Case No: JR 1705690 / 1705699

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 08/02/2019

Before:

MASTER ROWLEY

- -

Between:

(1) Aslam Bhatti	**Claimants**
(2) Rashid Bhatti	
- and -	
(1) Mohammed Asghar	
(2) Asghar & Co Solicitors (a firm)	**Defendants**

- -
- -

Richard Power (instructed by **Landmark LLP**) for the **Claimants**
John Foy QC (instructed by **Asghar & Co**) for the **Defendants**

Hearing dates: **13 / 14 September 2018**

- -

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.

.....

MASTER ROWLEY

Master Rowley:

Introduction

1. The claimants in this case provided money to the first defendant for the purposes of purchasing property in Dubai. Ultimately, the claimants sought the return of their money and when this did not occur commenced proceedings for breach of trust and/or breach of contract.

2. During the course of the proceedings, a Costs and Case Management Conference took place on 6 October 2015. The claimants' solicitors, Landmark Legal LLP ("Landmark"), failed to file and serve the claimants' budget in accordance with the rules and Master Leslie made an order under CPR 3.14. The effect of this order was that if the claimants were successful, the most that they could recover from the defendants by way of costs in respect of the budgeted costs were any court fees that had been paid. This order did not affect the costs that had been incurred to that point and nor would it affect any costs incurred under a subsequently amended budget.

3. The case reached trial and was compromised during that trial when the defendants sought to accept Part 36 offers made by the claimants out of time. In accordance with CPR 36.23 the claimants were entitled to 50% of their costs from the expiry date of the Part 36 offers.

4. Consequently, at the end of the substantive proceedings, the claimants were entitled to seek some of their costs from the defendants. In principle, this entitlement amounted to 100% of the costs incurred up to the hearing before Master Leslie; court fees only from that hearing until the expiry of the Part 36 offers eventually accepted; and 50% of their costs thereafter. Additionally, such costs as related to work permitted under the amended budget would also be recoverable at 100%.

5. The claimants sought to persuade the trial judge that the allegations made against the defendants and the continued defence of the case until trial, notwithstanding the Part 36 offers made by the claimants, merited an order for indemnity basis costs. Mrs Justice May, the trial judge, was not persuaded by those arguments, not least because the allegations of fraud et cetera were withdrawn as part of the agreement and had not therefore been judicially determined. If May J had made an order for indemnity basis costs, then the claimants' entitlement would have been simplified because the effect of Master Leslie's order would have been rendered nugatory. However, as things stand, the claimants' entitlement is as set out in the previous paragraph.

The point in dispute

6. The defendants say that they are not liable to pay the claimants' costs because the claimants are not liable to pay their solicitors' costs from the date of Master Leslie's Order on 6 October 2015. If that is correct, the indemnity principle bites since the claimants cannot seek any more by way of costs from the defendants than they are themselves liable to pay their solicitors.

7. By way of amended points of dispute, the defendants set out their case as follows:

> "As a result of the Claimants' solicitors being negligent resulting in a sanction of "court fees only" being ordered, the Claimants had a cast-iron case against them for their negligence and breach of contract and the quantum of that claim would be, if the claim is successful, all reasonable costs not recovered from the Defendants.
>
> In the event, therefore, the Claimants would never have had to pay these costs to their solicitors if the claim is successful. Any claim made against them by their solicitors would be met by a defence of set off and/or counterclaim in an amount equal to the unrecovered costs.
>
> On any view the Claimants would not have had to pay their solicitors after 6 October 2015 and they would not have continued to instruct those solicitors if they were fully informed and knew that they had to pay 100% of their costs whether the claim was successful or not.
>
> Either the Claimants' solicitors agreed that the Claimants did not have to pay them in the event of the claim being successful (or possibly at all) or their liability was only for 50% of their costs in the event that the claim was successful in which case this was a conditional fee agreement which did not satisfy the statutory requirements (e.g. it was not in writing)."

8. The point of dispute then goes on to say that if, contrary to the point put forward, the claimants did purport to agree to continue to pay their solicitors fully, then there was a breach of the SRA Code of Conduct in the form of an "own interest conflict" which states that the solicitor can never act where there was a conflict or a significant risk of conflict between the solicitor and the client and that rule was mandatory.

9. So, there are essentially two strands to the point of dispute. The first is that the claimants and their solicitors in all probability reached an agreement regarding the (non) payment of the solicitors' costs after 6 October 2015. The second strand is that if there was no such agreement then there ought to have been one because to do otherwise was to run into a conflict of interest rendering any fees charged to be unenforceable as against the clients in any event. I will deal with these two strands separately. The relevant passage in the point of dispute regarding the conflict of interest strand is set out later in this judgment.

Strand 1 - The effect on the retainer of Master Leslie's Order

10. Mr Colin Challenger, a barrister at Lamb Chambers, represented the claimants at the CCMC before Master Leslie. Following the Master's decision to limit the recoverability of the claimants' costs, Mr Challenger spoke to his instructing solicitor and produced an advice on the same day. A redacted form of that advice was produced to the defendants in these proceedings and I have compared it with the unredacted version. I am satisfied that there is nothing in the passages that have been redacted which has any bearing on the issues before me. Paragraph 4 of that advice describes the events at the hearing as follows:

> "4. … I learned on arrival at today's hearing that our costs budget had been filed at Court only on 1 October. That was just two working days before today's hearing when there is a fixed rule that, absent filing at least seven days before the hearing, the party concerned will be limited (as against his opponent) to court application costs. That objection may have been overcome in my arguments to Master Leslie save [the] claimants' Precedent H had been exchanged with the defendant only mid morning of 2 October. This was despite email exchanges suggesting that the defendant had been ready to exchange on 28 September – when he filed the Precedent H at the court. Other complaints were levelled by the defendant at [the] claimants' precedent H – e.g. the fact that some rates in it were contradicted by documents in a correspondence file and it was in out-dated format but I doubt that those would have caused the Master to rule as inevitably he did had it not been for the late filing and service. He gave a short reasoned judgment that by reason of late filing coupled with the failure to exchange with the defendant at least seven days before the hearing [the] claimants' costs would be disallowed in their entirety. This is a discretionary ruling and therefore in my opinion it is unlikely to be appealable. I will review that aspect in the next few days."

11. In the solicitor's attendance note of his call with Mr Challenger, the solicitor records that Mr Challenger explained the position to both claimants after the hearing. The claimants were then due to be attending at the solicitor's office to discuss the matter further on that date. Mr Challenger's advice records that he told the second claimant, who for simplicity I will call Rashid, that all of the solicitors' costs would be irrecoverable based on Master Leslie's order following the hearing. In fact, as Mr Challenger described it, the position was not quite so bad as he had originally understood since the costs restriction only applied to costs from the date of the order and not those that had already been incurred.

12. Mr Challenger gave evidence on the preliminary issues. In his witness statement, he said that he took Rashid through what had happened immediately following the CCMC. He said that the difficulties faced by the claimants appeared to have been brought about by the negligence of their solicitors and that they might wish to consider instructing other solicitors to conduct their claim. But even if they did so, the effect of Master Leslie's Order would bite on the costs incurred by fresh solicitors.

13. Much of the remainder of Mr Challenger's written evidence sets out the confirmations sought both by him and by his clerk before the case began and then again after Master Leslie's Order, regarding the security of counsel's fees. He said that he had received assurance that the claimants had entered into conventional fee paying arrangements at the outset and that he believed the solicitors had been put into significant funds thereafter. Once the hearing had taken place, subsequent conversations with both Rashid and the first claimant (whom I will similarly simply call Aslam) confirmed that they were continuing to instruct their solicitors rather than changing to a different firm. Moreover, they were continuing to instruct them on the same terms as they had

originally agreed. The final two subparagraphs of paragraph 9 of Mr Challenger's statement recount conversations with Rashid in the following terms:

> "(4) Rashid also on a number of occasions asked if I could advise him on the prospects of a claim against Landmark for negligence arising out of the Precedent H failure. I told him that I was unable to advise on this and suggested that he consult other solicitors or direct access counsel. My understanding throughout from what was said by both Rashid and Aslam was that they would await the outcome of [the] costs assessment in the action before seeking alternative advice and in the meantime they continued to pay fees to Landmark as and when required.
>
> (5) I recall in the second part of 2016 when a decision was taken to engage leading counsel for the claimants some complaint from Rashid about the cost from which I understood that he been asked to pay to Landmark costs covering the leader's initial fees. Later and very shortly before trial leading counsel tendered certain advice about a proposed settlement Rashid again made complaint about how much the leader was costing him and Aslam."

14. The evidence of the claimants is largely contained in witness statements dated 10 May 2018. Paragraphs 3 and 4 of their witness statements are written in identical terms as follows:

> "3. I confirm that following the Precedent H failings, I was advised by both my Solicitors, Landmark Legal LLP and by Counsel, Mr Colin Challenger of the full implications of the Precedent H failings and the impact that this would have on my ability to recover costs.
>
> 4. I took the decision to continue to instruct Landmark on the basis of the original retainer, that is I would pay any costs which were due from me to my solicitors irrespective of whether I was successful or unsuccessful in these proceedings, the retainer did not change following the Precedent H failing, I did not come to any subsequent agreement in relation to Landmark's costs and I confirm that my responsibility to pay legal costs were set out in the original retainer."

15. In paragraph 7 of Aslam's statement, he says that he made a further substantial payment to his solicitors following the agreement to continue to instruct Landmark having received receipt of some damages from the defendants. In paragraph 5 of Rashid's witness statement, he says that he made payment of substantial sums on account in relation to costs and counsel's fees.

16. Mr John Foy QC, leading counsel for the defendants, cross-examined all three of the claimants' witnesses i.e. the two claimants themselves and Mr Challenger. He began with Aslam who swiftly accepted that the wording of his first witness statement was

not in fact in his words as such but he maintained that they represented the thrust of his evidence. He had discussed the issues with his solicitor and Rashid beforehand. The solicitor had made handwritten notes first of all and then had had them typewritten on the same day. Aslam had read the statement again before signing it. This description of events was varied when considering Aslam's second witness statement dated 3 August 2018. In that statement he described preparing the first statement in a hurry. What in fact had happened was that he was unwell and so could not travel to the solicitors' offices and so provided instructions over the telephone. Once the statement had been drafted, it was handed to him by Rashid and so he did not notice, for example, that he was described as the second claimant rather than the first claimant. Upon cross-examination, he confirmed the second version of what had occurred and further confirmed that he had read the statement and signed it once Rashid brought it round to him.

17. It was abundantly clear that Aslam did not understand the terminology in a number of the key passages in his statement. When asked what the "full implications" of the Precedent H failings were by Mr Foy, or the advice he had received about the implications, he was unable to answer in any meaningful way. Eventually he simply indicated that he did not remember what those implications were although he accepted that they were important and that he had been told about them.

18. Aslam was keen to say that, in his view, there was no point in changing solicitor. He had already spent a lot of money and if he had gone somewhere else it would only cost more money. If he won, he was hoping to get all of his costs back: that was always in his mind. He expected to get the costs back from the first defendant and his firm. He accepted that after the Precedent H failings, he knew he would recover less from the defendants, but he had not been told how much less he might get back. He considered that he had paid out about £500,000 up to this point.

19. He said that he took advice from "Mr Colin" [i.e. Colin Challenger] about whether to change solicitors. He had talked to him in the solicitors' offices. He had been advised that he was free to go to any other solicitors but he thought that Landmark had provided a very good service until the Precedent H failing and so he would stay with them. This was also the view expressed to him by his daughter when he discussed the issue with her and with Rashid.

20. Mr Richard Power, the claimants' counsel, re-examined Aslam as to his state of health which is obviously not very good and indeed led to there being consideration on his part as to whether he was sufficiently well to give evidence in person. Aslam said that his memory was now very bad compared with previously as a result of the medication he was taking for his various medical issues.

21. It may well be that Aslam's memory is not what it once was, but it was not my view that the confusion in his evidence regarding his first witness statement in particular was entirely as a result of an inability to remember. He was very clear about certain aspects, for example that the principal sum which he was owed was £534,000 and it seemed to me that his resorting to indications that he did not remember matters was, at least on some occasions, used simply to avoid having to answer a question which appeared to trouble him. In any event, I do not think that I can take any real cognizance of his first witness statement which is in identical terms to Rashid's and which was obviously based upon the statement prepared for Rashid on 10 May. In my

view, the terminology used in those witness statements is entirely that of the solicitor drafting the document rather than either Aslam or Rashid. Whilst Rashid may well have decided simply to accept the legalese to describe his evidence, it does not seem to me that Aslam did any more than go along with the evidence that had already been prepared. I do not think Aslam's evidence really assists me regarding the events surrounding 6 October 2015 directly. Nevertheless, it is clear that Aslam took the view that he continued to expect to recover most, if not all, of his costs from the defendants if he were successful. It is also clear that he is of the view that if he had gone to other solicitors then he would have to pay both Landmark and the further solicitors for the work done. That belief, combined with the view that Landmark had done a good job until the CCMC, combined to make him wish to continue to use them for the remainder of the case.

22. Rashid's evidence in cross-examination began by saying that he was shocked and unhappy at the failure of his solicitors regarding the costs budget. He discussed the matter with Mr Challenger after the hearing and decided to have a further meeting at the solicitors' offices along with Aslam. At that time, he knew that the court fees would be recoverable, but it was unclear what else would be recoverable and it was necessary to "reassess the gameplan."

23. Rashid said that he would expect to get his costs back if successful though he might not get everything back. He had not been involved in a case like this before and so whilst he might well be out of pocket at the end of it, he did not think that was necessarily the case. He had paid £259,000 to the solicitors on account and there was about £128,000 outstanding at the present time.

24. In addition to the advice of counsel, Rashid said that he took independent advice and discussed the matter with a few business people. He vaguely remembered them saying that he could sue Landmark but he had decided not to do so. They had provided a good service including out of hours working on his behalf. The situation regarding the Precedent H would not go away if he simply changed solicitors and Landmark had put their hands up to say that they had made a mistake. He did not need counsel to tell him that he could go elsewhere. He was aware that he was being charged on an hourly rate basis.

25. There is no mention in any of the three witness statements served on behalf of the claimants as to the motivation for pursuing the defendants being anything other than the recovery of the money originally given to them. Under cross examination, however, both Aslam and Rashid referred to the case having a reputational impact. Aslam simply said that the case was about his reputation. Rashid went on at some considerable length about the need to continue with the case till the end even though the prospects were not easy in order to safeguard his reputation. He said that he was the son of a pioneer coming over from Kenya who was prominent in the community and it was therefore important for him to clear his name regardless of how much it would cost him. He was confident that, notwithstanding the Precedent H failing that the case was not going to bankrupt him even if it went badly.

26. The reputation problem was particularly referred to in the context of the offers that were subsequently made between the parties and which I have dealt with below. In that context, it seems to me that the reputation point was largely used to avoid apparently difficult questions concerning the acceptance or non-acceptance of offers.

Nevertheless, having heard the claimants' evidence, and notwithstanding the absence of any reference to the issue in the original witness statements, which were limited to direct retainer matters, I accept that the issue of reputation was one which bore upon the minds of the claimants in the pursuit of these proceedings. Whilst Rashid's evidence suffered from some remarkably florid turns of phrase in almost every answer, his evidence was clear about the terms of the retainer in my view. He clearly understood that there had been a financial impact upon the costs likely to be recoverable but wished to pursue the case using his existing solicitors which he described at one point as being "a cultural thing".

27. When giving his evidence, Mr Challenger confirmed that he advised Rashid that Landmark had plainly acted negligently, and a good claim therefore lay against them. When asked whether he agreed with the description in his advice of it being "cast-iron" he said that he agreed that it would be a very good claim but that nothing was really cast-iron.

28. Mr Challenger's witness statement did not provide any detail about what advice he gave Rashid orally on 6 October 2015. In cross-examination he informed me that he would have said that Landmark had been involved for 12 to 18 months already; that the fiasco regarding the Precedent H was professionally negligent; that if the claimants' confidence had been destroyed by those failings then they should go to other solicitors. He also said that he probably would have offered to recommend other solicitors to the claimants. He agreed with Aslam's evidence that there would be substantial additional costs in instructing new solicitors. He thought that doing so would then involve fighting the professional negligence insurers for payment of those costs rather than Landmark themselves.

29. Mr Challenger said that the advice he gave was moderated by the existence of a dual responsibility to his professional and lay clients even though his primary duty was to the lay client. Mr Challenger moved from that statement when taken to the BSB guidance and accepted that it was not a dual responsibility as such. Nevertheless, although Landmark had done an incompetent job on the Precedent H they had done other things well for the claimants. Mr Challenger considered it to be outside his area of responsibility to suggest to the clients that they actually went elsewhere. Nevertheless, he believed that he gave them some names should they wish to take this up.

30. As with the claimants themselves, I have only recorded the evidence given by Mr Challenger in relation to the events surrounding 6 October 2015 at this point. In so far as his evidence regarding the Precedent H failings is concerned, Mr Challenger's evidence was clear as to the nature of the advice he gave the claimants and was appropriately cautious as to matters of which he was not so sure. There were few items in this latter category but when queried whether he had been asked about another firm using a CFA rather than a conventional retainer he did not recall having any discussion about that option. His view in retrospect was that it was unlikely to have proved possible to obtain a CFA in this sort of case in any event.

Defendants' submissions

31. Mr Foy, in accordance with his skeleton argument, began his submissions by stating that once Master Leslie had made his order, it was likely that the claimants were

under no obligation to pay their solicitors given their negligence. The case against the solicitors was cast-iron and the quantum of that claim was the extent of the costs incurred by the solicitors in respect of the budgeted costs. If those costs were ever sought against the claimants, then the claimants were entitled to set off those costs by way of a counterclaim.

32. There was no evidence of any agreement in writing following the sanction being applied. The defendants say there must have been an understanding between the solicitors and the clients that they would not be charged any fees. In any event, as discussed below, the own interest conflict would mean that such fees could not be enforced against the claimants. Consequently, there was a breach of the indemnity principle in seeking to claim them from the defendants.

33. It was inappropriate for the solicitors to rely on counsel giving the claimants advice. It was to be expected that some written advice would have been provided by the solicitors, but it appeared that nothing was sent. Although the disclosed attendance note suggested a meeting at the solicitors' offices after the hearing before Master Leslie, the various descriptions of what advice was given did not tally. Aslam gave evidence that he had had a conversation with Mr Challenger in the solicitors' offices but in the attendance note of 6 October 2015, the only conversation with Colin Challenger was at court after the hearing. Samina Khan, a solicitor at Landmark, in a witness statement dated 7 October 2015 gave a different description of the provision of advice from the attendance note that she had prepared and which has subsequently been disclosed. Mr Challenger's evidence was that he had advised Rashid in a cafe with the solicitor present and not at the solicitors' offices. There were therefore, in Mr Foy's submission, four contradictory versions of events.

34. He submitted that it was much more likely that there was an understanding between the claimants and the solicitors about only charging if the claim was successful or only to the extent that costs were recovered. Such an agreement would be a conditional fee agreement. Since it had not been written down, it did not comply with the legislation and so was unenforceable.

35. Mr Foy said that this analysis of what was most likely to have occurred was backed up by the evidence of the claimants. Rashid had said in his witness statement that he compromised the case on the basis of receiving damages and costs. It was clear in Mr Foy's view that Rashid was not going to be left with any costs to pay to his own solicitors. In relation to Aslam, Mr Foy had produced a printout from the solicitor.info website regarding Landmark. On 19 March 2018 a post by "aslam" responded to a previous post saying: "my former solicitors stole over £600K from me and I got this back including all my costs they were the best 5 star service fantastic." Although Aslam denied that this was a post that he had put on the website, Mr Foy asked me to reject that evidence but to accept the reference to recovery of "all my costs" in the web post meant there would be no shortfall payable by him.

Claimant's submissions

36. Mr Power said that although it was clear on 6 October 2015 that Landmark had breached their duty of care to their client by failing to file and serve the Precedent H, there was not necessarily any loss flowing from that event. The claimants could not know whether they were going to be successful in the action and, if they were not,

then there would not have been any order for costs in any event. It was therefore wrong to describe the case as cast-iron on 6 October 2015.

37. Be that as it may, if Landmark had eventually pursued the claimants for their contractual claim for payment of costs, it might well be that the claimants had a right of set-off (assuming the claimants were successful in the proceedings and obtained an order for costs). Mr Power did not accept that the defendants in these proceedings were entitled to the benefit of any such cross-claim or set off which the claimants might have against their solicitors and relied on an extract from Halsburys Laws of England, Vol 11 (2015), paragraph 386 in this respect:

> "386. Meaning of "set-off"
>
> Where A has a claim for a sum of money against B and B has a cross-claim for a sum of money against A such that B is, to the extent of his cross-claim, entitled to be absolved from payment of A's claim, and to plead his cross-claim as a defence to an action by A for the enforcement of his claim, then B is said to have a right of set-off against A to the extent of his cross-claim."

38. The correct analysis, in Mr Power's submission, of the legal position is that the solicitor's primary right to payment for the retainer continues to exist as is the indemnity principle that applies to that right. In other words, the claimants' liability to their solicitors remained and therefore was one to which they could seek reimbursement from the defendants.

39. But where the client has a set-off or counterclaim it was open to the clients to decide which opponent to sue. They do not have to exercise their right to a set-off rather than another course of action and could not be compelled to exercise that right. In this case, if the claimants brought a claim against Landmark in professional negligence, the professional negligence insurers were bound to query whether all alternative routes to gain payment had been tried: here there is already a costs order against the defendants. It cannot be right that the defendants here and the professional negligence insurers in any putative claim could simply point to the other and say that they needed to meet the costs. Hence, in Mr Power's submission, the defendants could take the benefit of any indemnity principle point but not the benefit of any set-off.

Decision

40. The costs sanction imposed by CPR 3.14 is invariably described as a Draconian one. On the face of it, the solicitors have to work for nothing thereafter because the costs are not recoverable from the opponent even if the solicitors' client is successful. In the absence of some exculpatory reason as to why the budget was not filed and served (which would probably found an application for relief from sanctions in any event), it is invariably the case that the failure will have resulted from some form of negligence on the part of the solicitors.

41. Accordingly, all of the reported cases where the CPR 3.14 sanction is in play have stemmed from the party's solicitors' negligence. At first blush, it would be pointless

for the solicitors to render any charges to their clients thereafter for the irrecoverable costs because they would be met with the argument made by the defendants here.

42. It seems to me, however, that this case demonstrates why the matter is not as simple as it would first seem. First, it is clear from the advice given to the clients by Mr Challenger and the solicitors that the possibility of an indemnity basis order was very much a live one in their minds. Such an order would sweep away the difficulties of Master Leslie's order. Indeed, that view was held sufficiently strongly for a specific application to be made to May J following the trial for such an order. Whilst this was unsuccessful, it does not seem to me to have been a forlorn application and the prospect of costs recovery as a result was always live.

43. Secondly, Mr Power makes the point that the solicitors might not accept that they were no longer entitled to any costs and so pursue the claimants for them. Such arguments in defence as the clients might run would be dealt with by the solicitors' professional indemnity insurers. Whilst a breach of duty seems straightforward, the question of causation of the costs as well as their quantification could easily be matters of dispute as to whether they were really caused by the original budgeting problem. In this case there was a further budget and some Part 36 offers which might have been accepted, but were not, which would appear to provide fertile ground for causation issues.

44. Thirdly, the relationship which solicitors build up with their clients during a case should not be underestimated, in my view. This is particularly so where the solicitors have been instructed in previous matters as well. A single negligent act would not necessarily destroy the claimants' confidence, to use Mr Challenger's phrase, and the wish to continue using known solicitors is an entirely understandable one. This wish would come at a price, at least in the short term, because the solicitors were unlikely to be able to work for nothing whilst the case progressed.

45. Fourthly, Rashid said that he did not need counsel to advise him that he could go to another firm of solicitors. I think it was equally clear to him that a claim could be brought against Landmark in respect of costs if required. Mr Challenger's evidence was that Rashid asked him on a number of occasions about bringing a claim against Landmark. Although Mr Challenger felt unable to provide any further advice, it seems to me that questioning of him confirms that the possibility of suing Landmark remained in the claimants' viewpoint notwithstanding them continuing to instruct Landmark to bring the claim. Pursuing Landmark was not a matter that had to be decided there and then. Indeed this is Mr Challenger's evidence (see paragraph 9(4) of his witness statement set out at paragraph 13 of this judgment.)

46. In my judgment, these points all go to show that it would not be surprising if the claimants did not immediately consider that they must move to another firm of solicitors to conduct their claims. That is the case even without Aslam's belief that he would have to pay a lot more in the way of costs if he moved from Landmark. Even if he were able to recover them from his solicitors or their insurers in due course, it would certainly be the case that he would have to pay out more costs in the short term if he had changed horses.

47. This then leads to the question of whether or not the claimants are required to use the set-off that they may have against their solicitors rather than to claim the costs against

the defendants in these proceedings. The claimants would have to bring essentially an insurance claim against Landmark and their professional negligence insurers. There is no requirement for a party to claim upon his own insurance rather than to bring a claim against a tortfeasor or other civil wrongdoer. It seems to me that the same point must apply to third party insurance as much as to first party insurance. As I have outlined above, the claim against the solicitors might run into causation difficulties in any event.

48. Despite Mr Foy's eloquent submissions, there is nothing in this case which directly suggests that the claimants and their solicitors entered into any form of quasi CFA to reflect the fact that budgeted costs, save for court fees, would not be recoverable from the defendants if the claimants were successful. I appreciate that the defendants were never likely to have any first-hand evidence of this occurring, but it does not seem to me that such an interpretation can be placed on the documentation that has been produced nor the evidence of the witnesses closely cross-examined by the defendants' leading counsel. In my judgment, the evidence supports the claimants having played a long game by continuing with their solicitors for the time being in the knowledge that they had a claim against them if they needed to bring it at a later date.

Strand 2 - Subsequent events and potential conflicts of interest

49. The points of dispute, as set out earlier, go on to say:

> "If the Claimant[s] did purport to agree to pay the solicitors in any event, there was a breach of the SRA Code of Conduct as there is a conflict between the Claimants and their solicitors (an "own interest conflict") and the Code says, "you can never act where there is a conflict or a significant risk of conflict between you and your client". The rule is mandatory. The result is that the solicitors cannot enforce their costs, after 6 October 2015, against the Claimants and there is no obligation upon the Defendants to pay such costs. The Defendants will rely upon Mohammed v Alaga & Co [1999] EWCA Civ 3037 and Hollins v Russell [2003] 1 WLR 2487.
>
> There are numerous aspects to the conflict, Landmark Legal LLP could not properly and lawfully continue to act for the Claimants after 6th October 2015.
>
> The most obvious conflict is that the solicitors would be paid if the case was lost but would only recover 50% from the defendants if it was won and would not be able to recover the balance of the costs from the Claimants because of their negligence.
>
> It was in the solicitors' interests to keep control of the costs, to limit their losses and expenditure and to arrange the costs so that the negligence claim against them was minimised. Had the Claimants gone to other solicitors there would not have been the same pressure to keep costs to a minimum because costs unrecovered from the Defendants would be recovered in the

> solicitors' negligence action. It was therefore cheaper and more convenient for the solicitors to have control over the costs than to allow another firm to incur costs and obtain them from the negligent solicitors. That was not in the Claimant's best interests.
>
> It was also in the solicitors' interests not to accept any offer outside the Part 36 offer made by the Claimants. This led them to make a global settlement offer of £1.2 million for damages and costs which was far in excess of the amount that the Claimants could expect to receive by way of damages and 50% of their costs. The Claimants were prepared to accept by way of damages a total of £629,563, being a total of the Claimants' Part 36 offers which had not been and never were withdrawn. It was in the solicitors' interests to make a global offer of settlement which gave them a large amount of costs and it was in the Claimant's interests to get a settlement which gave them a reasonable sum in damages and the costs amount did not really concern them as they would recover their costs from their solicitors. Making such a large settlement offer which was most unlikely to be accepted was not in the Claimant's interests, but must have been designed to provide more costs than the solicitors would have obtained on an assessment at that time.
>
> Furthermore, on 25 November 2016 the Defendants in the Claimant Rashid's case made an offer in excess of what the Claimant ultimately accepted. They offered £127,888 and costs to be paid on a standard basis. The offer was not accepted but the claimant eventually settled for £108,923. The clear inference is that the higher offer was not accepted because it provided only for costs on the standard basis whereas if the Claimants Part 36 offer, as it stood then, for a lower sum was beaten and judgment entered the Claimants solicitors would get indemnity costs, so avoiding the impact of CPR 3.18. In the event the Claimants did not recover indemnity costs, although they tried to do so because, ultimately, there were additional items to the acceptance of the Claimants Part 36 offer."

50. The point of dispute continues in the same vein regarding the failure to accept the Part 36 offer in an attempt, the defendants say, to obtain a preferential order in respect of costs. The revised point of dispute concludes by suggesting that the conflict of interest continues into the detailed assessment proceedings in the following terms:

> "The lesser the sum recovered under CPR 38.23 (50% of the assessed costs) the less the value of the negligence claim. It would be in the Claimants' best interests for the retainer to be held invalid and unenforceable because in those circumstances they would not have to pay 50% of the assessed costs to their solicitors."

51. Chapter 3 of the SRA Code of Conduct (version 19 of which was in force at the relevant time) is entirely concerned with conflicts of interests. The proper handling of conflict of interests is described as being a critical public protection consequently it is important to have in place systems to enable the solicitor to identify and deal with potential conflicts. The Code says:

> "**Conflicts** of **interests** can arise between:
>
> you and current *clients* ("own interest conflict"); and
>
> two or more current *clients* ("*client* conflict").
>
> You can never act where there is a **conflict**, or a significant risk of **conflict**, between you and your *client*.
>
> If there is a **conflict**, or a significant risk of a **conflict**, between two or more current *clients*, you must not act for all or both of them unless the matter falls within the scope of the limited exceptions set out at outcomes 3.6 or 3.7. In deciding whether to act in these limited circumstances, the overriding consideration will be the best **interests** of each of the *clients* concerned and, in particular, whether the benefits to the *clients* of you acting for all or both of the *clients* outweigh the risks."

52. The outcome of following this principle is described in the Code at O(3.4) as being a prohibition on acting in conflict situations so that:

> "you do not act if there is a *client* **conflict**, or a significant risk of a *client* **conflict**, unless the circumstances set out in Outcomes 3.6 or 3.7 apply…"

Outcome 3.6 deals with the situation where the clients have a substantially common interest in relation to a matter. Outcome 3.7 is concerned with clients who are competing for the same objective. In either case the relevant issues need to be explained to the clients and they need to give the solicitor written confirmation that they consent to the solicitor continuing to act.

53. Mr Foy cross-examined all three witnesses at some length over matters relating to the conflict of interest point. Aslam said that he had been advised that he could go elsewhere for legal representation by Mr Challenger. He had not been advised that he had to instruct other solicitors. He did not remember ever being asked to give instructions to offer £1.2 million to settle the case including costs. He described it as being the first time that he had heard about it.

54. Rashid said that he did not need to be told that there was a vested interest in his legal representatives in the same way that he did not need to be told that he could take independent advice. He rejected the suggestion that there had been any agreement that the claimants did not have to pay their solicitors' costs. Similarly, he rejected the idea that Landmark might prefer the case to lose. As far as the £1.2m offer was concerned, he thought this may have happened at the mediation.

55. The defendants' offer of £127,888 with no costs was not an attractive one. Furthermore, the offer was only in relation to him and would have given nothing to Aslam. Rashid said that he was not prepared to leave Aslam alone in the litigation. When asked about the offers, Rashid said that the defendants' offer was not acceptable to him because it did not set out the truth. He was prepared to take the risk that he would lose and have to pay tens if not hundreds of thousands of pounds. When asked whether he saw the £1.2m offer, he said yes it would have been emailed to him and he would have digested it when he received it.

56. As I have recorded above, both Aslam and Rashid said in evidence that the litigation was not just about money but was also about reputation. As their evidence progressed the impression given was that it was more about reputation than the money. When Mr Foy put to Rashid that rejection of the defendants' offer made no sense, he squarely relied upon the fact that there was more to the litigation than simply money.

57. Whilst I accept that they may well have been some reputational issues in the local community about the veracity of the claimants' claim that monies had been misappropriated by the defendants, I do not accept that this was the main driver of the proceedings. There is no mention whatsoever in the witness statements as to this motivation. It seems to me to be something which gained life in the witness box but was not present to any meaningful degree when the witnesses considered their evidence in calmer surroundings.

58. Mr Challenger had begun his evidence by seeking to deal with the conversation between himself and the first defendant's son in respect of the offer of £1.2 million. He said that he did not recall the claimants making a formal offer of that sum but did recall a telephone conversation with Mr Asghar's son shortly after there had been a settlement discussion. Mr Asghar junior rang to see what amount the claimants might accept in costs and damages. Mr Challenger did not have his solicitor and client with him since he was in his chambers and was without formal instructions. He said that he gave a figure of £1.2 million for damages and costs but in giving this figure did not do any complex calculations. It was a figure that he would be prepared to recommend or advise to consider carefully. Mr Asghar's son then hung up the phone.

59. When cross-examined about this conversation, Mr Challenger was taken to an email which Mr Challenger had sent to the mediator (and copied to the defendants) on the evening of the mediation to record the telephone conversation between himself and Mr Asghar's son. Mr Foy put to Mr Challenger that phrases such as "I went to a little trouble to explain how the figure was calculated and apportioned" showed there was more detail in the calculation than suggested by a "top of the head" figure as Mr Challenger had originally recollected. Mr Challenger accepted that to be so.

60. Mr Challenger was then asked about Rashid's offer to accept £108,923 plus standard basis costs as well as the defendants' offer of £127,888 which was rejected. Mr Challenger accepted that the headline figure was better than the sum ultimately ordered by May J. He did not accept that the defendants' offer was better than Rashid's offer – or at least that it was not clear as to which was the better offer. He referred to the length of time between the two offers and the costs incurred in the meantime. He also said that various matters were left open in the defendants' offer and it was not appropriate to make any assumptions about the offer the defendants

appeared to be making. He had discussed offers with Aslam when he was fit to do so and had many discussions with Rashid about offers.

61. Mr Challenger said that he understood the defendant's theory that the claimants' solicitors would be better off to lose the case than to win it because they would receive their costs from the claimants for the loss but would practically speaking only receive 50% of some of the costs if they succeeded and no costs at all in respect of some of the others. Whilst he understood the theory, he considered it to be fanciful. To support this comment, he referred to the instruction of leading counsel three or so months from trial. It was not something the solicitors would do if they were trying to lose the case or to save expense. On the contrary, they were doing their utmost to win the case for their clients. Mr Challenger had not considered there to have been any potential conflicts of interest and consequently had not advised the claimants at any time that there were any potential conflicts.

Defendants' submissions

62. Mr Foy referred to the SRA guidance for the fact that where there was an own interest conflict, or a significant risk of one, there was a mandatory prohibition against acting for the client: there was no value judgment to be made. In Mr Foy's submission such a conflict clearly emerged during the evidence. This was most starkly illustrated when Rashid said that he refused to accept an offer made by the defendant to avoid letting Aslam down. There should have been independent advice in writing on the issues involved. Given the mandatory prohibition, the solicitors could not enforce their claim for costs against their clients by virtue of the indemnity principle and therefore the claimants could not seek their costs from the defendants' (or indeed had no need to do so). That should be the end of the case.

63. Mr Power had compared this case with the well-known case of Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537 where the first publicised disallowance of budgeted fees other than court fees had taken place. In that case, the claimant's solicitors had continued to act until the end of proceedings. Mr Foy said the difference between the two cases is that in Mitchell the claimant's solicitors entered into a CFA with their client. Consequently, if they won, the claimant's solicitors would recover some costs regarding incurred fees but would not get any costs if they lost. If, here, Landmark had entered into a CFA, they too could have removed the conflict of interest, but they had not done so.

64. Mr Foy then went through the matters that are raised in the revised points of dispute which are set out at paragraph [49] above. The effect of the conflict of interest was that it was better for the solicitors to lose the case than to win it. They would be motivated to keep control of the litigation and do as little as possible in order to minimise the costs involved in any insurance claim. When it came to negotiations the solicitors would only be interested in obliging the defence to accept a Part 36 offer so that indemnity costs could be sought thereby avoiding the costs recovery problems. The alternative approach by the claimants' solicitors was to claim a sum that was far more than the claimants could possibly achieve given the level of damages i.e. the offer to accept £1.2 million. Whilst Mr Challenger had said that sum was an "off-the-cuff" figure, the email he had been taken to showed that the figure had been discussed with the mediator in some detail. My Foy suggested that Mr Challenger had in fact had instructions to make the offer from the solicitor even though both claimants said

they did not know anything about it. The proposal was in the solicitors' interests not the clients.

65. In Mr Foy's submission, Mr Challenger accepted that the £127,888 offer was a more advantageous offer than the one made by the claimants. Since it was not made under Part 36, it did not suit the solicitors because they needed a Part 36 offer to found their argument regarding indemnity basis costs.

66. It was to be expected within this obvious conflict of interest situation that there would be written advice given by the solicitors, or oral advice given which was recorded in writing, regarding the nature of the cast-iron case against itself. But there was nothing in Mr Challenger's written advice and nothing in the solicitors' communications. If there was no oral CFA, it can only have been the case that the conflict was never really considered by either Mr Challenger or the solicitors. The lack of consideration resulted in costs which are entirely tainted by the own interest conflict. They should not have been incurred because the solicitors should have ceased to act straightaway. Having not done so, the costs are not enforceable against the claimants and so cannot be sought from the defendants either.

Claimants' submissions

67. Mr Power's submissions, in summary, were that there was no conflict of interest between Landmark and the claimants; nor that they were in breach of the SRA Code of Conduct; and that in any event following the decision in Patel v Mirza [2017] AC 467, a retainer which was found to be in breach of the Code of Conduct was not necessarily illegal or unenforceable anyway.

68. Mr Power submitted that if Landmark pursued the case in order to beat the claimants' own Part 36 offers so as to improve the costs recovery, then there was no conflict of interest between themselves and the claimants. Their interests were aligned. Seeking to beat a Part 36 offer was a perfectly proper goal to achieve. To the extent that this course of action involved "maintenance" because there was a direct financial interest to the solicitor in driving the case forward, (a further contention of the defendants), this was diametrically opposed to the other argument being run by the defendants that the solicitors were seeking to lose the case so as to minimise the costs incurred.

69. The Part 36 offer made by the claimants of £108,923 was sufficiently close to the defendant's non Part 36 offer of £127,888 for the extra benefits of the Part 36 offer potentially to outweigh the non Part 36 offer irrespective of whether the claimants were subject to a restriction regarding the recoverability of some of the costs.

70. Mr Power, like Mr Challenger, described the idea that the solicitors were seeking to lose the case as being fanciful. He pointed out that in order to do so the solicitors would have to breach a number of other principles in the SRA Code of Conduct, such as acting with integrity, in order to achieve this.

71. Based upon the defendants' argument that a solicitor was immediately in an own interest conflict as soon as his client suffered a CPR3.14 sanction, the claimant's solicitors in Mitchell ought to have ceased to act straightaway. But even the defendants accepted that offering a CFA may be sufficient to circumvent the conflict.

In fact, none of the judges in the Court of Appeal in Mitchell had criticised Atkins Thomson, the claimant's solicitors, for continuing to act for the claimant.

72. If Landmark had ceased to act for the claimants, they (the claimants) would have had to spend a considerable sum of money on new solicitors reading into the case. Whilst they may have ultimately been able to recover that money from Landmark or its insurers, that would not prevent the initial outlay having to be paid out.

73. Mr Power went on to say that not every dispute between a solicitor and his client created an own interest conflict. For example, there could be a dispute about the size of an interim bill that had been rendered. That would not create a situation where the solicitors must cease to act. In fact, what was required was a value judgment about the client's best interests and it was a perfectly proper course of action for the solicitors to conclude that the client's best interests would be served by continuing to be represented by them in any particular circumstance. It could not be right that the Code of Conduct necessarily required a solicitor, following a CPR 3.14 sanction, to have to leave the clients to their own devices. On the basis that the Code of Conduct did not compel Landmark to cease acting for the claimants, the retainer between them could not be tainted by any illegality.

Decision

74. I have already concluded in the first part of this judgment that it was perfectly reasonable for the claimants to take the view that they could continue to instruct the solicitors on the basis that if they suffered any losses as a result of the solicitors' breach of duty, they would be able to bring such a claim at the end of the case when the losses had been quantified.

75. It is clear from the evidence that the claimants were advised that they could take independent legal advice on their position. Whilst Mr Foy suggested that this was insufficient and that they ought to have been required in some way to take independent legal advice and indeed move to another firm of solicitors, I think this puts the duty on the claimants' legal team at far too high a level. There may be any number of perfectly legitimate reasons why a client wishes to continue with solicitors that he has instructed. Once the solicitor has advised the client that there is a potential claim against him on which he may wish to take separate advice, then his duty in my view is discharged.

76. I accept Mr Power's submission that it is perfectly possible for a solicitor to consider that his client's best interests may be served by the solicitors continuing to act for him notwithstanding a discrete mistake.

77. The fact that it would appear to be Mr Challenger who gave that advice to the claimants, rather than Landmark themselves, does not seem to me to make any difference. The contents of Mr Challenger's written advice was available to all and his oral advice to Rashid following the hearing was, as I understand it, made in the presence of a representative of Landmark. If the solicitors thought that some other advice should have been given, then they had the opportunity to make that view known. It seems to me to be clear that the solicitors accepted they had breached their duty to their client and so were potentially liable for a claim for losses depending upon how the case panned out.

78. Having advised the client that they might wish to obtain independent legal advice, what were the solicitors then expected to do? As Mr Power rather wryly observed, one way to minimise a potential legal claim, in the manner suggested by the defendants, was to leave the claimants without legal representation since that was more likely than anything else to prompt the claim to fail.

79. Instead, the solicitors pursued the claim under the strategy that had been worked out previously. The solicitors, perhaps optimistically, held the belief that an indemnity basis order might be achievable and which would prove beneficial to the recovery of costs. But it is clear that the general pursuit of the claim did not change as a result of Master Leslie's Order. The only conduct to which the defendants refer in terms of the solicitors either seeking to maintain the case or to run it into the ground appears to relate to the offers made and rejected.

80. The offer of £1.2 million was undoubtedly an optimistic proposal from the claimants. But that is hardly an unusual state of affairs. The email record of Mr Challenger's conversation about the offer indicated that he produced a justification of the figures which he took some trouble to explain to Mr Asghar's son. It is clear from Mr Challenger's evidence that he no longer recalls that justification and there is no evidence from the defendants as to what was said.

81. Nevertheless, I accept that there was some justification of the figures put forward and as such I do not consider that a great deal of store can be put by a simple analysis of the offer being made through deducting the damages put forward in other offers and assuming the remainder relates to costs as Mr Foy submits.

82. More problematically for the defendants, if, as Mr Foy suggested, there was no prospect of the defendants accepting that offer, then it is hard to see that it could possibly be of any benefit to the solicitors in the aims imputed to them by the defendants. In the absence of any settlement, the seemingly generous amount of costs contained within the offer would not be recovered and the litigation would continue. If the putative offer had been acceptable to the defendants, Mr Challenger indicated that it was one he would recommend and there is nothing to suggest that the claimants would have been short changed in their damages if that had occurred. Therefore, it does not seem to me that the defendants are able to make out any conflict between the claimants and their solicitors as a result of making that offer, even if neither of the claimants now recollected it to any degree.

83. The rejection by Rashid of the defendants' offer of £127,888 notwithstanding his own offer to accept £108,923 is rather more complicated than it first appears.

84. Rashid's Part 36 offer of £108,923 was made by letter dated 20 November 2015. The defendants made an offer in response in December 2015 which, although described as without prejudice to costs, was not made in accordance with Part 36 since it sought to limit the costs recoverable in addition to the damages. This offer played no part in the hearing before me.

85. Almost exactly a year after Rashid's offer, the defendants made two offers to settle his claim. The first, dated 22 November 2016, was described as being without prejudice to costs and offered £101,000 together with standard basis costs, subject to reservations regarding the costs of an appeal; any reduction to costs regarding

conduct; and any costs reserved to that point. The offer was open for acceptance for 7 days, i.e. until 4pm on 29 November 2016.

86. On 25 November 2016, the defendants set out a further offer which again had to be accepted by 4pm on 29 November 2016 or it would be automatically withdrawn. This offer was for £127,888 rather than £101,000 but otherwise repeated the terms of the earlier offer.

87. It is this last offer that Mr Foy put to both Rashid and Colin Challenger when querying why such an offer was rejected given that it was for a higher sum than Rashid's own offer from November 2015.

88. Rashid described the offer as being for £127,888 and no costs. He also described it as being incapable of acceptance because it did not set out the truth. The first of these comments does not appear to be an accurate description since some costs were offered and the defendants simply reserved their position on the others. The second comment has more force than would normally be the case because the offer was set out in several numbered paragraphs. As such it was not simply a monetary offer which had nothing to do with setting out any other issues. Nevertheless, Rashid's comment is difficult to follow and it seemed to come from his view that every action could be explained by the fact that the case was about reputation at least as much as about money.

89. Mr Challenger's recollection was much more accurate. He referred to the length of time between Rashid and the defendants' offers as well as the fact that the defendants' offers left certain matters open. This evidence is borne out by the offer documents. His conclusion that it was difficult to be sure as to what the offers amounted to and whether they were better that Rashid's offer is also borne out, in my view, by other documents lodged for the hearing which were not referred to by counsel on either side. They were exhibited to the first defendant's witness statement and consist of email exchanges between leading counsel for both sides in between the defendants' offers and the beginning of the trial in December 2016. The emails attach various draft Tomlin orders where the parties seek to impose their own wording as to various costs provisions in particular. They demonstrate in my view the wrangling left to be done as a result of the open ended nature of the defendants' offers. They are important because there is no suggestion that the claimants' leading counsel was affected in any way by the alleged conflicts of interest and would undoubtedly have been advising the claimants upon the various proposals put forward. It was clearly not the damages that were in issue but, to my reading, the efforts of the defendants to limit the extent of the costs that would be payable. It is interesting to note that the first draft of the Tomlin order produced by Landmark on 29 November 2016 proposes a simple order for standard basis costs. That does not fit with the defendants' argument that Landmark were holding out for indemnity basis costs to the detriment of the claimants.

90. Given Master Leslie's order and the workings of Part 36, it seems to me to be no mean feat to establish which of the offers made by the parties may be more beneficial than the other. That is so, even if the extra complication of the possibility of the trial judge making an indemnity basis order is ignored. When compared to the order ultimately made by May J following the acceptance of Rashid's offer by the

defendants, it is not clear to me whether the defendants' own offer was ultimately beaten or not.

91. In the circumstances in this case, I do not see that the rejection of the defendants' offers made very shortly before trial was unreasonable, let alone was it demonstrative of the existence of any conflict of interest. Nor do I see any difficulty in the concept of one claimant deciding not to accept an offer because it would cause difficulty for the other claimant if he were to do so. It shows no conflict of interest in my view.

92. This leads me to what I think is the nub of this preliminary challenge. The defendants have taken the view that if the claimants can avoid paying any of their solicitors' costs then they should do so. It is not simply a suggestion that the defendants should benefit from the claimants' solicitors supposedly falling foul of the SRA Code of Conduct. But it is the expectation that the claimants will positively act in a manner detrimental to their solicitors simply in order to avoid having to meet their ostensible contractual liabilities.

93. In the case of Birmingham City Council v Forde [2009] EWHC 12 (QB) the appellant defendant argued that the claimant had been placed under undue influence by her solicitors to enter into a second CFA in case their first CFA was found to be unenforceable. If there had not been that undue influence, the defendant argued, the claimant could have relied upon the first CFA being unenforceable and have no liability to meet her solicitors' costs. At paragraph 98 Christopher Clarke J (as he then was) set out the defendant's argument as follows:

> "CFA 2 was, Miss Bretherton submits, manifestly to Miss Forde's disadvantage because of the success fee and because it imposed a retrospective liability when, if CFA 1 was invalid, she was not responsible for [her solicitors'] fees under it. The making of the agreement calls for an explanation and the presumption of undue influence applies. In the absence of evidence that Miss Forde received independent advice on CFA 2 it must be treated as invalid. The fact that [the solicitors] told Miss Forde that she had the right to seek independent advice cannot save it. The fact that it did so only served to increase the trust that she reposed in them without providing the advice necessary to rebut the presumption."

94. The judge then cites the dictum of Lord Nicholls in Royal Bank of Scotland Plc v Ettridge (No.2) [2002] 2 AC 773 where he said that the evidence required to discharge the burden of proof:

> "…depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship and all the circumstances of the case."

95. At paragraph 106 of the judgment Christopher Clarke J deals with the defendant's argument in the following way:

> "It is apparent that Miss Forde was prepared to assist her solicitors recover their fees despite the challenge made by the Council to the validity of CFA 1. A willingness to do so appears to me to be readily accounted for "by the ordinary motives of ordinary persons" if they were in the relationship that Miss Forde had with [her solicitors] and in the circumstances which she was asked to sign CFA 2. [Her solicitors] had acted for Miss Forde, obtained a s 82 order, and secured an offer of £4,500. In those circumstances it would be entirely understandable for her not to seek to rely on the unattractive contention that [her solicitors] should get nothing at all for what they had done – a contention that she would not have the resources to mount and the advancement of which would probably have to await at least the resolution of [another case involving the defendant]. It was also understandable that she would not wish to be placed in a position where, if her solicitors had no valid retainer, they had no subsisting obligation to act for her. It made sense for her to enter into an arrangement which would ensure that there was a valid retainer under which [her solicitors] would be bound to continue acting and pursuant to which it would be entitled to be paid. Many people would regard it as unacceptable that [the solicitors] should get nothing for their work. The ordinary motives of ordinary persons do not exclude doing the decent thing, even if some persons would not be minded to do so."

96. Mr Foy referred to the so-called costs wars where the validity of CFAs – in particular their compliance with primary and secondary legislation – was challenged on many occasions. Where those agreements fell short, the solicitors were unable to recover their costs from the clients and consequently those clients had no claim for costs against their opponents. The case of Forde comes from that time.

97. The circumstances of this case are not entirely on all fours with Forde, but the desire of the clients to use their solicitors, notwithstanding retainer issues, runs through both cases. The fact that in this case the solicitors made an error did not detract from the confidence placed in them by the claimants based on the evidence before me. Simply because the claimants might be able to bring a claim against their solicitors professional insurers does not mean they have to do so, as indicated above.

98. When CFAs were first used, solicitors and then barristers all decried the use of such contingent arrangements because of the clear conflicts of interest that would arise in many and varied situations. Nevertheless, such agreements came into being and legal professionals had to deal with the professional difficulties as and when they arose. That solicitors have been able to do so satisfactorily may be demonstrated by the fact that there is only one reference to conditional fee agreements in the SRA Code of Conduct that was in force at the time of this case. Under O(1.6), solicitors were required only to enter into fee agreements that were legal and which the solicitor considered to be suitable for the client's needs taking into account the client's best interests. Indicative behaviour 1.17 said that where a solicitor was acting for a client under a fee arrangement governed by statute, "such as a conditional fee agreement",

behaviour achieving the required outcome involved providing the client with all relevant information relating to that arrangement. This very limited reference in the Code of Conduct suggests that the ethical problems in running CFAs had effectively been resolved by the time of this case.

99. In my judgment, the solicitors here have been placed in a situation which is no more ethically difficult than the running of a CFA with a client. The extent of the recoverability of costs from the opponent was not certain. An indemnity basis order would achieve a good recovery and a standard basis order would achieve a partial recovery. It was in both the solicitors' and the claimants' interests to seek the best recovery of damages possible.

100. On the other hand, a loss for the client would not necessarily have enabled the solicitors to recover all of their costs. Given the sums involved there must always have been a possibility that the claimants would not have been good for the money if they had not achieved the success at trial. Whilst Rashid said that the costs involved would not bankrupt him, it is noticeable that neither of the claimants have met all of their outstanding solicitors' fees. It is in my view too simplistic to say that the solicitors would be paid if their clients lost but would only be paid to an extent if the clients won.

101. Once the clients had decided to remain with the solicitors, there is nothing in my view to indicate that the solicitors did not pursue this case as it would have been pursued in any event. The defendants point only to the offers that have been made in terms of conduct. As I have set out above, it does not seem to me that either the optimistic £1.2 million offer or the rejection by Rashid of the defendants' £127,888 offers demonstrate a conflict, whether actual or potential, between the solicitors and their clients.

102. Consequently, in my judgment the theoretical concerns regarding conflicts of interest, whether actual or potential, raised by the defendants have not been demonstrated in reality and as such there is nothing to taint the validity of the claimants' retainers with their solicitors.

Unenforceability and illegality

103. Both counsel referred me to a number of authorities on the question of whether any breach of the SRA Code of Conduct would cause the retainer to be unenforceable or illegal. Given the decision that I have made, I have not found it necessary to come to any conclusions on the matters raised by counsel. I have decided to leave the field clear for a High Court Judge if this matter is taken on an appeal. Consideration of this issue would only occur if my conclusions were overturned and at which point any views expressed on this issue by me would be valueless. It would be a much better course of action in any event for an authoritative decision to be produced regarding whether the Supreme Court decision in Patel v Mirza does indeed change the position from that set out in many costs cases in the Court of Appeal and below, as contended for by the claimants.

Postscript

104. At the costs hearing before her, May J encouraged the parties to settle the question of costs without reaching a hearing before a costs judge given the expense that would be involved. Clearly that exhortation did not bear fruit. Some of the difficulties in assessing this bill began to emerge at the preliminary issues hearing before me on 18 January 2018. In addition to the retainer issues dealt with in this judgement, it became clear that parts of the bill had claimed costs which on the face of it would appear only to have been recoverable at 50% of the amount claimed. This was so, either by reason of the effect of CPR 36.23 or by the fact that only one of the claimants was entitled to the costs rather than both. I gave directions to seek to improve the understanding of the paying parties and the court of this particular issue, but it is not one with which the court has yet been troubled in earnest. Before getting to the nuts and bolts of the detailed assessment, I simply reiterate to the parties May J's exhortation regarding settlement in this case if that is possible.