluntary. No permission was therefore required to continue the counterclaim against Momenta. By the time of the assessment hearing, the claim had been dismissed; not being pursued by the liquidators.

Approach to the assessment

7. By the skeleton argument, it was submitted that there should be judgment in specified sums pursuant to CPR 12.4(1)(a).

8. CPR 12.4(1) provides that:

*"12.4—(1) Subject to paragraph (3), a claimant may obtain a default judgment by filing a request in the relevant practice form where the claim is for—*

*(a) a specified amount of money (Form N205A or N225);*

*(b) an amount of money to be decided by the court (Form N205B or N227);.."*

9. But I did not consider that course was available to Cheval, and Mr Pennington-Benton did not in the end ask for it. The short point is that the judgment in fact obtained by Cheval on its counterclaim was for a sum to be assessed by the court. It was entered administratively on 14 February 2024 in these terms:

   "*It is Ordered that the Claimant must pay the Defendants an amount (in respect of damages and interest and costs) to be decided by the Court*".

10. As to the approach to be taken to that assessment, the matters pleaded in the Counterclaim stand as a proxy for a judgment that would otherwise set out the basis of the liability of Momenta. And causation for each of the heads of loss claimed by Cheval must still be established as part of the quantification exercise notwithstanding the default judgment. I take those points from *Celebrity Speakers Limited v Daniel* [2023] EWHC 2158 (KB) at [38], [40] & [41].

11. As the counterclaim involves thousands of underlying Plevin claims, Cheval grouped them by types of case and loss for the purposes of the disposal hearing. Given the very large number of underlying claims, evidence as to causation and loss was given largely by samples in accordance with very sensible directions of Master Clark made by order of 3 May 2024. I had unchallenged evidence in the form of several witness statements of Mr McGarry with exhibits. I shall deal with each group in turn after addressing two points which are significant for a number of the groups.

12. The first point concerns the correct approach to causation. For a number of the costs incurred by Cheval and claimed as losses, Cheval's case is that, but for Momenta's failures, these Plevin claims would have progressed and the costs been recouped out of settlement or judgment sums.

13. As that case depends on the actions of others, namely the other side in the Plevin claims and the County Court disposing of them, I considered that the appropriate analysis was a loss of a chance.

14. The classic statement is now to be found in *Perry v Raleys* [2019] UKSC 5 by Lord Briggs at [20]:

    "*For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation.*"

15. While Cheval had not approached the assessment of damages hearing in that way, on reflection Mr Pennington-Benton accepted that that was the correct analysis.

16. It was argued, however, that the Plevin claims were sure-fire winners so that no discount was to be made for the possibility that the claims might have failed.

17. There were at least two difficulties with that argument.

18. One, the evidence for the assessment dealt with removal from the schedules of loss of a significant number of what were called rogue cases. These were claims in which no criticism of Momenta was made, including as to the vetting of the claims, but which still failed.

19. Two, it also became clear that some claims which did form part of the overall loss being sought had potentially fatal flaws. By way of example, one of the samples I was taken to in Group 1 was, on the evidence, statute barred. That would therefore have been likely to fail even without Momenta's procedural failures.

20. It is right that where a result is a racing certainty, so the chances of it are 90 percent or more, there need be no discount for the chance of failure when applying the loss of a chance approach - see *Assetco plc v Grant Thornton UK LLP* [2020] EWCA Civ at [206]. But the two factors I have referred to suggested that, at least on average, these cases were not a racing certainty.

21. As there had been no focus on assisting the court with a loss of a chance assessment, the question became how to conduct that assessment on the evidence. I requested written submissions detailing, from the evidence, the proportion of sample cases in those groups where summaries of the sample claims were available (being Groups 1-4 and 6) which were rogue claims or flawed claims. The former had already been identified and the latter were readily identifiable as the funding agreement set out detailed criteria for eligible claims. Claims which did not meet those criteria were not expected to achieve a recoupment of costs or a profitable return.

22. The result of that request was an analysis of the evidence showing that 8.7 percent of claims were rogue claims and a further 18.8 percent of claims were ineligible and so flawed.

23. That being the best guide I have to risk of failure, I consider the underlying Plevin claims therefore had, on average, a 27.5 percent chance of not succeeding so as to cover the costs claimed by Cheval as losses. Put the other way round, the chance of recovering the costs which was lost by reason of Momenta's breaches of duty was 72.5 percent.

24. The second point of some general significance is this. It was argued for Cheval that it could still complain of and show causation of loss in ineligible claims because it was part of its counterclaim that Momenta was liable to Cheval for running ineligible claims, either as a breach of the operating agreements else under the indemnity.

25. In my judgment, that does not emerge with sufficient clarity from the Counterclaim which stands as a proxy for the judgment Cheval has the benefit of.

26. The particulars of breach and loss begin at [100] of the Counterclaim and expressly include losses under the contractual indemnity forming part of the outsourcing agreements. Those particulars continue to [115]. Nowhere among that series of paragraphs is there an allegation that Momenta approved for selection, issued, or ran cases which were ineligible or otherwise likely to fail. On the contrary, the allegations are all about the negligent management of claims, including missing deadlines and unreasonable conduct in the litigation, else the failure to issue claims. Further, examples

were set out in an Annex. All the examples in the Annex are of failures in the conduct of the claims.

27. When pressed, Mr Pennington-Benton pointed to the long sweeping-up list of duties or failures in [112] of the Counterclaim, and in particular to, "*11.2 – failure to issue claims in accordance with the operating manual*". This was a reference to para.11.2 of Schedule 3 to the outsourcing agreements which set out service standards. But this seemed to me rather to highlight that the allegation being made was not of wrongly issuing claims. First, the failure was described as "*failure to issue claims*". Second, notably, it was para.11.2 which was pleaded, not para.11.1. It is para.11.1 which is concerned with Momenta's role in ensuring it is only viable claims which are issued. Those subparagraphs are in these terms (the Provider being a reference to Momenta):

"*11.1 The Provider must ensure prior to drawing funds and issuing a claim that the claim meets the eligibility criteria for both Market ATE Insurance and Spectra Funding Agreement.*

*11.2 The Provider will arrange for claims to be issued in accordance with the Operating Manual.*"

28. The point as now put is a simple one. It is that there were cases which Momenta should not have been running at all. That simple point can be expected to be seen readily in the Counterclaim if it forms part of Cheval's case. It is not so seen.

29. I move to tackle each of the groups and start with Group 1.

Group 1

30. This group comprises 742 claims lost by strike out owing to procedural failings. A total of £656,676.20 is sought. That is made up of a number of elements which need to be considered separately.

31. The first is litigation, or WIP (work in progress), funding. This WIP funding was provided by Spectra and the total sum of £80,605.29 went to Momenta in respect of the Plevin claims complained of in Group 1. Under the funding agreement, Cheval is liable to repay such funding to Spectra and so bears it as a loss in the circumstances set out in cl.2.5.1, namely where the failure to recoup it out of the proceeds of a claim is the result of a breach of duty by Cheval.

32. That clause imports the same, or a like, causation question as arises for the recovery of costs out of proceeds generally, as I understood Mr Pennington-Benton to accept. By his written submissions, he included WIP funding among those items which were properly subject to a loss of chance analysis. That reflected his oral submissions.

33. Assessing this item therefore involves a loss of a chance evaluation. For the reasons already given, the chance of successful recoupment of these WIP funding costs lost by breaches of duty in these claims was 72.5 percent. Accordingly, I assess this item of loss in the sum of £58,438.84 (72.5% of £80,605.29).

34. The second element in the Group 1 claimed loss is counsel fees for work done on the underlying Plevin claims. Those fees totalled £97,494.84. Cheval says these claims would have progressed to trial or settlement so as at least to cover counsel's costs.

35. Again, as I understood Mr Pennington-Benton to accept, this element was properly the subject of a loss of a chance evaluation. The recoupment of these out of pocket expenses depended on the actions of others, namely the other side in the Plevin claims and the County Court disposing of them. That evaluation, as I have already explained, is that Momenta's failures caused Cheval to lose a 72.5 percent chance of recovery. I therefore assess this element of the Group 1 loss in the sum of £70,683.76 (72.5% of £97,494.84).

36. The third element of the loss is made up of the costs of the other side which Cheval's clients became liable for under adverse costs orders in the Plevin claims. On the evidence, it was Cheval which paid the sums due under these orders; doing so as of part of its professional negligence liability to the clients. The total sum paid was £210,858.76. I consider this sum is recoverable in full. Adverse costs are awarded in small claims only where there is unreasonable behaviour - see CPR 27.14(2)(g). This is therefore a loss caused by the breach. Without the breach there would have been no such liability for Cheval to discharge. Cheval's clients would not otherwise have become liable for these sums even if the litigation had failed.

37. The fourth and fifth elements of the loss claimed in this group can be taken together. They are issue fees and hearing fees in the underlying claims. On the evidence, the issue fees for the claims in this group totalled £139,658.70 and the hearing fees totalled £56,300. Like the litigation funding (being the first element dealt with above), these sums are part of Spectra's investment and, under the funding agreement, Cheval is liable to repay them to Spectra and so bears them as a loss where the failure to recoup them out of the proceeds of a claim is the result of a breach of duty by Cheval.

38. Just as with litigation funding and for the same reasons, these items are to be assessed using a loss of a chance evaluation. For reasons already given, the chance of successful recoupment of these fees lost by breaches of duty was 72.5 percent. I therefore assess this item of loss in the sum of £142,070.06.

39. The sixth and final element of loss in Group 1 is compensation so far paid to clients for the loss of their underlying claims. On the evidence, the total sum of £71,758.58 has been paid out by Cheval on that basis.

40. This element, like the adverse costs orders liability, is one which should, in my judgment, be recovered in full. This is a cost which was caused by the breach. Not a cost which Cheval has lost the chance of recouping out of proceeds or might have incurred in any event.

41. Totting those elements up to arrive at a subtotal for Group 1 gives a figure of £553,810.

Group 2

42. Subject to one point, Group 2 is comprised of 432 claims which were abandoned owing to failures of Momenta, rather than being struck out as with Group 1. The elements making up the loss claimed in Group 2 are litigation funding, court fees, and compensation. On the evidence, in relation to these underlying claims, £44,389.26 of litigation funding went to Momenta, issue and hearing fees totalling £112,279.84 were incurred, and compensation of £31,003.92 has been paid out by Cheval to wronged clients.

43. These are elements already discussed above in relation to Group 1. The same considerations apply. I accordingly assess Cheval's loss in relation to litigation funding and court fees as 72.5 percent of £78,600 plus £112,279.84, being £113,585.10. And its loss in relation to compensation as the full sum of £31,003.92. The subtotal for this group is therefore £144,589.02.

44. The point about the composition of this group, very fairly brought to my attention by Mr Pennington-Benton and which also applies to Group 3, is that there are some claims within it which should perhaps more properly be in Group 1 as they were in fact struck out. I consider they are still, however, properly part of the assessment. They are cases which are within the scope of the Counterclaim. It is just that they may have been wrongly categorised. It would be particularly unjust to take any different approach given that the categorisation was derived from information supplied by Momenta.

Group 3

45. The claims in Group 3 are, subject to the same point as to composition referred to above, claims which were abandoned owing to failures of Momenta, but where no compensation has been paid. There are 886 claims in this group. The losses claimed are litigation funding of £72,613.17, counsel fees of £149,695.20, and court fees (made up, again, of issue fees and hearing fees) in the total sum of £181,264.88.

46. It follows from my decisions so far that all these elements fall to be assessed by way of a loss of chance evaluation and that the relevant percentage to apply is 72.5 percent. I therefore assess Cheval's loss in relation to this group in the sum of £292,590.61 (being 72.5% of £72,613.17 plus £149,695.20 plus £181,264.88).

Group 4

47. The cases in the next group, Group 4, are all claims in which adverse costs orders were made against Cheval's clients. The claims were neither struck out nor abandoned so do not feature in Groups 1-3. As with other groups though, on the evidence the adverse costs orders were paid by Cheval given the lawyers rather than the clients were at fault.

48. As already noted, adverse costs are awarded in small claims only where there is unreasonable behaviour. The full sum paid out by Cheval in relation to these claims, being £588,129.02 on the evidence, is therefore a loss caused by the breach. I assess Cheval's loss under this group in that sum.

Group 5

49. Thousands of intended claims were never even issued by Momenta despite it having received litigation funding. On the evidence, there were 29,336 such claims in respect of which £1,438,179.56 was paid to Momenta.

50. Cheval has, on the evidence, paid this money for a service which has not been provided. In my judgment, it therefore has a claim for the full total sum paid as damages representing wasted expenditure else as a remedy in unjust enrichment, namely repayment of a sum where consideration has failed. There is support for that in *Jackson & Powell on Professional Liability, 9th Ed.* at 11-334: "*Where the solicitor's services are valueless as a result of his breach of duty, the client is entitled to recover any sum which*

*he has paid to the solicitor by way of costs. This may be regarded either as damages for wasted expenditure or as repayment of a sum for which the consideration has wholly failed*".

Group 6

51. The underlying claims in Group 6 are collected together as they share the same type of loss, namely payments made by Cheval to clients whose claims had been struck out owing to failures by Momenta. The total sum lost in that way in these claims is £87,769.96. There is no double counting as the evidence is that these claims do not feature in other groups.

52. As already decided, compensation paid out is a loss which Cheval is entitled to recover in full. It is a cost caused by the breach. Not one which Cheval has lost the chance of recouping or which might have been incurred in any event. The loss under this head is £87,769.96.

Group 7

53. Cheval's Counterclaim included at [115(2)] as a head of loss "*Indemnity required from Momenta for further potential professional negligence payments*". This head was labelled, for the purposes of the hearing before me, Group 7. It represented a request to the court to deal, in some way, with the obvious potential further liability of Cheval to clients in underlying Plevin claims.

54. One way of dealing with that potential liability seemed to me to be to adjourn this head of claim with permission to restore. That such course of action is one of the alternatives available is supported by *Jackson & Powell on Professional Liability, 9th Ed.* at 11-330. I therefore proposed that course to Mr Pennington-Benton. I understood Cheval was content with that and so I will adjourn this aspect of the claim with permission to restore.

Groups 8 and 10

55. These groups are conveniently addressed together as they involve the same batch of cases; the group number referring to a type of loss. The claimed loss in Group 8 is acquisition costs. That in Group 10 is administration fees. Both require a little explanation.

56. Starting with Group 8, acquisition costs are fees paid by Cheval to claims management companies in return for them referring the underlying Plevin claims to Cheval. On the evidence, these were often £35 or £50 per claim. The hope was that these costs would be recouped out of the proceeds of the underlying claims but, again on the evidence, these claims were struck out or abandoned owing to failures of Momenta.

57. The total sum claimed in relation to acquisition costs was £251,147.50. There was no double counting as, while at least some of these claims appear in other groups, there is no claim for this loss advanced in those groups.

58. As I understood Mr Pennington-Benton's oral and written submissions, he did come to accept, however, that these groups 8 and 10 required a loss of a chance evaluation. They both relied on saying that the costs would have been recouped out of proceeds.

59. Accordingly, the proper assessment of loss for Group 8 is £182,081.94, being 72.5 percent of £251,147.50.

60. As to Group 10, administration fees are charges made by Spectra under the funding agreement for its funding of the litigation. The relevant charge was usually £50 per claim. As with the fees to claims management companies, Cheval's expectation was that they would be met out of the proceeds of the underlying claims. The total sum sought by Cheval in respect of these fees was £496,210. But it follows from the discussion above in relation to acquisition costs that the proper assessment of loss for Group 10 is £359,752.25, being 72.5 percent of £496,210.

Group 9

61. This group is another one bound together by type of loss, in this case renewal fees. These fees are payable by Cheval to Spectra under the funding agreement where claims are delayed in that they do not succeed, by way of judgment or settlement, within 12 months of being funded by Spectra.

62. Cheval sought the sum of £537,526.94. On the evidence, that was the total sum paid in renewal fees in cases which succeeded, but succeeded only late owing to Momenta's failures.

63. However, the terms for payment in the funding agreement mean, in my judgment, that only 50 percent of that sum represents a loss to Cheval. A renewal fee is payable only where a claim succeeds and "*in accordance with clause 10.1.1(b)*" – see Schedule 3 to the funding agreement defining the renewal fee. Under clause 10.1, the fee comes out of what would otherwise be proceeds to be split as profit between Cheval and Momenta under their agreements. As that split was on a 50/50 basis, I consider it follows that what Cheval has in truth lost by reason of Momenta's failures in these cases, is its share of the profit which instead was swallowed up by the renewal fee.

64. I therefore assess Cheval's loss under this Group 9 as 50 percent of £537,526.94, so £268,763.47.

Group 11

65. This group was not pursued at the hearing.

Groups 12 and 13

66. These final groups, Groups 12 and 13, are akin to groups 8 and 10; the group numbers referring to the same types of loss as in those groups. The claimed loss in Group 12 is acquisition costs. That in Group 13 is administration fees. The batch of underlying Plevin claims is different than that for Groups 8 and 10 only in that it was Cheval which, on the evidence, had to abandon these claims owing to failures by Momenta; doing so once it had taken them back from Momenta.

67. The same considerations as set out above in relation to Groups 8 and 10 accordingly apply. A loss of chance evaluation is appropriate, as Cheval's case on these costs is that they would have been recouped out of proceeds.

68. Whereas Cheval claimed £101,070 for acquisition costs and established on the evidence that it has spent such a sum, the right assessment of its loss in relation to those costs is £73,275.75 (72.5% of £101,070).

69. And while it claimed £281,135 for administration fees and, again, showed that fees in that sum were incurred, the true loss is £203,822.88 (72.5% of £281,135).

Summary and costs

70. By way of a summary of my decisions, there will be judgment for Cheval against Momenta on the counterclaim in the sum of £4,192,764.46, being the total of the following sums by numbered groups:

(1) £553,810

(2) £144,589.02

(3) £292,590.61

(4) £588,129.02

(5) £1,438,179.56

(6) £87,769.96

(8) £182,081.94

(9) £268,763.47

(10) £359,752.25

(12) £73,275.75

(13) £203,822.88

71. There will also be an order adjourning the claim under Group 7 generally with permission to restore.

72. Having succeeded in obtaining judgment in a substantial sum, Cheval should also have an order that Momenta pay its costs of the counterclaim to be assessed if not agreed. The costs of the claim have already been dealt with by an order of 25 November 2024.