Neutral Citation Number: [2021] EWHC 525 (Comm)

Case No: CC-2020-BHM-000028

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
CIRCUIT COMMERCIAL COURT (QBD)

The Birmingham Civil Justice Centre
The Priory Courts, 33 Bull Street, Birmingham B4 6DS

Date: 22 March 2021

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

- -

Between :

Denise McFarland-Cruickshanks	**Claimant**
- and -	
England Kerr Hands Solicitors Limited t/a England Kerr Hands	**Defendant**

- -
- -

Tim Chelmick (instructed by **DWF Law LLP**) for the **Claimant**
John Virgo (instructed by **England Kerr Hands**) for the **Defendant**

Hearing date: 28 January 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HHJ WORSTER

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.00 am on Monday 22nd March 2021.

HHJ WORSTER :

Introduction

1. By an application dated 15 September 2020, the Claimant seeks orders striking out the Defence and Counterclaim, alternatively for summary judgment. The applications were opposed, and I heard oral argument for a day on 28 January 2021.

2. The Claimant is a barrister specialising in intellectual property law. The Defendant is a firm of solicitors, described in the Defence as a "high street solicitor's practice in Birmingham". The claim is for the balance of fees the Claimant says are due for work she did in relation to a patent action in the IPEC ("the patent action").

3. The Claimant and the Defendant in this claim acted for the Claimants in the patent action, who were Andrew England-Kerr ("Mr Kerr") and Waterside Manufacturing Limited ("Waterside"). At the time Waterside was controlled by Mr Kerr, and together they held patents relating to body armour which incorporated an inflatable life jacket. The patent action arose out of a dispute they had with BCB International ("BCB"), the holder of a licence to sell the body armour in Ecuador. BCB was accused of also selling a product which infringed one or more of the patents. Mr Kerr is also a solicitor, and England Kerr Hands and Co is effectively his firm.

4. The Claim Form in this claim was issued on 13 May 2020 and claims unpaid fees said to be due and owing to the Claimant. The Claimant's billed fees totalled £53,765, of which £19,755 had been paid, leaving a balance of £34,100. A schedule of the fees billed and paid is appended to the Reply [35]. A Defence and Counterclaim verified by Mr Kerr was filed on 22 June 2020. There are two lines of defence. Firstly, that the parties had agreed that the Claimant's fees would be capped at £50,000 plus VAT. That was said to be a fundamental term of the parties' contractual arrangement, and that by claiming in excess of the cap the Claimant had breached the capping agreement. The Defendant's case was that the consequence of that breach was not only that the Claimant was not entitled to more than a total £50,000 plus VAT in fees (which would be a further £30,245 plus VAT) but that no further fees were payable at all, and the £19,755 already paid was to be repaid. The Claimant's application sought summary judgment and/or strike out on the fee capping issue. The question of whether or not there is a maximum fee of £50,000 is a question to be determined by considering the effect of the agreement made in some emails between the Claimant's clerk and Mr Kerr. Whether the Claimant lost the right to charge any fees at all by claiming in excess of the cap is essentially a matter of law.

5. The second line of defence is a set off of the sums due on the Counterclaim. The principal counterclaim is for the losses the Defendant alleges it has suffered as a result of the Claimant's breach of contract and/or negligence. The issue on this part of the application is whether the Defendant can bring a claim against the Claimant for the financial loss it suffered as a result of the Claimant's alleged breach of contract and/or negligence, or whether it should be struck out. The central issue is whether the Claimant owes the Defendant a relevant duty.

6. The third element of the application relates to the Defendant's counterclaim for an indemnity in relation to a claim from its lay client Waterside. The only evidence that

Waterside make such a claim is an email from Mrs Kerr (its present Director) on 16 March 2020. The application before me was to strike out this element of the Counterclaim on the basis that no claim had yet been made by the lay client, so that there was nothing to indemnify. That appeared to be resisted in the evidence filed by the Defendant in response to the application, but the point was notably absent from Mr Virgo's skeleton argument, and in response to my inquiry at the outset of the hearing, it was confirmed that the Defendant was not in a position to seek an indemnity as matters stood. If a claim was made, then the Defendant had the usual rights of indemnity and contribution, but that was for the future. In those circumstances the current claim for an indemnity will be struck out.

7. The application was supported by the witness statement of Mr Bennett, the Claimant's solicitor, of 15 September 2020. The Defendant filed witness statements from Gordon Walker of 19 January 2021, Peter Boynton of 12 January 2021 and David Croston of 19 January 2021. Mr Walker is the Defendant's solicitor, and his witness statement sets out its case by reference to the documents and his instructions. Mr Boynton was the solicitor at the Defendant firm dealing with the patent action. His evidence is given on the basis of his personal involvement in much of what occurred, although a lot of his evidence about the fee cap is drawn from the documents and his instructions. Mr Croston is a Patent Attorney. He gives evidence in relation to the conduct of patent infringement proceedings in the IPEC. His witness statement reads like expert evidence. The Claimant objected to it but accepted that I should read it. In the event little if any reliance was placed upon it. Finally, the Claimant filed a short witness statement in reply dealing with some discrete factual issues.

8. Whilst the application bundles were extensive, there are in fact very few documents which I need to consider. I refer to them by reference to their page number.

9. The approach to an application of this sort is well established. The power of the Court to strike out a statement of claim is set out in CPR r 3.4(2). The relevant sub rule is (a):

> *The court may strike out a statement of case if it appears to the court—*
> *(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;*

10. In relation to the question of whether the Claimant owed the Defendant a relevant duty for the purpose of the counterclaim for loss, the Claimant's case is that no valid claim is raised as a matter of law. If that is my conclusion, then I should strike it out; *Price Meats Ltd v Barclays Bank Plc* [2000] 2 All E.R. (Comm) 346, Ch D.

11. Mr Virgo referred me to the need to exercise particular caution when the issues under consideration concern a developing area of law. He referred to the judgment of Lord Browne-Wilkinson in *Barrett v London Borough of Enfield* [2001] 2 AC 550 @ 557E-G:

> *In my speech in the Bedfordshire case X (Minors) v Bedfordshire County Council [1995] 2 AC 633 at pp. 740–741 with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law*

> *which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out.*

Mr Chelmick submitted that this was not a case of an uncertain and developing area of law such as that referred to by Lord Browne-Wilkinson, there was no relevant dispute as to the facts, and this court was in as good a position as any to deal with the question of whether a relevant duty arose. I agree with that submission.

12. CPR Part 24 sets out the test for summary judgment:

> *The court may give summary judgment against a … defendant on the whole of a claim or on a particular issue if –*
>
> *(a) it considers that –*
>
> *(ii) that defendant has no real prospect of successfully defending the claim or issue; and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial.*

13. The general principles on such an application are set out in the judgment of Lewison J (as he then was) in *EasyAir Limited v. Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15] (emphasis added):

> *1. The court must consider whether the [respondent to the summary judgment application] has a "realistic" as opposed to a "fanciful" prospect of success.*
>
> *2. A "realistic" [statement of case] is one that carries some degree of conviction. This means a [case] that is more than merely arguable.*
>
> *3. **In reaching its conclusion the court must not conduct a "mini-trial".***
>
> *4. This does not mean that the court must take at face value and without analysis everything that [the respondent] says. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.*
>
> *5. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.*
>
> *6. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without a fuller investigation into the*

> *facts at trial than is possible or permissible on an application for summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.*
>
> ***7. On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.*** *The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction.*

Mr Virgo emphasises principle 3 – the court should not conduct a mini-trial. Mr Chelmick emphasises the opening section of principle 7.

The Fee Cap

14. The relevant background is not in issue. Mr Kerr and Waterside instructed the Defendant to represent them in the claim against BCB, and both entered Conditional Fee Agreements ("CFA's) with the Defendant on 9 June 2015. The Claimant was first instructed to advise in writing on 11 June 2015, and she provided a written advice on 17 June 2015. She was subsequently instructed on a number of occasions to carry out specific tasks. In particular, she was instructed to draft the Reply and Defence to Counterclaim which was served on 19 July 2016.

15. On 14 July 2015 at 15.22 Mr Boynton emailed the Claimant's clerk asking Counsel to deal with 3 identified pieces of work and asked him to contact Mr Kerr to agree fees. At 19.07 the Claimant's clerk emailed Mr Boynton and Mr Kerr [113] with estimates for the 3 pieces of work.

> *Dear Andrew and Peter*
> *Thank you for your email which I have discussed with counsel to provide you with the requested estimates*
> *To date counsel's fees stand at £3,070 plus vat*
> *Future anticipated fees:*
> *To finalise her written Opinion for ATE insurers – up to £1,000 plus vat*

> *To advise re damages assessment – counsel suggests that this could be dealt with by way of telephone conference - £275-£350 plus vat*
> *If your preference is for this to be dealt with in the form of a written advice - £650-£1,000 plus vat*
> *To consider and comment upon the draft letters £300-£450 plus vat*

16. On 16 July 2015 Mr Kerr spoke with the same clerk about fees. Mr Kerr gave no direct evidence of that conversation, but the Defence relies on the content of the subsequent emails between Mr Kerr and the clerk, and the evidence from the Defendant comes from Mr Boynton's reading of those emails; see paragraph 21 of his witness statement and following [54]. The first is at 12.24 from the Claimant's clerk [115] to Mr Kerr:

> *Dear Andrew*
> *We spoke earlier this morning and you asked me to give some thought to counsel's potential future fees if this matter ran to trial in the IPEC for insurance purposes. The following therefore are for guidance only and for the present purposes*
>
> *To draft Particulars of Claim - up to £4,500*
> *To review and advise re Defence - up to £1,500*
> *To draft Reply to Defence - up to £1,500*
> *To prepare for and attend CMC - £3,500 to £7,000*
> *Any intermediary work up to trial*
> *i.e. expert evidence, disclosure - £10,000 to £20,000*
> *ADR/Settlement/Contingency costs - £10,000 to £15,000*
> *Preparation for and attending 2 day trial – up to £26,500*
> *Preparing for and attending post Judgment hearing - £1,000 - £2,000*
>
> *If you have any questions in respect of the above please do not hesitate to call*

17. Pausing there, the estimate is for between £58,500 and £78,000. It relates to specific items of work, and as the Claimant notes, there is no reference to a Counterclaim. Mr Chelmick also drew attention to the fact that neither of the CFAs the lay clients had entered into with the Defendant referred to a Counterclaim either. The Defendant's case is that the parties were aware that BCB may "counter-attack" and question the validity of the patents. In the event that is what happened, and BCB's Counterclaim went to the validity of the patents. In support of that point, the Defendant referred to paragraph 4 of a Note prepared by the Claimant on 17 June 2015, and in particular to sub-paragraph (f), which expressly refers to such a possibility [81].

18. Nor is there any reference in this estimate to work such as dealing with Part 18 requests or withdrawing an admission – matters which actually arose in the course of the Claimant's involvement in the patent action. There is, however, a reference to "any intermediary work up to trial" (although that may be qualified by the words which follow) and to contingency costs.

19. Following the email at 12.24, Mr Kerr and the Claimant's clerk had another conversation regarding fees. Again there is no direct evidence of that conversation, but the Defendant refers to an email from the Claimant's clerk to Mr Kerr at 15:36 [115]:

> *Further to our conversation of a few moments ago, I can confirm that it is my view that counsel's cumulative fees for this matter should not go beyond £56,000 + vat.*
>
> *You have asked me if we would agree to cap counsel's fees at a maximum of £50,000 + vat, and I am happy to confirm that we are agreeable to that proposal.*

20. The Claimant's case is that this email must be read in the context of the previous estimates and is to be construed as an agreement to cap the fees for the work contemplated by the estimate given on 16 July 2015. The fact that the £56,000 figure is close to the bottom of the bracket for estimated future work to trial may support that. Her case is that this cap was not intended to cover the work done to date (some £6,200), and nor was it intended to cover the work involved in dealing with a Counterclaim. The Claimant's case is that much of the work that she went on to be instructed to do fell outside the scope of the agreement. The Defendant's case is that it was looking for some certainty in relation to fees, and that the cap was in relation to all fees. At paragraph 32 of his skeleton argument Mr Virgo submits that much will turn on what was said in the conversation which preceded that email.

20. The key words in the email of 15.36 are "counsel's cumulative fees for this matter". "Cumulative fees" are to be contrasted with "potential future fees" in the 12.34 email. Further, the phrase "fees for this matter" suggest the whole case, not simply what has been estimated. I very much doubt whether there will be anything further of relevance in the conversations which preceded the emails, but that is, at least, a sufficiently plausible construction to defeat an application for summary judgment. Consequently for the purposes of summary judgment, the Claimant is limited to the principal sum of £30,245.

21. However, the Defendant's case goes further than a limit on fees. Claiming a sum above the cap is said to be a breach of a "fundamental term of the contractual arrangement"; see paragraph 7 of the Defence [14]. When the issue was explored in argument the case appeared to be that this was the breach of a term which excused the Defendant from further performance, and the further performance in question was payment for work already done.

22. Mr Boynton hints at total failure of consideration in his witness statement, but the point is not pleaded, nor did Mr Virgo submit that this was such case. That was obviously the correct course to take, for it is not arguable that this is a case of total failure of consideration. Work of value was done. Nor do I see how it can be argued that the breach of the fee cap agreement is somehow so essential to the parties' agreement that its breach can fairly be seen by the Defendant as a substantial failure to perform the contract. The term may be a condition, and its breach may amount to a repudiation which, if accepted, excuses the Defendant from further performance. But that is not how the matter is put, and even if it were, it would not entitle the Defendant to refuse to pay for what it had already received and claim back the fees it had already paid. There is no realistic prospect of success on this second aspect of the fee cap defence.

The Counterclaim for breach of contract/negligence

23. Before turning to the central question of whether a relevant duty arises, it is helpful to identify how the Defendant says it has suffered a loss. It alleges that the Claimant was negligent in a number of respects, but there are two which are said to be relevant to the causation of loss to the Defendant. Firstly, that the Claimant was negligent in incorporating into the Reply and Defence to Counterclaim in the patent action, a document which amounted to an admission that the patent owned by Mr Kerr and Waterside was not valid (the issue is more technical than that, but that is the nub of it). The Claimant's case is that she was not negligent, but the parties agree that is a matter which cannot be determined on an application such as this. Secondly it is alleged that after the hearing of the CMC in the patent action, at which the Court refused an application to withdraw that admission, the Claimant told Mr Boynton that she did not think that we would get a fair trial if the action proceeded to a full hearing. Mr Boynton says this at paragraph 47 of his witness statement [59]:

> *DM told me after the hearing on 27.09.2016 that she did not think that we would get a fair trial if the action proceeded to a full hearing. She said this after the hearing and before she left to return to chambers. I told this to AK almost immediately afterwards and also commented that it felt that Dm had almost set us up to fail. This was the impression I took away with me following her reaction after the hearing as she had made it clear that following the hearing the case was hopeless.*

Mr Kerr then proceeded to settle the patent action (it is said) in reliance on the view of the merits the Claimant had expressed. Those allegations are pleaded at paragraphs 19 and 23 of the Defence [15].

24. The causative effect of those two matters is as follows. Firstly, including the admission in the pleadings led to a situation where it presented a potential problem for the patent owners, and needed to be withdrawn. Secondly, the Claimant failed to advise that the admission *"was not of any meaningful effect on the majority of the arguments on the validity of the patent and that this combined with the clear infringement of BCB would still lead [to] a victory in the litigation*". That is a quotation from paragraph 34 of the witness statement of Mr Walker, where the Defendant sets out its case on this application [10]. Hence the Defendant's case is that the advice that the case was "hopeless" (Mr Boynton's evidence) or "no longer viable … and should be compromised" (the pleaded allegation) was negligent, and that consequently the case was settled on "unsatisfactory terms". The Claimant denies that she advised that the case was no longer viable as a result of the failure to withdraw the admission; see paragraph 59 of the Reply [27], and she was not asked to advise on settlement, nor was she involved in any of the discussions. But these are issues of fact which cannot be resolved on an application such as this.

25. From the lay client's point of view, a loss caused by under-settling the case on the Claimant's negligent advice is recoverable in principle. That is the lay client's loss. The Defendant's case is that it too has suffered a loss. The case as pleaded at paragraphs 25-28 of the Defence [16] is that (and I summarise) because the lay client lost the opportunity of successfully claiming damages and orders preventing a competing business from using their patent, the Defendant lost the opportunity of claiming fees from its client pursuant to the CFA. There is an issue as to whether in

fact the settlement Mr Kerr achieved amounted to a success for the purposes of the CFA, but again that is a dispute which I cannot resolve at this stage. The Defendant also argues that had the litigation proceeded further (as it now says it should have done) it would have been able to bill more fees, which it would have recovered from the lay client when the claim "succeeded" (whether at trial or settlement). Those losses are not particularised in the Counterclaim, but at paragraph 65 of his witness statement [62] Mr Boynton sets out a table in which he identifies the "billable fees" he believes would have been earned. The total is £151,975.

26. Having identified the causative allegations of breach, I turn to the question of whether the Claimant owed the Defendant a relevant duty under the contract or at common law. The nature and scope of that duty was not defined in the Defence or in the course of the Defendant's submissions, but it would be to exercise reasonable skill and care when supplying the Services so as not to cause the Defendant financial loss (or to that effect).

Breach of Contract

27. I begin with the claim for breach of contract. The contract is the "written contract" referred to in the Claim Form. The parties agree that this was made on the basis of the written standard terms and conditions of the Claimant's chambers ("the terms"). These are based almost verbatim on the model terms produced by COMBAR and the City of London Law Society, Basis A.

28. Clause 1 provides for definitions and interpretation. The definitions include the following:

> *the "Lay Client" means the Solicitor's client for whose benefit or on behalf of whom the Barrister is instructed by the Solicitor to supply the Services;*
>
> *the "Services" means the legal services supplied or to be supplied by the Barrister in connection with the Case pursuant to the Instructions provided by the Solicitor and otherwise in accordance with the Agreement; and*
>
> *the "Solicitor" means the sole practitioner, partnership, limited liability partnership or company who instructs the Barrister to supply the Services, together with all successors…*

29. Clause 3 is headed "Providing the Services". Clause 3.2 provides that:

> *The Barrister will exercise reasonable skill and care in supplying the Services.*

30. Clause 4 is headed "Benefit of the Services". I set out the entire clause, but it is 4.1 which is of particular importance in this case:

> *4.1 Unless otherwise agreed in writing, the Barrister's Services are provided to the Solicitor as the Barrister's client, acting for the benefit of the Lay Client. Subject to the duties of the Barrister and the Solicitor to the court, the Barrister and the Solicitor acknowledge and agree that each owes a primary duty to the Lay Client.*

4.2 The Barrister acknowledges the existence of a duty of care owed to the Lay Client at common law, subject to his professional obligations to the Court and under the BSB Handbook.

4.3 Subject to clause 4.4, no one other than the Solicitor and the Barrister has any rights under the Contracts (Rights of Third Parties) Act 1999 or otherwise to enforce any provision of the Agreement.

4.4 The Lay Client may enforce the Agreement subject to and in accordance with clause 21 and the provisions of the Contracts (Rights of Third Parties) Act 1999.

4.5 The Solicitor and the Barrister must obtain the consent of the Lay Client before they rescind by agreement the Agreement so as to extinguish the Lay Client's rights to enforce the Agreement or alter the Lay Client's entitlement under that right. This requirement applies instead of the circumstances set out in section 2(1)(a) to (c) of the Contracts (Rights of Third Parties) Act 1999.

31. Basis A of the model agreement provides for the "traditional" arrangement as to fees, and consequently Clause 9.5 provides that the solicitor will pay the barrister any sums properly due.

32. Clause 11 is headed "Conflicts of interest". By clause 11.1 the barrister confirms that they have no conflict of interest or other professional impediment which prevents them from acting for the solicitor or the lay client, and by clause 11.2 agrees that if that situation changes he or she will inform the solicitor immediately. Clause 11.3 provides for the circumstances in which the solicitor or the lay client might have a claim in damages against the barrister for breach of clause 11, and clause 11.4 recognises that they might have claims other than damages for such a breach; an injunction being the obvious example.

33. The Defendant relies in particular upon clause 12, which is headed "Liability". I set it out in full.

12.1 The Barrister is not liable for any loss or damage suffered by any persons, firms or partnerships other than the Lay Client and the Solicitor.

12.2 The Barrister shall arrange and maintain professional indemnity insurance as required by the BSB Handbook or, if higher, to the level, if any, set out in the Agreement as provided in clause 20.2.

12.3 Save as otherwise expressly agreed by reference to optional clause 20.3 below, nothing in these General Terms excludes or limits any liability (whether at common law (including in negligence), in equity or otherwise):

(a) that the Barrister would have had to the Solicitor,
(b) that the Barrister would have had to the Lay Client or
(c) that the Solicitor would have had to the Barrister had there been no contract (whether or not incorporating these General Terms) with regard to the Case between the Barrister and the Solicitor or between the Barrister, the Solicitor and the Lay Client.

12.4 However, if:

(a) the Barrister is liable to the Solicitor,
(b) the Barrister is liable to the Lay Client or
(c) the Solicitor is liable to the Barrister (save in relation to fees)

solely as a result of breach of these General Terms or of any other contractual provision of the Agreement and would not otherwise have been liable (whether at common law (including in negligence), in equity or otherwise), that liability shall be limited to the sum stated in the Agreement. If no such sum is stated, the limit of that liability will be £100,000, being the highest limit of cover for such liabilities provided to Barristers by the Bar Mutual Indemnity Fund.

34. Clause 20.3 also deals with the limitation of liability:

20.3 Notwithstanding clause 12, the Barrister's liability (whether at common law (including in negligence), in equity or otherwise) in respect of

(a) any breach of the Barrister's obligations in providing the Services, and/or

(b) all breaches of the Barrister's obligations in providing the Services arising from or which are attributable to (i) the same act or omission, (ii) a series or group of related acts or omissions, (iii) a series or group of similar acts or omissions or (iv) the same originating cause

shall be limited to the lower of the sum agreed in writing between the Barrister and the Solicitor, or, if the Barrister is solely liable as a result of breach of these General Terms as set out in clause 12.4, the sum stated in clause 12.4.

35. The Claimant's case is that whilst the agreement is between the solicitor and the barrister, the services are provided for the benefit of the lay client. In other words, they are not provided for the benefit of the solicitor; see paragraphs 82-83 of the Reply [31]. Mr Chelmick submits that Clause 4.1 of the terms makes that clear; see paragraphs 48-49 of his skeleton argument. The parties to the agreement can agree otherwise, but in this case they did not. In particular he submits that: (i) the contract does not contain any duties to the solicitor in respect of their (the solicitor's) fees; and (ii) that the COMBAR terms were not intended to change the fundamental relationship between barristers and solicitors, but to provide a mechanism by which fees could be recovered contractually, and deal with the changes in the law brought about by section 61(1) of the Courts and Legal Services Act 1990.

36. Mr Virgo did not deal directly with the meaning and effect of clause 4.1. He referred to the scheme of this contract, submitting that it included an explicit assumption of a duty to exercise reasonable skill and care (clause 3.2) and an obligation in relation to conflicts of interest (clause 11). He submitted that the existence of a duty owed by the barrister in contract to the solicitor was clear, and that the fact that clauses 12 and 20.3

referred to the barrister's liability to the solicitor meant that there was no room for any doubt about that.

37. The question of whether or not the Claimant owed a duty to the Defendant to exercise reasonable skill and care when providing the Services is to be determined by construing the contract. The principles of construction are well established. They were recently considered by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; see Lord Hodge at [8]-[15], and Lord Justice Leggatt (as he then was) summarised them in his judgment in *Minera Las Bambas SA v Glencore Queensland Ltd* [2019] EWCA Civ 972 @ [20]:

> *In short, the court's task is to ascertain the objective meaning of the relevant contractual language. This requires the court to consider the ordinary meaning of the words used, in the context of the contract as a whole and any relevant factual background. Where there are rival interpretations, the court should also consider their commercial consequences and which interpretation is more consistent with business common sense. The relative weight to be given to these various factors depends on the circumstances. As a general rule, it may be appropriate to place more emphasis on textual analysis when interpreting a detailed and professionally drafted contract such as we are concerned with in this case, and to pay more regard to context where the contract is brief, informal and drafted without skilled professional assistance. But even in the case of a detailed and professionally drafted contract, the parties may not for a variety of reasons achieve a clear and coherent text and considerations of context and commercial common sense may assume more importance.*

38. These are not only detailed and professionally drafted terms, they follow the model terms drafted by the professional bodies representing commercial solicitors and barristers for use in these sorts of circumstances. Considerable weight is to be given to the text.

39. The Defendant's case is to the effect that these terms give rise to a relevant duty. It has had a more than adequate opportunity to marshal any points it wishes to take. There was nothing in the factual background which Mr Virgo raised as relevant to the question of the construction and effect of clause 4.1, and I did not understand him to disagree with Mr Chelmick's submission that the model terms were not intended to change the fundamental relationship between solicitors and barristers; a relationship with which the Court is particularly familiar. Some play was made of an apparent interest in the case from the Law Society. But it was unclear what that interest was, or how that affects the question of construction, and in the event the Law Society made no appearance. Having considered the submissions made to me, I am satisfied that I have the evidence necessary for the proper determination of the question. This is a short point of construction, and the Court should grasp the nettle and decide it.

40. I agree with Mr Chelmick that these terms are to be understood in the context of the arrangements for instructing members of the Bar, and the changes which took place after section 61 came into effect. In simple terms, the solicitor acting on behalf of the lay client, instructs the barrister. The barrister does the work for the solicitor, acting on behalf of the lay client, and is then paid by the solicitor for that work, either from funds provided by the lay client, or on the basis that the solicitor recovers the cost

from the lay client. Clause 4.1 expressly recognises that the services are provided to the solicitor who is *…acting for the benefit of the lay client*. That is unless something different is agreed. None of that is at all surprising and reflects the traditional relationship between the professions and the lay client. The second part of clause 4.1 also reflects the general understanding of the position. Subject to their overriding duties to the court, the barrister and the solicitor owe their primary duties to the lay client.

41. The assertion that the contract provides for a relevant duty and that the provisions dealing with liability make that clear requires some examination. The duty in question must relate to services, and thus must arise from clause 3.2. That clause must be read in the context of is the agreement as a whole, and (here) in particular in the context of clause 4.1.

42. The provisions of clause 12 and 20.3 do not establish relevant duties. The Defendant's case is that they are drafted in a way which recognise that the barrister has a potential liability to the solicitor. That is correct; see in particular clause 12.1, 12.3(a) and 12.4(a). Mr Chelmick submits that one such example is a claim under clause 11, and there may be others. Whilst Mr Virgo is right to point to the terms of these clauses, I am satisfied that Mr Chelmick's approach is the right one. The fact that there may be a liability to limit does not mean that there is a liability for the breach of the duty the Defendant contends for.

43. For the Defendant's counterclaim to succeed in contract, clause 3.2 is to be construed as providing for a duty owed by the barrister to the solicitor to exercise reasonable skill and care in supplying the services so as not to cause the solicitor financial loss. Neither party was able to refer me to any decided authority where such a claim had succeeded, and it was accepted that the claim was a novel one. I return to the question of novelty when considering the question of a duty at common law, but the point is relevant here because it suggests that clause 4.1 is doing no more than stating the generally understood position.

44. Clause 4 is headed "Benefit of the Services". Clause 4.1 distinguishes between the solicitor and the lay client. The services are not simply provided to the solicitor, but to the solicitor acting for the benefit of the lay client. They are not provided to the solicitor acting for his own benefit, or to the solicitor on his own account and for the benefit of the lay client. My reading of the first sentence of clause 4.1 is that the services are provided for the benefit of the lay client, and the lay client alone. That construction finds support in the definition of the "Lay Client" as the person *… for whose benefit or on behalf of whom the Barrister is instructed by the Solicitor to supply the Services*. Those definitions reflect the traditional arrangements by which solicitors instruct barristers to provide advice and other legal services for their clients.

45. To read that clause as meaning that the services were provided for the benefit of the solicitor, or for the benefit of the lay client and the solicitor, or that concurrent duties of the same nature and scope were owed to both in relation to the provision of services, would not reflect the natural and ordinary meaning of the language. Nor would it be consistent with the traditional arrangements between the professions. If it were the intention to provide for the barrister to owe a contractual duty to the solicitor in relation to the solicitor's financial interests in the litigation, then something more

would have to be said, because that would entail the provision of services to the solicitor acting for the benefit of himself.

46. It is of importance to remember that it is open to the parties to the contract to make some other agreement as to the benefit of the services. The opening words of clause 4.1 expressly provides for that. That provision underscores the limitation to who is intended to benefit from the provision of these services.

47. The second part of Clause 4.1 refers to the barrister and the solicitor owing a "primary duty" to the lay client, subject to their duties to the court. Again, that reflects the established position. I do not read that part of the clause as a recognition that the barrister owes the solicitor a "secondary" duty in relation to the supply of the services beyond that owed *qua* solicitor for the benefit of the lay client. To find a relevant duty to the solicitor in these words would be inconsistent with the first part of the clause, but it would also raise issues as to what the nature of that secondary duty was.

48. What are the commercial consequences? Which interpretation is more consistent with business common sense? If the Defendant is correct, the consequence is that the barrister would be liable for the losses suffered by the lay client as a result of his breach of contract in failing to exercise reasonable skill and care in supplying the services, **and** for the losses suffered by his professional client as a result of the same breach. It may be open to a barrister to agree to provide his services for the benefit of a solicitor, or to undertake a duty to them to exercise reasonable skill and care. But that does not accord with the underlying purpose of this instruction, which was to provide advice and other services in relation to the lay client's case. It was not (for example) to advise so that the solicitor could decide whether or not to enter into a CFA.

49. In the course of argument, Mr Virgo referred to there being a number of construction cases in which concurrent claims had been made (i.e. where like duties were owed to two people at the same time). I do not know precisely which cases were being referred to, but Chitty on Contracts (33rd ed) deals with Contracts for the Benefit of Third Parties at 18-051 to 18-069. The cases discussed there involve a number of different sets of facts, including some building cases, but none appear to be analogous to the position which would arise if the Defendant's construction were correct. The discussion centres on the ability of those for whose benefit the contract was made to recover, even though they were not a party, or the circumstances in which a party can recover for the losses of the beneficiary. That is a different issue to the one under consideration in this case. The editors of Jackson and Powell on Professional Liability (8th ed) consider the liability of construction professionals under the *Hedley Byrne* and reliance principles at 9-074 to 9-092. The authorities discussed there may have a greater relevance.

50. Mr Chelmick submitted that finding concurrent duties such as the Defendant contended for raised difficult issues for the barrister where the interests of the lay client and the solicitor conflicted. The barrister could not serve two masters. I agree that the Defendant's construction has the potential to create a situation where conflict might arise. That might be answered by the provision in clause 4.1 that the primary duty is owed to the lay client, but I agree that finding concurrent duties has the potential to significantly complicate the situation. Business common sense would tend to favour the clarity which the Claimant's construction brings.

51. Finally on this aspect, and to come full circle, it would be surprising if these model terms led to the imposition of a duty on a barrister which had never been found in any previous authority and changed the fundamental relationship between the professions and the lay client.

52. The words used in clause 4.1 read in the context of this agreement lead me to the clear conclusion that the services are not provided for the benefit of the solicitor. The Claimant's construction is more consistent with business common sense. If the services are not provided for the benefit of the solicitor, I do not see that the solicitor can say that the barrister is liable to him in contract for any loss he (the solicitor) suffers if the barrister breaches that term of the contract. That is not what is contemplated by these terms. It goes beyond the nature and the scope of the duty in relation to the supply of services which the words provide for. I conclude that there is no relevant contractual duty owed to the Defendant by the Claimant.

A relevant duty at Common Law?

53. The second source of a relevant duty for the Defendant's Counterclaim is a duty at common law to a similar effect to that contended for under the terms of the contract; in other words to take reasonable care not to cause financial loss to the Defendant when supplying the services.

54. Despite the fact that the law of professional negligence is well developed, there is no reported case dealing with the existence of a duty such as that contended for by the Defendant. Nor is there any discussion of such a duty in any of the leading textbooks in the area. Jackson and Powell at 12-005 notes that there is limited authority on the duty of barristers to third parties – third parties in that context being those other than the lay client. Both the cases referred to by the editors in that paragraph involved consideration of a duty owed to people associated with the lay client, and who might be seen as the beneficiaries of the work. Clerk and Lindsell on Torts does not deal with the issue at all.

55. The only case Mr Chelmick had been able to find was the Australian case of *O'Doherty v Birrell* [2001] VSCA 44, which appears in a footnote in Jackson and Powell at 12-005. This was a dispute between two members of the Victorian Bar. They had both been retained to act for the Defendants in proceedings. As a result of the failure by Birrell to prepare for a hearing, it had to be adjourned, and as a consequence O'Doherty was unable to recover fees for work he had done. He sued Birrell, alleging that at all material times Birrell owed him a duty of care to take reasonable care to prevent financial loss to him; see paragraph [43] on page 27. The Court of Appeal of the Supreme Court of Victoria described that as "extraordinary".

56. The case is not direct authority on the point before me, and it relates to the position of co-counsel in a case rather than the relationship between a solicitor and a barrister representing the same lay client. However, the discussion as to why such a duty should not be imposed is of some assistance, and I set out below two passages from the judgement of the Court (Winneke P, Phillips and Batt JJA) which are relevant to issues which arise in this case. The first passage relates to the court's reluctance to create potentially conflicting duties of care.

> [*45]* *... It is, we think, not surprising that no such duty has been held to exist between co-counsel jointly retained to represent the interests of the same client, if only because such a duty has the potential to conflict with the barrister's obligation to the client, particularly if, as was said in Giannarelli v. Wraith (1988) 165 CLR 543, the barrister's primary responsibility is always to the court and the due administration of justice. The potential conflicts which could arise were the subject of much debate during the course of argument on the hearing of this appeal. As Gaudron, J. pointed out in Hill v. Van Erp:*
>
> > *"... there can be no duty of care owed to a third party if the duty asserted is inconsistent with the duty owed to the client or if the solicitor is obliged to act exclusively in his or her client's interests."*
>
> *[46]* *The law does not readily create or countenance conflicting duties of care. The duty of co-counsel, retained to represent the interests of the same client in the same litigation, is to serve the interests of the client. They act as a team in discharging that duty and the relationship of each is primarily with the client, not with each other. It would, it seems to us, detract from the obligations which separately and together they have to the client if co-counsel, in the course of discharging those obligations, were also required to discharge a duty to each other of the type contended for. There are many things which counsel might, or might not, do in pursuit of the client's interests which could have an impact upon the ultimate discretion as to costs. If counsel is required to have regard to the potential impact of what he or she does upon the fees recoverable by other counsel, then, to that extent, the client's interests suffer. (As Mason, C.J. pointed out in another context, it is the potential impact that can matter.) Reduced to the lexicon of the law relating to duties of care, the relationship of counsel commonly representing the interests of the same client is not one where each is required to have in contemplation the potential financial harm to others when discharging the duties commonly owed to the client. Counsel assume their respective obligations to the client voluntarily, well aware that the interests of the client are to be pursued regardless of whether reward is returned to them in the form of fees. The course of litigation is notoriously unpredictable and the recovery of fees uncertain, particularly where the award of costs is dependent upon the exercise of the court's discretion. In such a relationship, it cannot, we think, be said that one counsel is in any relevant sense "vulnerable" to the activities of the other or that one is "reliant" upon the other to save him or her from financial harm.*

57. The second passage refers to relevant policy interests:

> [49] *Having arrived at our conclusion that there is no duty of the kind alleged here, we would add that in our opinion there are strong policy interests, grounded in the ethics of the profession, which militate against the existence of the duty for which the plaintiff contends. For the law to encourage co-counsel to sue one another to recover what they regard as their full entitlement to fees will inevitably lead to a loss of confidence by the public in the profession, not least by provoking a species of satellite litigation calling into question the manner in which the principal litigation was conducted but at the same time without altering its result.*

58. Apart from this one Australian case, Mr Chelmick was unable to find any case, reported or unreported, in which it has been argued that a barrister owed such a duty to a solicitor, despite the existence of a duty to lay clients for work done outside court and the abolition of the immunity of advocates in *Hall v Simons* [2002] 1 AC 615. Mr Virgo submits that this lack of authority is to be seen in the light of the immunity barristers enjoyed until the decision in *Hall v Simons*. I come to the merits below, but the absence of decided authority or of other cases in which the point is being raised leads me to conclude that this is not a "developing area of law"; see paragraph 11 above.

59. I begin by considering the way the Defendant puts its case. In his skeleton argument at paragraph 24-25 Mr Virgo refers to three "tests" for finding a duty at common law: (i) the three-part test of foreseeability of damage, proximity and the requirement that it is fair, just and reasonable to impose a duty; (ii) the assumption of responsibility test; and (iii) the incremental approach. He submitted that whichever was applied led to the imposition of a duty. As to (i) the retainer provided a relationship of proximity; it was clearly foreseeable that if counsel negligently advised premature settlement on inadequate terms that the economic interest of the solicitor in the pursuit of the litigation would also be prejudiced, and that there was no reason in justice for shielding counsel from the consequences of their negligence by limiting the right to sue to the lay client. The solicitor would be left without a remedy. As to (ii) I note that Mr Boynton says this at paragraph 26 of his witness statement [55]:

> *I took it as obvious that DM would appreciate both EKH and the lay clients (Waterside and AK) were relying on her to advise on and conduct the patent litigation competently and that if she failed to do so each would suffer loss …*

Mr Virgo accepted that there were no authorities in which such a duty had been found, and he did not suggest that this was a case where the Defendant was arguing for the incremental extension of the scope of an existing duty, although he did submit that there were analogies to be drawn with *White v Jones* [1995] 2 AC 207 and *Smith v Bush* [1990] 1 AC 831.

60. Lord Reed considered the approach to the imposition of a duty of care, and the effect of *Caparo v Dickman* in his judgment in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 @ [21]-[30]. I refer in particular to [27] and [29]:

> *[27] It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. Following Caparo, the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is "fair, just and reasonable". As Lord Millett observed in McFarlane v Tayside Health Board [2000] 2AC 59, 108, 108, the court is concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases. But it is also "engaged in a search for justice, and this*

demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper".

...

[29] Properly understood, Caparo thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable. In the present case, however, the court is not required to consider an extension of the law of negligence. All that is required is the application to particular circumstances of established principles governing liability for personal injuries

61. Mr Virgo referred to *Smith v Bush* [1990] 1 AC 851 and *White v Jones* [1995] AC 207 as examples of cases where the court has been prepared to find duties at common law to provide remedies for those who had suffered losses as a result of some professional negligence. He does so to show that it is possible for there to be a situation where a duty is owed to two different persons with different interests, rather than to argue for the incremental extension of a duty of care.

62. I was not taken to either case in the course of argument, but the facts of both are well known, and obviously different to the facts of this case. In *Smith v Bush* a valuer instructed by a building society to value a modest house for mortgage purposes was held to owe a duty to protect the prospective mortgagee against economic loss flowing from unreported defects. Lord Templeman considered that the basis for that duty of care was that the relationship between the valuer and the mortgagee was akin to contract; see at 851. Lord Griffiths considered issues of proximity, foreseeability and whether it was just and reasonable to impose such a duty; see at 865. Lord Jauncey considered that by reason of the proximate relationship between them the valuer assumed a responsibility to the mortgagee; see at 871. The important fact in that case was that it was widely recognised by valuers that purchasers relied on these reports when deciding to purchase, and that the valuer knew that this was the case. In *White v Jones* the Court was prepared to recognise that duties were owed to both the testator and the beneficiaries of the will. That was for reasons of justice; the only person who had a valid claim had suffered no loss, and the only person who had suffered a loss had no valid claim; see Lord Goff at 275D-275F.

63. Mr Chelmick submitted that this was not a case where the Court should impose a duty at common law. To do so would render counsel potentially liable for lost fees and for other consequential losses in just about every retainer. He submitted that this would be so whether or not there was a liability to the lay client for breaches of duty. He also referred to a number of other factors which pointed away from the imposition of such a duty:

(1) that the existence of such a concurrent or co-extensive duty may lead to positions of conflict. The example given is where the lay client wishes to settle the claim, but the solicitor wishes to continue to recover fees;

(2) the dangers of satellite litigation;

(3) the difficulties which arose for counsel in assessing the risk of liability to an instructing solicitor for the loss of fees so that they might insure against such a claim, and the undesirability of such a process; and

(4) that there was no reason to impose such a duty.

64. Mr Virgo made a number of points in response:

(1) *O'Doherty* was a different case on the facts;

(2) the duty of Counsel to the lay client and the solicitor would be identical and would reflect the advice to be given in relation to the case. In other words, if the duty to the lay client were fulfilled, there could be no breach of the duty owed to the solicitor. Where settlement was an issue, the advice would be driven by the merits;

(3) the dangers of satellite litigation were exaggerated; and

(4) the availability of insurance would not be a problem, and terms of business could be adjusted to impose limits, as these terms did.

He submitted that the court needed to analyse the facts before it could conclude whether or not there had been an assumption of responsibility, and that the question of whether or not a duty of care was recognised was "fact sensitive". The matter was not suitable for strike out and should go to trial so that the Court could consider the issue more fully.

65. It is unnecessary to engage in a wide-ranging review of the authorities to decide whether or not there is some arguable basis for a duty which would allow the Defendant to defeat the application to strike out its case. Mr Virgo accepted in argument that the nature and scope of any duty at common law would be the same as the duty in contract. I assume that by that concession he did not intend to accept that in the absence of a contractual duty, the claim in negligence would fail. But it is the fact that his client was a party to the contract with the Claimant which is the key. The Defendant may have suffered a loss as a result of the negligence of the Claimant, but unlike the Claimants in *White v Jones* or *Smith v Bush*, the Defendant in this case was a party to a contract with the person it says caused the loss. There is no reason for the court to impose a duty at common law in this situation because these parties have made a contract which provides for the relevant duty.

66. Nor is this a case where the law leaves a claimant (here the Defendant) without a remedy. The contract the parties made gave the Defendant the opportunity to agree with the Claimant that the Claimant would owe it a duty of care in relation to the supply of the services. The reasons of justice which might lead to a Court to recognise a duty of care at common law to provide a remedy for those who have suffered a loss

do not exist. This was a commercial relationship. The parties were free to make their own bargain. The agreement that these parties made did not provide for such a duty, notwithstanding that clause 4.1 gave them the opportunity to do so. For this court to then impose a duty of care at common law would run counter to the parties' agreement. That is not a course which the court should take. Even leaving aside the public policy considerations which Mr Chelmick relies upon, that is the answer to the Defendant's case.

67. The point can also be analysed by reference to the tests Mr Virgo referred me to. Given that the terms of the parties' agreement are that the services are provided for the benefit of the lay client, it would be unrealistic for the solicitor to argue that there was a proximate relationship for the purposes of finding a duty owed to it; or that its loss (as opposed to the client's loss) was reasonably foreseeable; or that the imposition of a duty of care would be fair, just or reasonable. Similarly, the argument that there was a voluntary assumption of responsibility is inconsistent with the terms of the contract and the provision of the services for the benefit of the lay client. This is not a case which is "akin to contract"; there was a contract. There may be an argument about whether (on the facts) the Claimant knew that her advice was being relied upon by the Defendant for its own purposes, but the point does not arise because the parties had already made a contract on terms that did not provide for such a duty.

68. I conclude that on the particular facts of this case, the Claimant did not owe the Defendant a duty in contract or at common law in relation to the provision of the services, and that there are no reasonable grounds for bringing the counterclaim. In those circumstances it is to be struck out.

Conclusion

69. In the course of argument, the Claimant confirmed that if she succeeded in obtaining summary judgment on the claim up to the level of the cap, and the Counterclaim was struck out, that she would not pursue the balance of the claim. In those circumstances, I will give judgment on the claim for the capped sum and any interest due and proceed to deal with the costs of the action.

70. Following the circulation of the draft of this Judgment, Counsel were able to agree the terms of the order on the application and the consequential orders for costs. I make an order in the terms of the minute they agreed.