Case Nos: 1705239 and 1803877

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Date: 13 January 2020

Before :

MASTER BROWN

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Between :

KARIS DEVELOPMENTS LIMITED **Claimant**

- and –

EMW LAW LLP **Defendant**

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Mr. Mallalieu, instructed by **Kyriakides & Braier Solicitors**, for the Claimant
Mr. Bacon QC instructed by and for the Defendant

Hearing dates: 9-12 July 2019

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Approved Judgment in public

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 BROWN

Master Brown:

1. I am required to determine various preliminary issues which arise on two claims for detailed assessment on various bills delivered by the Defendant, a firm of solicitors, to the Claimant. The hearing in this matter took place over three days from 10 to 12 July 2019. The oral evidence was not completed until substantially after 4.30 pm on 12 July 2019 and it was

not possible for counsel to complete their submissions that day, so the matter had to be adjourned for submissions. There were difficulties arranging a hearing for such submissions soon after the hearing; in the event the parties agreed that transcripts of the evidence should be obtained and that there should be submissions in writing only. The last of those written submissions was served on 2 October 2019. I am grateful to both counsel for their comprehensive submissions which I have considered in detail.

2. The Claimant is a company involved in property development. From about April 2016 the company instructed the Defendant in respect of a number of matters including a claim against Lewes District Council ('LDC') arising out of agreements concerning the development of land, and a related claim in professional negligence against the Claimant's former solicitors Howard Kennedy ('HK').

3. After termination of the retainer with the Defendant the Claimant instructed another firm of solicitors to pursue the claims against LDC and HK. The claim against LDC, which had been issued in the Chancery Division was discontinued pursuant to a settlement agreement dated 11 March 2019 on the basis of no order as to costs. Whilst it is understood that no claim has yet been issued against HK there remains a real prospect of such a claim being pursued. The evidence before me related to privileged matters arising in the claim against LDC and the claim against HK. As I had understood it and was confirmed on the first day of the day of the hearing, there had been no general waiver of privilege in the proceedings. It was not practical for the hearing to be conducted part in public and in part in private; accordingly, I decided that the hearing should take place in private. For the same reasons, parts of this judgment are given in private and have been removed from the judgment to be given in Public (where parts have removed this has been indicated by highlighting).

4. The bills subject to the claims for detailed assessment are:

(1) Bill no. 4004811 in the sum of £50,000 (plus VAT) dated 21st February 2017 ('the £50,000 bill')
(2) Bill no. 4005064A headed 'Re Lewes District Council' dated 24 May 2018 in the sum of £169,126.13 inclusive of VAT ('the LDC bill')
(3) Bill no 4005055a headed 'Re The Ecology Consultancy' dated 24 May 2018 in the sum of £6,270 inclusive of VAT 'the Ecology Consultancy bill')
(4) Bill no 4005056a headed 'Re 60 Middle Street Brighton' and dated 24 May 2018 in the sum of £3,420 inclusive of VAT ('the Middle Street bill')
(5) Bill no 4005057a headed 'Re Claim by Conran & Partners' dated 24 May 2018 in the sum of £2,910 inclusive of VAT (the Conran bill')
(6) Bill number 4005382 stating on its face 'Re RBS' dated 25 May 2018 in the sum of £17,100 inclusive of VAT ('the RBS bill')

The issues

5. The parties entered into a conditional fee agreement ('CFA') dated 21 February 2017 to fund the pursuit of claims against LDC and HK. Prior to entering in the CFA, the Claimant says, as a condition for entry into the CFA the Defendant required payment of a sum £50,000 (represented by the £50,000 bill), which sum the Claimant agreed to pay and did pay.

6. The first issue, as it has evolved, is as to whether the sum of £50,000 was, as the Defendant says, strictly limited to costs for work in the claim against LDC up to 25 November 2016 (the costs of the work thereafter being subject to the CFA) or whether the payment of this sum was, as the Claimant says, to 'clear the decks' in respect of all of the then outstanding fees on all matters for which the Defendant were acting for the Claimant, including a potential claim against Royal Bank of Scotland Plc ('RBS'), two disputes concerning claims brought variously by businesses called the Ecology Consultancy and Conran & Partners, and a property transaction relating to 60 Middle Street, Brighton. The claims by the Ecology Consultancy and the Conran & Partners arose out of the agreements with LDC (both organisations contended that liability for their fees for the work done on the project could be passed under the agreements to the Claimant).

7. The Defendant says that the agreement in respect of the sum of £50,000 covered costs incurred in respect of the LDC matter up to 25 November 2016 only and preserved their right to bill separately for work on the LDC matter from 25 November 2016 and on the other matters referred to above. If the Claimant were right, the bills at (3) to (6) above are to be assessed at nil and to the extent that any sum should be payable pursuant to the CFA for the work up to the date of the agreement to pay £50,000 they are to be treated as compromised by the payment of £50,000.

8. If I were to accept that the Defendant's contention on the first issue the second issue arising is as to whether any sums can properly be charged by the Defendant in the RBS bill. The Claimant alleges there was a conflict of interest which ought to have prevented the Defendant acting for the Claimant and by reason of fiduciary duties arising, or terms to be implied in the contract between parties, the costs should be assessed at nil. The issue, as it has been raised in the Statements of Case, for me to determine is whether there was any such conflict of interest.

9. In the (further) alternative to the first issue, is the third issue which is (as it had developed) whether the £50,000 bill was a sum agreed by way of compromise in respect of outstanding fees or whether it was an invoice seeking payment for all the WIP (work in progress) on the LDC case up to 25 November 2016. If the latter, there is an issue as to whether it was a valid statute bill; and if so, whether there are special circumstances justifying an assessment of this bill (pursuant to section 70 of the Solicitors Act 1974). As I understand the Claimant's case on this point, the issue only arises if I find against the Claimant on the first issue above.

10. The fourth issue, as initially set out in a Directions Order made on 15 August 2018 is as to whether the CFA *was "wrongfully terminated".* The Defendant contends that pursuant to the terms of the CFA it is entitled to payment of its fees as the CFA was terminated by them under provisions of the contract which require the Claimant to pay their fees.

11. The termination provisions in the CFA include the following:

> *14.1 The Client [Claimant] can end this agreement in writing at any time. Unless done so on the written advice of EML* [the Defendant], *or pursuant to clause 14.2 below, if the Client does not continue with either or both the Claims, the Client will become liable for, and must pay, EML's Fees at the Normal Rates and all Disbursements for the work done up to the termination date in relation to the Claim (s) which the Client does not continue. If the Client continues with either or both of the Claims after*

termination of EML engagement and wins either of them, the Client will also have to pay the Success Fee and the Normal fees for any work undertaken by [Defendant] *and Counsel (if Counsel is working under a CFA) plus VAT as well as any other Disbursements*

14.2 EMW can end this agreement if:

(a) the Client rejects EMW's reasonable advice or counsel's reasonable advice on any matter relevant to the Claims;

...

(b) EMW believes on reasonable grounds that most Claims do not have reasonable prospects of success. In this event, the Client will only have to pay Disbursements and VAT.

In the case of 14.2(a) ... above, the Client will have to pay EMW's Fees, at the normal rates for the work done to the termination date and Disbursements together with VAT, if applicable. If the Client then goes on to "win" either or both Claims, the client will also, in addition, be liable for the Success Fee plus VAT, if applicable, in accordance with Clause 6 above.

12. The Defendant contends that it was entitled to terminate pursuant to Clause 14 (2) (a) and refers to the content of a letter dated 10 July 2017 from Defendant to the Claimant which reads as follows:

"*I write further to your telephone call to me this morning and to your subsequent email.*

It seems to me that the true position is that, as recorded in your email timed at 13.02 today you do not accept our advice in relation to the Part 36 Offer that we have advised you to make. We do not accept that it is contrary to your interest.

Be that as it may, it is apparent that you do not wish to follow our advice and in the circumstances, this letter is our notice of termination of the conditional fee agreement (the Agreement) dated 21 of February 2017 in accordance with clause 14.2(a) thereof.

Subject to the terms of the agreement I am happy to arrange for an orderly transfer of our papers to your new solicitors. In the regard I understand that you wish to instruct [Messrs] *Cubism Law. I am therefore currently ascertaining our costs to date which I will then advise to you under separate cover. Subject to that we can then no doubt thereafter address modalities for transferring the papers.*"

13. The Defendant's case, at least it might have appeared from this letter, was that such advice as they gave as to a Part 36 offer was reasonable and the Claimant, having rejected it, was entitled pursuant to clause 14 (2) (a) to the payment of its reasonable fees. It is accepted by the Claimant that the Defendant gave advice as to the making of a Part 36 offer which it rejected but the nature of that advice was disputed by the parties. The Claimant's case was that it was, in effect, being required to make a Part 36 offer without adhering to an agreed strategy in the litigation, a strategy which, it was contended, had been agreed with Leading Counsel; the Claimant was being required to make such an offer at a time which was not appropriate having regard to the agreed strategy and which was unreasonable, inter

alia, also because it was given in circumstances which were inconsistent with various assurances that the Claimant said had been provided before entry into the CFA.

14. Further, Mr. Bacon QC for the Defendant, referring to the words '*[be] that as it may'* in the letter, argued that there had been general rejection by the Claimant of the Defendant's advice. The Defendant contended that the Claimant had withdrawn instructions from the Defendant and instructed other solicitors prior to the termination of the retainer with the Defendant and this evidenced or established an alternative basis upon which it was entitled to fees under Clause 14 (2) (a). Further, the Claimant had manufactured a dispute about the advice it had been given as to Part 36 offer, in order to facilitate the instruction of other solicitors without liability (for fees) under the CFA.

15. One element of this dispute between the parties in the fourth issue was whether, as contended by the Claimant, the Defendant was estopped or otherwise prevented from terminating the CFA under clause 14 (2) (a) by reason of a collateral contract or (mis)representations or assurances which it said had been made by the Defendant prior to entry into the CFA. The Defendant denied that the Claimant was entitled to rely upon any such discussions and representations prior to the CFA, relying upon an Entire Agreement clause in the CFA (clause 19) which provided:

> *This agreement together with Our Small Print constitutes the entire agreement between the Parties in respect of our engagement by the Client in relation to the Claims and supersedes all previous agreements between the Parties relating to its subject matter.*
>
> *Each Party acknowledges that, in entering into this agreement, it has not relied on, and shall have no right or remedy in respect of, any statement, representation, assurance or warranty (whether made negligently or innocently) other than as expressly set out in this agreement or Our Small Print, save as aforesaid.*
>
> *Nothing in his clause shall limit to exclude any liability for fraud.*

16. Mr. Mallalieu, for the Claimant, contended that this clause did not cover the terms of the assurances or representations made, alternatively that this clause did not satisfy the requirement 'of reasonableness' as set out in section 11 (1) of the Unfair Contract Terms Act 1977 ('UCTA') (pursuant to section 3 of the Misrepresentation Act 1967).

Evidence generally

17. There was an agreed bundle of documents containing witness statements which had been served sequentially. I heard oral evidence from Josh Arghiros ('JA'), who is the managing director of the Claimant. The Claimant also relied upon the evidence of Colin Wynter QC ('CW'). As well as being a practising barrister he also runs a specialist barrister chambers dealing with insurance disputes constituted as an LLP. He was a friend of JA (the friendship dating back to childhood) and was instructed in the claim against LDC as counsel. For the Defendant I heard evidence from Trevor Jenkin ('TJ') who is a solicitor and consultant of the Defendant and was the principal fee earner with conduct of the Claimant's claim against LDC at the Defendant solicitors. Mark De Chastelai Rondel ('MR'), who is a solicitor and heads the Dispute Resolution department of the London Office of the Defendant, also gave oral evidence.

18. There were substantial disputes of fact between the parties and it was necessary for me to make findings on these disputes. As might be expected, in course of the underlying litigation there were a large number of communications by email and by telephone between the parties. I am not able to give a complete account of those communications which are referred to in the evidence albeit I have considered all of them. It is however a significant feature of the dispute that there were a limited number of attendance notes recording the conversations that took place, in particular in respect of discussions that were central to some of the issues (and some of the notes that have been provided are markedly brief).

19. In dealing with the disputes that arise I have had regard to guidance summarised by Stewart J in *Kimathi v FCO* [2018] EWHC 2066 at [96]. Such guidance includes the reminder that the process of civil litigation itself subjects the memories of witnesses to powerful biases including considerable interference with memory by the procedure of preparing for trial and that the *"best approach for a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts"* avoiding *"the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".* It was important also for me to consider the disputes in the context in which they took place and in considering the oral testimony of the witness to have regard to their "*personality, motivations and working practices*".

Background

-the claims against LDC/HK

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-events leading up to agreement to pay £50,000

24. Mr. Mallalieu places reliance upon the funding discussions and arrangements leading up to those immediately prior to entry into the CFA (and with which I am immediately concerned) and it is important for me to make at least some reference to these events.

25. In early 2016 JA made enquiries of CW as to whether he knew any solicitors who were prepared to work on a 'no win no fee' basis to bring a claim on behalf of the Claimant against LDC. As a result of CW's recommendation JA spoke to TJ in early February 2016. .

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27. . JA sought an indication of fees at that stage, to which TJ said that wanted to take some more time to review the documents. It had been made clear by JA that he wanted the Defendant to do the case on a 'no win no fee basis; this was, JA says, the very reason he had approached TJ in the first place.

28. In an email dated 26 April 2016 at 11.07 am TJ stated that he had" started *to look at 4 large boxes of approximately 25/26 lever arch files yesterday…. We are willing to do the following for a fee of 12,500 plus VAT inclusive of Counsel*.

1. *Thoroughly investigate the claim;*
2. *Instruct counsel to advise;*
3. *Settle a letter of claim; and,*
4. *Pursue litigation funding.*
5. *Conclude arrangement with* [CW] *if willing to undertake the case and a junior perhaps.*

29. To this, JA responded with obvious enthusiasm: "*Proceed Proceed Proceed!"*

30. JA explained in his witness statement that although he was not keen to pay anything up front, and he had wanted the Defendant to enter into a '*no win no fee*' arrangement, nevertheless he understood, as TJ had explained to him, the need to charge an initial fee in order to read into the case, and have counsel look at the case to be able to reach a view on whether this was a matter the Defendant would be prepared to take it on on a 'no win no fee' basis. He says however, and I accept his evidence on this point, that he had understood and had been led to believe that the figure of £12,500 plus VAT would mark the only fee that he would have to pay in order for the solicitors to decide whether or not they would enter into an arrangement on a 'no win no fee' basis; and if such an arrangement could be concluded there would be no further fees payable up front.

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35. On 11 May 2016 an email was sent to JA an email by a legal secretary of the Defendant referring to a meeting which was due to take place on 13 May 2016 (involving JA and TJ) and attaching a document headed 'Confirmation of Instructions' which set out the following statement of the scope of work:

> *"<u>Step 1</u>*
> *Considering the material provided by the client (including material from Howard Kennedy) and sending an initial without prejudice ("WP"*[)] *letter to LDC with an offer to settle and/or to Howard Kennedy if we believe the circumstances warrant the letter.*
> *<u>Step 2</u>*
> *Absent a settlement preparing Instructions to Counsel to advise upon the validity of the notice to terminate the agreement between the client, LDC and others dated 30 July 2015 and the merits of the claim against LDC and/or Howard Kennedy; and*
> *<u>Step 3</u>*
> *If Counsel so advises on the merits, proceeding with the claim by firstly drafting a formal letter of claim to LDC and/or Howard Kennedy, and subject to the response.*
> *<u>Step 4</u>*
> *To pursue litigation funding options for your consideration."*

36. In the document, and alongside the heading '*What we have agreed about fees based on the scope of work,* was reference to the fixed fee of £12,500 plus VAT for steps 1, 2, 3 and 4 which was said to be payable in any event; it was also said that if counsel needs to be instructed per step two, counsel's fees would be paid from the fixed fee; any subsequent advice from counsel would be at the Claimant's expense (although it would be agreed with the Claimant first). It is thereafter stated:

> *"If either of the offers to settle in accord with step 1 of the Scope of Work above produces a settlement you agree that we are entitled to an additional fee being 25% (including VAT) of the settlement sum offered and accepted by either of LDC or Howard Kennedy with such additional fee(s) being payable at the same time that any damages /settlement paid to you.*" [my underlining]

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39. On 28 July 2016 an invoice of the same date in the sum of £12,500 plus VAT was sent to the Claimant, The charge is stated to be for "*our services provided to 28 July 2016 in connection with our Confirmation of Instructions dated 11 May 2016"*(my underlining). It contained no particulars of work done but it is clear that that at this stage not all the work contemplated in the earlier Scope of Work, such as drafting letters of claim, had been undertaken or completed.

40. On 2 August 2016, following a meeting with CW at the Defendant's offices to discuss the case generally, TJ told JA that he wanted to speak more about fees. JA said, and I accept, that TJ said he needed further funds for him to investigate the case before he was able to give the Claimant the '*no win no fee'* agreement. JA said that having already paid £15,000 he did not feel that he could refuse the request for further funds: he wanted to pursue the case and if that was what TJ was telling him that what was needed to get to the point where a 'no win no fee agreement' could be entered into he was willing to make the payment as he trusted him. In his witness statement JA said in this period TJ would repeatedly assure him, whenever the issue was raised as to when he could have a 'no win no fee' agreement, TJ would respond with the phrase that "*We're going to get there*". He said he was "continuously" (which he later qualified by saying,"regularly") given assurances to the effect that he would get his costs back plus a figure that was put at £1.5 to £2 million. He said that TJ referred to a history of him getting settlements on all, or almost all, of his cases. JA's evidence was that at this point TJ assured him that this was all he would be required to pay up front, other than counsel's fees to take the matter further against LDC. He said he trusted TJ at his word and even shook hands on this additional fee arrangement.

41.

42. On 9 August 2016 TJ emailed JA as follows:

> *"As agreed last Tuesday, the revised confirmation of instructions and invoice, on the terms agreed, will be with you tomorrow to take the matter up (hopefully) to settlement. If it doesn't we will discuss all the funding options the favourite of which for you and the one I favour we discussed"*

43. On 10 August 2016 a document headed 'Confirmation of Instructions' was attached to an email to JA from a legal secretary at the Defendant stating (inter alia) "*as agreed with* [TJ]". The document stated:

> "*This is in addition to our confirmation of instructions dated 11 May 2016.*
> *The work that we will undertake is to continue the consideration of the material provided by you and your former solicitors in order to draft a letter of claim against LDC for inter alia* [breach] *of the agreement dated 30 July 2015 by LDC, including seeking Leading and Junior Counsel's opinion, attending upon those persons with relevant knowledge able to assist the formulation of the claim and thereafter formulating a draft letter of claim for your approval.*
> *We shall thereafter seek a settlement of your claim from LDC by negotiation.*
> *If a settlement does not occur or it becomes apparent that settlement will not be achieved without commencing litigation, we shall advise you upon the various options available to fund the pursuit of a claim, including the provision of third-party litigation funding, a possible Damages Based agreement and/or private funding and after the event insurance*."

44. In the document it was asserted that "*a fee of £20,000 plus VAT and a sum equal to 25% plus VAT of any sums paid to you ("the Success Fee") including on account of legal costs payable to you*" [my underlining] had been agreed; the Claimant was to be responsible for all fees to Leading and Junior Counsel in addition to the Defendants' fees and that "[in] *the event that we are approaching that budget we will notify you in advance and endeavour to agree a revised budget with you. We will not incur fees beyond our current agreed budget without your agreement*." (reference is then made to charging rates). The proposed timescale was for a letter of claim to be available for approval by 16 September 2016 and "*thereafter for negotiation until 31 December 2016*" (my underlining). Payment was to be made of the fee of £20,000 plus VAT in 14 days.

45. JA responded by way of an email dated 10 August 2016 confirming that all was "*accepted and understood*". On 11 August 2016 the Defendant sent the Claimant an invoice for £20,000 plus VAT in respect of fees together with the costs of what is described as a 'Negotiation Lunch' for the further sum of £167.47 (making a total of £20,167.47 plus VAT), stated to be in respect of the LDC matter and "*[to] our services provided to 11 August 2016 in connection with our Confirmation of Instructions dated 10 August 2016*" [my underlining].

46. By email dated 25 November 2016 the Claimant received a draft Particulars of Claim which had been prepared by Counsel. The Particulars pleaded the case in contract but did not advance any case in misfeasance. LDC having declined the without prejudice meeting proposed by the Claimant, a letter of claim was sent to LDC on or about 1 December 2016; the letter itself was in relatively short form attaching the draft Particulars of Claim prepared by Counsel (newly instructed on this claim).

Issue 1 – what did the fee of £50,000 cover?

47. In January 2017 TJ and JA discussed fees again. In an email dated 31 January 2017 TJ suggested, by way of "*preliminary thoughts only*", that the Claimant pay an agreed fixed fee to the Defendant, certain steps in the litigation would be outsourced to CW and the Defendant would enter a CFA for full fees (albeit until the case is determined only the fixed fee was to be payable). TJ wrote that "[if we win] *LDC pays our full fees*" including

CW's fees and the Claimant would recover the fixed fee but would be liable for a success fees from damages.

48. JA says that at or around the time of a meeting 8 February 2017 and possibly at this meeting , the Defendant proposed that in return for entering into a CFA the Defendant wanted the Claimant to pay £50,000 plus VAT in order to clear all the work in progress for which the Claimant had not yet been billed. This included principally work on the LDC matter but also what he describes as other smaller pieces of work on the matters concerning Middle Street, Conran and Partners and, the Ecology Consultancy and RBS. JA says that TJ and MR told him that the partners of the firm would not allow him to continue the case on any basis until all their previous fees had been paid; that £50,000 plus VAT figure was the sum sought in respect of the unbilled work and this presented as the cost of entering into a CFA.

49. JA says that he was surprised that there was as much as £50,000 of unbilled work. On 13 February 2017 he sent an email to TJ and MR attaching a spreadsheet, headed Running Total Legal Fees LDC. The email stated:

> *"Please see attached a spreadsheet that shows the breakdowns of the money expended to date on the case with* [LDC]. *I know that it has been requested that I clear the* [fees] *on* [the Defendant's] *books up to date, but to be honest I'm a little worried that some of what we have already paid has not been taken into account when the figure of £50,000 of unbilled time has been mentioned. You have always mentioned that we have only paid £20,000 towards the* [fees] *and I think you may have overlooked some of the other payments that have also been paid to* [the Defendant] *towards the costs.*
> *I've asked* [Zoe Masterson the Claimant's book keeper/manager in the accounting department] *for the invoices for all the attached* [fees] *paid but she is telling me that not all the invoices have been raised and that she just relied on my asking to pay* [the Defendant]*....you will see all the payments made on the breakdown….Can we discuss please and agree what had been paid and what is due going forward."*

50. The spreadsheet records that the Claimant had paid £12,500 (plus VAT) on 2 August 2016 and £20,167.47 plus VAT on 9 September 2016 both stated as being for "legal fees". It records payments for disbursements (in respect of counsels' fees and printing) on various dates. It also records two further payments for "legal fees" in the total sum of £10,705 plus a sum of £7,000 in the matter concerning Conran and Partners. This latter matter and the Ecology Consultancy matter were to be part of the claim again LDC(notably, in an email on 3 February 2017 JA had emailed TJ asking whether someone was "*monitoring the costs expended to date on the* [LDC] *case and ensuring that they form part of our claim"*): they were to that extent subsidiary to the LDC claim. It is clear in any event that this spreadsheet included costs in relation to various matters, not simply costs incurred strictly in the LDC claim.

51. On 20 February 2017 JA received an email (including what appears to be a time record or ledger attached, entitled ('Billing Timekeeper') purporting to show slightly over £65,000 as WIP on the LDC matters. In an email of 20 February 2017 TJ says:

> "*See the WIP. Obviously we will stick to our agreement*"

52. JA says that the agreement always remained that the sum of £50,000 would cover all outstanding matters.

53. In his witness statement TJ said that he had a number of conversations in early 2017 concerning the funding arrangements in particular in relation to matters concerning the £50,000 bill. He said that JA was firm in his demand that the Defendant take the case on what he refers to as "a contingency fee basis". He said that he told JA that he was required to put the case to a risk committee before a CFA could be approved and that he was happy to do that. He accepted that as part of the ongoing discussion they met on 8 February 2017 and following discussions with CW about what her refers to as "*the legal aspects of the claim*" he says that JA stayed behind and they discussed with MR two matters: firstly whether the Defendant had sufficient people to resource the claim and secondly the procedure and the need to satisfy the firm's risk committee that the claim had sufficient prospects of success to justify CFA. He says that he confirmed that he was happy to take the proposal to the risk committee and told JA that he was pushing for it to be taken on a CFA basis.

54. MR gave evidence as to what occurred at the meeting on 8 February: he says that there were no discussions then about the sum of £50,000 or 'clearing the decks'.

55. TJ says that the risk committee's decision was that they were prepared to enter into a CFA but first they wanted the Claimant to meet the current unbilled work in progress which he says at that time amounted to some £63,000 odd. He says that he reported that decision to JA and he subsequently had discussions over the weekend of the 18/19 February. He says that at that stage a draft CFA had been prepared and sent to JA who wanted to discuss it. He says in addition to concerns about the size of the success fee (which would be payable out of damages) JA was concerned about paying the outstanding work in progress. He says that he considered matters further and that in what he described as his last conversation on 19 February, he says that subject to approval by the Defendant's CEO the Defendant would "*reduce*" the success fee to 75% and that he would, as he says in his witness statement, "*try and meet JA's concerns by not seeking to bill the full outstanding work in progress but instead restricting it to a sum of £50,000… [with] the remaining outstanding work in progress rolled into the CFA so in the event of success it became recoverable under the CFA.*"

56. TJ says that consistent with his account of what was agreed he sent an email to the CEO of the Defendant on 20 February 2017 which said as follows:

> *The terms of the CFA are agreed with the client with whom I've been discussing this weekend* [.] *Where I need your help is paying the WIP. It is circa £65K* [.] *The client is willing to pay £50k plus VAT but wants the balance subject to the CFA which is provided for. The current position is that if we don't settle before issuing a Claim we receive nothing. Of course we can refuse a CFA. However he has been offered a CFA by Neumans LLP who he went to after we refused to deal with the RBS compensation claim and with no payments.*
>
> *We are owed other* [fees from the Claimant] *on three other matters and they are unaffected by this I hope you can agree this because I believe it is a unique position. The reason is that we get paid our normal fees even if we lose against LDC provided we recovered against* [HK]. *We want the CFA signed tomorrow so look forward to hearing from you I would expect payment of the fees on a before signing the CFA* [.]

57. The Defendant contended that this email, which JA says was subsequently approved by management, was the basis upon which they entered into the CFA (which is stated to be retrospective in nature, covering work from 25 November 2016) and is supportive of their case that there was no agreement the £50,000 bill included the work done on the other

matters that I referred to above. Reliance is also placed on an invoice dated 21 February 2017 which is headed 'Lewes District Council' and contains a narrative which the Defendant says made it clear that the work that the bill related to work done on the claim against LDC only, stating in particular: "*Our fees up to 25 November 2016 as agreed advising you in relation to your agreement with Lewes District Council and Southern Housing Group Ltd dated 30 July 2015…".* The covering letter, also headed Lewis District Council, stated the invoice was submitted in line with "*our agreed confirmation of instructions*". No other matters were referred to in the invoice which, the Defendant said, was paid without demur.

-decision

58. As well as challenges to credibility of the witnesses and generally as to their recollections as to what was said in the relevant discussions, both sides argued forcefully that the contemporaneous documentation supported their case. In the event having considered all the evidence, I prefer the account relied upon by the Claimant.

59. I accept, as Mr. Mallalieu argued, that the spreadsheet to the email of 13 February refers to other matters such as Conran and Partner besides costs strictly incurred in the claim against LDC; to my mind, this supports the conclusion that (notwithstanding the references to the "*monies expended to date on LDC matter*" in the email and such references elsewhere in particular in the title to the email and the spreadsheet) that JA was told that the sum would cover outstanding fees generally. No attendance note has been produced by the Defendant of the relevant discussions and the Defendant has not produced any email or other written response to the email of 13 February, as, it seems, might have been expected if payment were not to cover all the outstanding fees. It appears from TJ's evidence that it was not his practice to make anything more than very brief attendance notes, albeit he would record the time he had been working on funding arrangements. Common sense suggests that if the Defendant had disagreed with what was being said in this email, or that the proposal were to have changed clarification was required and that it would have been sensible for the Defendant to deal with the matter in writing setting out in detail what had been discussed and agreed; it was not sufficient just to send out an invoice.

60. Mr. Mallalieu relied upon a further matter being that the LDC 'matter number' was also used for the RBS matter (albeit, significantly, not for the other matters on which the Defendant were instructed) so that the WIP (work in progress) recorded on the RBS matter would also appear in the LDC ledger. The ledger sent to JA on 20 February 2017, which it would appear was automatically produced- purportedly showing £65,000 of outstanding WIP on the LDC matter, would, it seems, therefore have included work on the RBS matter. I do not accept the suggestion in Mr. Bacon's written submission (on instructions but without evidence), that work on the RBS matter would have been stripped out. I agree that this provides further clear support for the conclusion that other fees besides those strictly limited to those included in the claim against LDC were to be covered by the £50,000 payment. TJ and JA can be expected to have known what matters were included in the ledger.

61. I accept JA's account as to the proposal he said was put to him; and that the sum of £50,000 was to 'clear the decks' in respect of unbilled fees 'on the Defendant's books' (which included all potential costs on the RBS matter, even though no immediate payment was due- see below) and this was what was agreed by the Defendant. To my mind this is supported by the email of 13 February 2017. To the extent that MR and TJ gave evidence

that a request in the form described in this email had not been made I would reject it (albeit it may be that MR's evidence did not necessarily precluded the possibility that such a proposal was put, even if not at the meeting on 8 February). The email from TJ to JA on 20 February 2017, in which TJ appears to confirm that whatever the WIP, he would 'stick to the agreement', is - I am satisfied- a reference to the earlier discussions that a payment of £50,000 would cover all outstanding matters and that the CFA covered costs prospectively.

62. JA was keen to enter into a CFA but he was not keen to do so at any price; as the concerns raised in the email of 13 February suggest, by this stage he had become wary of the Defendants' demands for fees. The Claimant had made substantial payments under the fixed fee arrangements (the scope of work in the August agreement taking matters up to the end of December 2016) and to my mind, it is clear in the light of events that he was likely to have considered carefully what the payment of £50,000 was going to cover by way of unbilled work. JA described a discussion on 19 February 2017 in which he expressed some doubt that there could be over £50,000 unbilled fees on the LDC case alone. In any event the email of 13 February also appears to reflect JA's well-grounded scepticism that there could be any substantial outstanding work justifying a figure close to £50,000 for unbilled work specifically on the LDC claim or otherwise.

63. I accept that the £50,000 bill was emailed to Ms Masterson and that in any event there was no consideration of this bill or earlier bills by JA. It was clear to me that JA placed a great deal of trust both in TJ and the Defendant and it was not his practice to check the bills that the Claimant received, as he would have trusted the Defendant to have served a correct bill if it were in the sum he had understood to be payable. Ms. Masterson paid them without considering them in any detail. Accordingly, I do not accept that the fact that the bill was paid without demur assists the Defendant.

64. Nor, to mind do the matters stated on the £50,000 bill and in the covering, letter substantially assist the Defendant. There were substantial troubling features of the billing by the Defendant. Mr. Mallalieu relied in particular on the following:

(a) As to the Ecology Consultancy bill, in the course of his evidence TJ accepted that there had been an error in the creation of this bill he said that "*someone has looked at this file and taken my email as our correctly recorded time, but has ignored the fixed fee arrangement*".

(b) The bill in respect of counsel's fee in the RBS matter but which is headed '*Re Lewes District Council'* and carried the LDC case number. I understood TJ to say in his evidence that this was also an error.

(c) The LDC Bill is stated to be for services provided in connection with the document headed Confirmation of Instructions dated 10 August 2016 whereas the costs were claimed pursuant to a CFA dated 21 February 2017.

(d) As is apparent from the matters set out above, between the first and second documents headed 'Confirmation of Instructions', the success fee shifts from being VAT inclusive to VAT exclusive (adding substantially to the potential net sum that would be payable) a matter which one might assume had been the result of a considered decision. The change was not in any event explained to JA. In his evidence

TJ sought to explain this by saying that it was a mistake," *pure and utter laziness or lack of attention*".

(e) There was also an increase, between the first and second documents headed 'Confirmation of Instructions', in the coverage of the fee of 25% in respect of the settlement sum; it was extended so that it applied also to any costs recovered when previously it did not. This appeared to be another increase without any clear explanation. TJ also sought to explain this as being the result of inadvertence.

(f) Further as noted above, notwithstanding the agreement to do certain work on a fixed fee basis bills were served on the purported basis that a charge was to be made for work done up to a certain date, implying that further fees might be charged after that date- indicative not of a fixed fee arrangement (indeed inconsistent with a fixed fee arrangement) but of one where a charge after the date mentioned was to be made on the basis of an hourly rate (as Mr. Mallalieu put it, a 'taxi meter' basis). Thus, notwithstanding the first fixed fee agreement the invoice subsequently served was for services provided "*to 28 July 2016"*; and the invoice emailed following the second 'Confirmation of Instructions' is for services provided " to *11 August 2016*". The Defendant's case at the hearing that the arrangement, as I understood it to have been put to JA, was that the fee for £20,000 covered only work to 11 August 2016. I reject that case: it seems to be clear that the imposition of dates beyond which further charges might be made on an hourly rate basis was inconsistent with the fixed fee agreements.

It appeared to be accepted by TJ and in any event it is clear to me that the scope of the work to be undertaken following the second 'Confirmation of Instructions' was the same as the work covered by the first, or at least substantially the same. I do not accept that it was explained to JA that he could have objected to such extra payments or indeed that there were any agreed modification of the fixed fee arrangement that would have entitled the Defendant to charge for work on top of the fixed fee arrangement for work done after the date provided for in the bills. There was no further 'Confirmation of Instructions' to this effect in circumstances where one would clearly expect to see matters set out in writing; nor any attendance note. In short, I do not accept that JA did agree to what was effectively, on the Defendant's case the conversion of the fixed fee arrangements to an hourly charging rates basis from the dates set out in the invoices; in this context it will be noted the invoice of 11 August 2016 was served only a day after the 'Confirmation of Instructions" and purportedly served in accordance with the terms of this document.

65. When TJ was asked about the billing, he accepted that "*it paints a picture of carelessness, certainly"*. However the changes involved the imposition of some substantial additional liabilities on the Claimant beyond that which had previously been agreed and, moreover, it was not clear to me that all the features referred to above are readily explicable by carelessness. Whilst it is not necessary (in the context of dealing with the Defendant's reliance on the contents of the documents relied upon by the Defendant) for me to make any further findings as to the precise reason for these discrepancies or miscommunications it is clear to me having regard to some or all of the matters stated above I could not take what was said on the relevant bill and covering letter as being a reliable indication as to what had been agreed with the Claimant.

66. I note that that the first draft of CFA sent to the Claimant on 18 February 2017 did not have retrospective effect, in that it did not impose a charge for work already done: this is consistent with JA's version of events that at the time of the initial discussions at least the figure of £50,000 was to cover all work done to date with a one off payment. As I have noted, the second draft of the CFA is retrospective in effect (covering work undertaken from 25 November 2016). The Defendant relies upon this as indicating that an agreement had been reached on the terms which it relied upon (it being said that there was no point in having a retrospective agreement otherwise). However there was nothing in writing advising JA in clear terms that such a revision had been made to the first draft and its effect, which, to my mind, would have been expected given the length and complexity of the CFA document and the relative inexperience of JA in dealing with such matters. In any event, having regard to my findings above concerning the billing, I was not satisfied that the retrospective nature of the final draft meant that it had been discussed and agreed.

67. I have, further, given close consideration to the reliability and credibility of the witnesses against the background of the uncontested documentary material.

68. I preferred the evidence of the JA over that of TJ (and MR to the extent that his evidence conflicted with that of JA). JA's recollection as to the precise detail as to all the events was understandably not complete (as might be expected) and he had strong feelings about the way he considered that he had been treated (having, he considered, placed a considerable amount of trust in the Defendant). Nevertheless I considered that he was a truthful witness whose evidence could be relied upon as to the essential matters in dispute. I have considered all the matters raised by Mr. Bacon. I do not accept that the credibility of JA was affected adversely by the allegation that he made against the Defendant that they were at fault for failing to ensure that the Particulars of Claim included a claim in misfeasance or in respect of an allegation that the Defendant should not have agreed to the splitting of liability issues from other issues in the case (as occurred).

69. Whilst JA was complimentary about the initial draft of the Particulars of Claim the failure to include the misfeasance claim gave rise to the need to amend the claim and an adverse costs order in a substantial sum (over £34,000). Even accepting that sufficient evidence had not yet been obtained to support such a claim in misfeasance before issue, I can see that from JA's perspective, he could reasonably have expected such a matter to have been addressed in advance of the issue of the proceedings. Similarly, the splitting of issues: it appears the proposal made in the Directions Questionnaire prepared by the Defendant (as to the splitting of issues) gave rise in due course to an order for a hearing of a preliminary issue and this had, as JA saw it, the effect of reducing the settlement leverage. It appears that significant efforts had been made to resile from the proposal agreed by the Defendant after the Claimant had instructed fresh solicitors and whilst I accept that at least Junior Counsel instructed by the Defendant was behind the proposal of a preliminary issue hearing I can understand that the Claimant might think that he had not been fully advised of the ramifications, particularly in the light of the strategy he wished to pursue. JA was not a lawyer. He has since instructed others lawyers who dealt with the application to amend and the attempt to resile from the position taken by the Defendant as to the splitting of the trial and the application to amend and might themselves have taken a critical view as to what had happened before their instruction. To my mind the Defendant's reliance on these matters was misplaced.

70. Mr. Bacon further contended that JA's credibility was adversely affected by the allegation to the effect that the Defendant was motivated to "*extract as much money from the Claimant as possible and deliberately avoided entering into a CFA for that reason*'. He said this was a "*scurrilous allegation*". JA says in effect, that the Claimant had been "*strung along*" by promises that the decision would be made as to the entry of CFA so long as certain payments had been made. In my judgment there is substance to JA's complaint. I accept that there was no firm promise or commitment by the Defendant to the effect that a CFA would be entered into. I am satisfied however that JA was led to believe that there were good prospects of recovering a substantial nuisance payment and costs by TJ. He was also led to believe a decision would be made as to whether to enter into a CFA after the initial fixed fee agreement on 26 April 2016 (and payment of £12,500 plus VAT). When this did not happen, JA was persuaded to pay a further fixed fee of £20,000 in the circumstances where he was assured that such payment would take him to the point when a decision would be made about whether to enter into a CFA or not. In the event TJ accepted that the work to be undertaken under the second fee arrangement was essentially the same work covered by the first fixed fee arrangement. In the circumstances it is not a satisfactory answer to the complaint that in the event JA agreed to make this additional payment: the Claimant was in essence asked to pay more for the same, or at least not substantially or significantly different, work and did so, on the basis of the assurances made to JA. A yet further payment was then required as a condition for entry into the CFA.

71. The Defendant had the benefit of junior counsel's advice obtained prior to their instruction (which, the papers might suggest was obtained for the sum of £4,500 plus VAT, albeit I did not have sufficient evidence to conclude that this was so). In any event I do not accept that the work actually required exceeded what was anticipated, or that the pre-litigation scope of work had changed substantially; nor do I accept that the claim had became substantially more difficult or complex such that is merited the additional fees which were demanded. In short, I am not satisfied that the Defendant have provided any adequate explanation for the very substantial increases in their fees for the pre-CFA work.

72. I formed a substantially less favourable view of the reliability of TJ as a witness. I have already referred to his evidence as to the effect of the proposed £300,000 offer, which I had some difficulty following (see [33] above). Moreover and more significantly, I considered his account of the material events was unreliable. When asked about the contents of the email of 13 February, -which might indicate that there was have been a conversation prior to that email in which the figure of £50,000 was discussed as one which would 'clear the books', TJ's response was that that he did not remember it (having previously said there had been no discussion it JA about a figure of £50,000 until immediately prior to signing of the CFA); but it seems to me clear that there was such a conversation about 'clearing the decks' and that that discussion had already taken place at some point before the sending of the 13 February email. TJ was dismissive of the 13 February email as "an *accounting exercise*" or "mere housekeeping exercise". He suggested that it was probably prompted by Ms. Masterson who was "*incredibly efficient*" and JA was probably "*at sea*" and did not appreciate his various financial commitments but nothing to do with what was agreed. It does seem to me that the email was clearly relevant in indicating the understanding on the part of JA that at least at the outset of these discussions the payment £50,000 should cover not just specifically the costs in the claim against LDC but all debts to the firm and should cover unbilled costs to date. In any event, the email suggests to me that it was TJ and MR who were confused about the amount that the Claimant had already paid.

73. Further, TJ said in evidence, and with some emphasis, that the nature of the transactions concerning Middle Street and Conran and Partners were such that it "*could not possibly be correct*" that an agreement had been reached to clear all outstanding fees as JA claimed. He referred in particular to the Middle Street transaction and potential High Court litigation (and disagreed with the suggestion that was not going to be any significant further work on this matter); in respect of the Conran and Partners there were substantial on-going matters requiring considerable amount of further work. In the event it was clear on further consideration of this matter, in particular from TJ's own email sent 23 February 2017 that it was anticipated that no further fees were to be charged unless as TJ accepted "the balloon went up" (and it proved necessary to sue). It was clear in any event that in respect of this matter there were no such impediment of the sort which TJ had asserted. Similarly, on further consideration of the Conran and Partners matter there was no impediment to clearing the fees to date in the way JA had suggested (the spreadsheet attachment to the email of 13 February suggesting that substantial fees had already been paid).

74. In any event in all the circumstances, it was necessary for me to exercise considerable caution before relying on TJ's testimony in the absence of supportive contemporaneous documents.

75. Further, there were events shortly after the signing of the CFA which in my judgment further support the Claimant's case. In particular on 23 February 2017 at 9.07 am TJ sent an email to JA in which he said there was a total of £10,575 of unbilled time on three other matters (including £5,250 of alleged unbilled time on Ecology Consultancy matter). At 2.03 pm JA emailed Ms. Masterson telling her to ignore the email from TJ stating that "w*e're not paying it I've just rung him and told him …*" JA's evidence was that he had called TJ and pointed out in strong terms that the agreement had been that the £50,000 plus VAT included all unbilled work on all matters. He says that TJ backed down and agreed that he did not have to pay anything, as a result, he said, no bill was then delivered for these matters. JA says that he was outraged. It is clear, as TJ himself said, that there was a heated discussion. It may be that JA did not, as TJ says, articulate in precise terms that it had been agreed that the £50,000 would cover this work (no attendance not having been produced of this discussion) - perhaps because he considered that it was axiomatic that the £50,000 had covered all matters on the Defendant's books. Nevertheless it seems to me clear that JA's response, which I accept was one of outrage, is consistent with him having a clear understanding that the sum of £50,000 covered all outstanding matters. In my judgment, having heard and seen JA give evidence I do not accept that he would have reacted in the way described had the relevant agreement been otherwise.

76. The Defendant contended TJ could not have been wrong about the substance of this agreement because of the terms in which he emailed his CEO shortly before the CFA was signed and hence contemporaneously; TJ was an experienced solicitor with an unblemished record and it was inherently unlikely that he would have deliberately misrepresented what had been agreed to his CEO. TJ himself said the sums were "trifling" and there was no reason why he should have deliberately misled anybody concerning them. I do not accept that it necessarily follows that if I were to accept JA's account, that TJ would have deliberately misrepresented what had happened to the CEO. The events were relatively fast moving, there were a significant number of other complex matters to be dealt with prior to entering into the CFA (such as the level of the success fee and other matters). Whatever TJ may have thought or intended in respect of the coverage of the sum £50,000 he left JA with the clear and reasonable understanding that the £50,000 payment covered all outstanding

unbilled fees to date. From TJ's perspective it may be that it was a matter of "mere housekeeping" of relatively little importance set alongside the other matters being discussed and he did not give it the attention that it merited. In my judgment the more likely explanation is one of error and of carelessness and confusion on the part of TJ. In any event (whatever the correct explanation) considering all the evidence and all the submissions that have been put to me, I am satisfied that the agreement reached was to cover all outstanding fees on the Defendant's books - in effect, to 'clear the decks', for the various reasons set out above (considered both individually and collectively) having regard to all the inherent probabilities.

Issue 2 – the RBS bill- conflict of interest?

77. JA said that in about August/early September 2016 he began to consider instructing the Defendant on a claim against RBS. At that point the Claimant was instructing other solicitors on the claim. JA said that he recalls TJ encouraging him to transfer the case and that he would repeatedly remind him of the favourable settlements on his claims. He said however that he was aware that many law firms were conflicted out of acting against RBS; having encountered this problem in seeking to instruct other firms of solicitors, and it was important for him to know whether the Defendant was conflicted before he could consider moving his case to the Defendant. He said that he asked TJ on more than one occasion to check whether the Defendant would be conflicted or not. He says that he was reassured by TJ that they were not and he decided to instruct the Defendant on the claim.

78. JA said shortly after the conference with counsel in the claim in September 2016 TJ told him the Defendant did have a conflict of interest and was unable to conduct the case. He said he was very surprised to be told this given, he says, what TJ had previously told him; when he queried it with TJ he was told, in effect, that the partners of the Defendant firm decided against it. JA says that TJ was unable to explain why this conflict had not been apparent at the outset and why the Defendant took on the case in the first place. JA said that TJ seemed embarrassed about what happened. On 28 September 2016 TJ sent JA an email about the matter saying that it was necessary to instruct a new firm "*for a variety of reasons*" which he does not specify. JA suggested that the use of private email address to send email indicates that he did want anyone in the Defendant firm to see it.

79. On 10 October 2016 the Defendants sent an invoice for counsel's fees only which the Defendant paid. On 3 February 2017 some five months after the last work done TJ emailed JA telling him not to overlook the money paid for counsel's advice and "*the reasonable fee for my firm in procuring it*". He suggested £7,500 plus VAT for the work although he says that he only expected payment if RBS reimbursed the Claimant. JA says he was surprised by the email as he considered that the Defendant should never have acted in first place, given the conflict, however he said he did not feel able to challenge it at the time because he says he was instructing the Defendant in so many cases; JA suggested a note be sent to his new solicitors on this matter.

80. As noted above the relevant bill is dated 15 March 2018. It was served some eight months after the termination of the retainer in the LDC matter. The Defendant sought to charge £17,100 (inclusive of VAT).

81. TJ said that the initial instruction was simply to investigate the claim and to seek an extension to an existing standstill agreement. He said that JA wanted the Defendant to

undertake the case on a CFA basis if it were to proceed and he was aware that the firm would only do so having undertaken a risk assessment. He said that the risk committee did not want to take on additional exposure at this. Further, he said that the firm would require clearance from RBS as the Defendant was a panel solicitor for that bank. However he said that did not preclude it *per se* from acting against the RBS provided there was no conflict of interest in terms of "*utilising information from any work we had done for the bank the defendant could technically act albeit might well have and directly damage the panel relationship for obvious reasons*." On balance, he said therefore the Defendant was not interested in taking on the case on a CFA.

82. TJ denied that JA raised the issue of conflict with him before instruction. He said that following the decision of the risk committee he did talk to JA about it and explained that the Defendant did not have an appetite for taking the case. In his witness statement he said that he "[suspected] *at the time that he sought to present this to him by emphasising the conflict position more than the overall appetite".* He said that he told JA that he was unhappy at the decision and, he says, he found other solicitors for him to instruct.

83. The issue, as I note above, for me to determine is whether or not the Defendant had a conflict of interest preventing them acting; the Defendant's Statement of Case raises no issue as to the implied terms of the contract and fiduciary duties relied upon by the Claimant.

-decision

84. I accept JA's account of the discussions that occurred about the RBS matter; that TJ had previously told him there was no conflict of interest and, further, that TJ had told him that the reason for the rejection of the CFA was the existence of a conflict of interest. I accept too, for the reasons given by JA, that TJ was indeed embarrassed about this given the assurances that were sought prior to the instruction of the Defendant on this claim. I also accept the explanation that JA gave for seeking assurances as to whether the Defendant were conflicted and his reasons for not pressing the matter further than he did after the true position came to light.

85. Mr. Mallalieu argued that at least on one interpretation of TJ's own account in his witness statement, he was seeking to mislead his client as to the reasons for the Defendant declining to act further. In his oral evidence in any event TJ appeared to deny that he had said that there was a conflict and asserted that he had only referred to a "potential for conflict". However I was left with the concern that TJ's account to me in evidence of what was said was driven more by the exigencies of the Defendant's case than an attempt to recall what was said in the relevant discussions. In any event I have already set out my views on the credibility and reliability of JA and TJ as witnesses; views which were reached on considering all the evidence.

86. I reject the Defendant's case that the conflict was merely theoretical (or merely a potential risk) rather than real, no proceedings having been issued. Solicitors' firms are required to have in place systems for identifying and assessing potential conflicts of interest (SRA Handbook – Code of Conduct 2011 O (3.1- 3.3) such that it is reasonable to expect that if this matter were to have been a treated as a new matter (which, it appears, it should but as Mr. Mallalieu suggested may not have done in the circumstances referred to above, see paragraph [60] given the use of LDC 'matter number' for the RBS matter) the conflict would have been picked up at the outset. I do not accept that any conflict was merely theoretical in

respect of pre-issue work such as formulating and deciding whether to pursue a claim but which became 'real' when a decision was made to pursue the claim. Further, I do not accept that a conflict arose merely when information might be used by the solicitors which they had gathered from their instructions in another case or that the Defendant had understood that to be case when it caused TJ to inform JA of the conflict: whether there was a conflict or not was not determined solely by RBS; it was not only RBS's interests which were affected by a conflict or potential conflict. The Defendant was on the RBS panel; it seems to be clear that a conflict arose when the firm was asked to provide advice as to the bringing of a claim against another person or body for whom it acts. There is no reason to suppose that RBS was not a substantial source of income for the Defendant firm. Nor do I accept, as Mr. Bacon argues, that the problem arose merely because the Defendant had previously acted for RBS in another case: no evidence was called as to the nature of the arrangements with RBS save that the Defendant was at the relevant time a panel solicitor of RBS; whatever the precise arrangements RBS was, it would seem, a standing client to the firm and the instruction of the Defendants would have the potential to damage the panel relationship. In any event (and whatever the position as to these matters), I accept that the conflict that arose was a sufficient basis for the Defendant to have decided not to continue acting in this case and was also such as should have prevented the Claimant acting in the first place when first taking instructions and advising on the merits of the claim. Such a conclusion is supported by JA's account which I accept; and I was provided with no sufficient evidential or legal basis for making the distinctions contended for.

87. I should also record Mr. Bacon's further argument that the work of the Defendant was confined to investigating the claim in particular in relation to the decision to take it on (a decision ultimately being made not to do so), to drafting instructions to counsel to advise in conference, the introduction of the Claimant to other solicitors and drafting a CFA for use by that firm and negotiations of fees with that firm. I do not accept that the involvement of the solicitors was so limited that no conflict arose. It is clear that as well as attending the conference, the solicitors would be expected to advise in conference, indeed they have sought to charge the Claimant for advising on the merits of the claim which was implicit in the drafting of instructions to counsel and thereafter in assisting the pursuit of the claim against a standing client, RBS.

88. In *Surrey v Barnet & Chase Farm Hospital NHS Trust* [2018] EWCA NHS Trust [2018] 1 WLR 5831 the Court of Appeal held that a solicitor seeking to revise an existing retainer is in a position of absolute trust and confidence in respect of any advice he gives his client in respect of variations of an existing arrangement where it stands to benefit. This was held to be a reflection of the *"the fundamental principle of equity that where a person stands in a fiduciary relationship to another , the fiduciary is not permitted to retain a profit from that fiduciary relation without the fully informed consent of the other*."[1]

[1] Mr. Mallalieu also refer to the SRA Code of Conduct 2011 which provided that "[the solicitor] *can never act where is a conflict, or a significant risk of conflict, between you and your client*" save for limited exceptions where there is client conflict but the clients have a substantially common interest in relation to a matter or a particular aspect of it, and where there is client conflict and the clients are competing for the same interest ((SRA Handbook – Code of Conduct O(3.6- 3.7). However both exceptions required the solicitors to explain the relevant issue and risks to the client and in the latter case the clients must confirm in writing that they wish the solicitors to act in the knowledge that the solicitor acts or may act for one or more other clients who are competing for the same objective.

89. In his written submissions Mr. Bacon sought to argue that the Claimant had waived their right to objection, the Claimant having been aware of the potential conflict, it was alleged. Mr Mallalieu says that it is too late to raise the point. To my mind, he is right about this. But in any event, it seems clear from the matters which have been set out above that any effective waiver would require the Claimant to have full knowledge of all the material facts. I do not accept that any satisfactory explanation was given by the Defendant as to the conflict, still less that the Claimant had a full knowledge of the material facts. Indeed, as I have found, TJ mispresented the position of his firm at the outset.

90. Accordingly, on this alternative basis I would assess the costs due under the RBS bill at nil.

Issue 3- the £50,000 bill- whether it is a valid statute bill and other there are special circumstances justifying an assessment

91. As I understand it, the Claimant's position is that relief is only sought in respect of this bill if I were to conclude that all the costs to February 2017 were not settled by way of an agreed payment of £50,000 plus VAT. Since I have found that the costs to February 2017 were settled by way of this agreed payment this issue does not arise. It seems to me in any event that the payment of £50,000 was the product of an agreement or compromise which implicitly waived any right to an assessment under section 70 of the Solicitors Act 1974[2].

Issue 4 'unlawful termination'

92. On about 3 February 2017 LDC responded to the letter of claim, denying any liability. A letter was then sent to HK on 16 February 2017 which enclosed the letter of claim against LDC and the letter of response from LDC. It was contended in the letter to HK that it was the corollary of a number of the arguments of LDC that HK were negligent and/or in breach of contract.

93. Following receipt of the first draft of the CFA on 18 February 2017, JA wrote an email to TJ in which he raised concerns about the reasons given for the success fee (at 75% of normal fees). Following this exchange there was a discussion between TJ and JA, in which JA raised his concern as to his position under termination provisions in the CFA if he were to pay the £50,000 and then enter into the CFA; in his witness statement he said that he was concerned that the Defendant might try and settle the claim and "*dump* [the Claimant] *as a client*" .

94. In an email on 20 February 2017, which is particularly relied upon by the Claimant, TJ said as follows:

> *I've thought very carefully about the CFA, our chat yesterday and concluded that essentially it comes down to trust. I would never force you to settle on a basis that was financially unacceptable to you PROVIDED you were acting realistically and sensibly. I have looked back on all the other CFAs I have won and in every case except one, the matter settled before trial. We agreed a deal with the clients they gave them what they*

[2] See Walton *v Egan* [1982] QB 1231 Mustill J (as then was) dealing with section 57 of the Solicitors Act 1974 (non-contentious agreements) at pages 1237 H to 1238 A

wanted and what we wanted in other words a deal. The clients were flexible as we were. That includes both [the Defendant] *and my former firm. Even in the case won at trial, we agreed a deal with the other side for our fees. Detailed assessment by the courts can take 12 months and is expensive for the paying party so deals are done*
In the present cases although I believe you accept my good faith, you have [CW] *on your side. Can you imagine he, you and us having different views of whether*
And on what basis to do a deal
It is impossible to provide for every eventuality, it is too complex and [there are too] *many moving parts but short of you being stubborn or(sorry) plain stupid against* [CW's] and *my advice, I don't see us falling out over this*
We all want a deal, you compensation, us fees. Are we likely to act like lemmings falling over the cliff and ending up with nothing
A CFA depends on a high degree of trust. Us that there are no skeletons in your cupboard and you that we are competent and acting in your best interests. The termination provisions and consequences are in clause 13 of CFA but they don't detract from the sentiments in this email.
(my underlining)

95. A further draft of the CFA was signed on 21 February 2019 (as recorded above the termination provision are found at clause 14 in the final draft). It is clear to me and not substantially disputed that the Claimant relied upon the assurances in this email before entering into the CFA. It is clear too that JA was concerned that if he entered into the CFA the Defendant would seek to terminate the CFA or decline to pursue the claim against LDC against the advice of CW or otherwise against his best interests. The assurances were provided to JA in order to persuade the Claimant to enter into the CFA and pay the sum of £50,000 which the Defendant sought; and they had the effect of doing so. The assurance that CW would be involved in any advice which might be relied upon if the termination provisions were to be invoked by the Defendant were the reason why the Defendant was instructed.

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97. Proceedings were issued on 14 March 2017. A Defence was served in or about early April 2017 and a Request for Further Information was served by LDC on or about 13 April 2017.

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116. On 9 July 2017 JA emailed the Defendant asking for a copy of the CFA as soon as possible. He repeated the request early the following morning and a copy was provided to him.

117. On 10 July 2017 JA spoke with MR. JA says that he explained to him that he felt his firm and TJ were "*leaving me exposed, isolated and out in the cold"*. He said he was worried by their consistent refusal to meet to "strategize" a way forward and that he was particularly concerned about TJ continued enthusiasm to put forward a Part 36 offer. He said he felt like he and MR were looking for a way out. He says he made it clear that the Defendant was not to put a Part 36 forward offer forward at this stage.

118. MR's manuscript notes of the conversation read,

Attg [JA],

Wants to pull it.
Take it elsewhere.
Not getting [? there]
Not following instructions.
We get paid out.

Cubism

119. There is thereafter a note by MR of what appear to discussion with TJ, "*yes, agreed will make Part 36 offer in next weeks*."

120. MR says that during the call with JA, JA told him that he wanted to withdraw his instructions from the Defendant and take the case elsewhere. He said that JA told him in effect that he did not feel that the case was progressing with the Defendant, and he felt that the Defendant were not following instructions. He said that JA proposed that the Defendant

transfer the files in the case to his new lawyers and the Defendant would then get paid out under the terms of our CFA if the case was won and that when he asked him who his lawyers JA told him that they were "Cubism". MR said that it is his practice when taking calls to make brief headline notes as he speaks and to then write up a longer note. He appends the brief note which I have referred to above to his witness statement.

121. At 12.06 pm JA emailed MR as follows:
"Further to our conversation I really want to hear from you ASAP regarding moving on so that we can move past this. Once that has been done, I can arrange for the file to be collected from you.
Irrespective of that, I do still need the time costs to date so that I can be certain of any prospective costs,"

122. At 12:58 pm TJ emailed JA as follows:
"I am shocked by the content of your conversation with [MR] *today and your allegation that we are not conducting litigation as you wish. It is totally untrue as you are well aware. You have fabricated this as an excuse to instruct the same law firm dealing with your RBS claim. Shame on you.*
.
There are rights and obligations in our CFA on both sides and today's actions by you have legal repercussions."

123. JA replied to TJ (cc'ing in MR and CW) as follows:
"No Trevor, you have been trying to 'guide' me to put forward a part 36 offer, which is contrary to my interests. You shouldn't be shocked; you should be surprised it took me this long to realise you weren't looking after my best interests.
If you are threatening me with repercussions, we'll go down the Mediation route, if you want to safeguard your [fees] *to date, we'll do a quick handover. It's your call"*

124. At 1:13 pm TJ replied:
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As of last Monday, last you had accepted my advice. How things change!
You live on another planet.
Why don't you run the claim yourself. You give the impression that you know more than the lawyers"

125. JA then replied as follows:
The way you're reacting shows there is a blatant dispute and chasm between us and the way the case should be taken forward. The truth is that you are now descending to levels that you ought not. However, that does not mean this is incapable of resolution between us. We should resolve it. I would prefer that.
Where do we go from here? I have made a suggestion as to how we proceed, which is fair to all … no one loses other than myself and your [fees] *are safeguarded.*
I no longer have faith in the way you are taking this forward Trevor and have a right to use lawyers of my choosing.

126. MR thereafter wrote the letter which I have referred to above at [13] containing the 'Notice of Termination' ('the termination letter').

127.

128. JA went on to say in the email that he simply wanted to fight his case against LDC as effectively as possible, that if he had no confidence in his legal firm, he had to go elsewhere. He then proposed an arrangement whereby he would agree the Defendant's fees and costs and that once a settlement was achieved either on the LDC or HK matter these monies would be passed on to the Defendant but that the papers, files and on all the evidence held by the Defendant would immediately be made available to the new lawyers which he said, "I wish to engage". He said that he would contest any resistance to providing the papers and look into any negligence in the handling of his claim. He said he would not be "coerced" by the Defendant and referred to the earlier email thread.

-decision

129. Again, both sides argued that that the contemporaneous document supported their case in respect of the factual disputes that arose.

130. Having considered all the evidence I am satisfied that JA is correct in his account as to the nature of the advice that TJ gave him on 3 July and subsequently, and that he was being compelled to make a Part 36 offer "immediately", meaning within the next week or so, in conflict with CW's strategy.

131. The Defendant's case was that they were not requiring the Claimant to make a Part 36 offer at that stage but were content to go along with CW's advice. I have considered this, and all the other points made by Mr. Bacon. He argued that if the Claimant were correct about the nature of the advice on 3 July he would have acted differently and would, for instance, have emailed TJ and others directly protesting about the advice. But it seems to me that the situation was more nuanced than is suggested by the Defendant. JA had agreed to the making of an offer but had misgivings about it and called CW; he explained what had happened and CW questioned whether the course of action proposed by the Defendant was correct and told JA, in effect, that the advice was unwise. JA then left it to CW, whom he trusted, with the task of persuading the Defendant to stick to the plan that had previously been agreed. That avoided the need for him to revert to TJ. It seems plain to me that JA was aligning himself in the final email of the day CW's strategy not (as I understand the Defendant to contend) TJ's advice.

132. Further, JA's expression of confusion in his email on 3 July 2017 that the "*direction*" had "*changed*" points to JA having been informed of a departure from a previously agreed strategy. Although as I note above, CW has no specific recollection of an earlier conversation with JA in his email he questioned why it was "*we cannot proceed as we had planned*". This, to my mind, is why he set out in detail why the strategy, which had been agreed, was an appropriate one in order to obtain a reasonable outcome; and why he said that the making early offers was unlikely to yield a reasonable offer.

133. As I understood the Defendant's case, it was that there was no contemporaneous complaint by JA of the matters that he has subsequently relied upon. It is however clear that JA did make a complaint to the effect that the Defendant was requiring the Claimant to make a Part 36 offer prematurely in his letter of 11 July in particular. I do not accept that the reference or references in the letter to concerns about the timing of the proposed offer were oblique. Further, the letter of 11 July being closely contemporaneous to the relevant events it is, in my judgment, supportive of his complain that he had been pressurised by TJ

to accept TJ's strategy of putting the Part 36 offer immediately (in the terms in which he explained) and that TJ was continuing to insist on putting forward the Part 36 offer at the stage when JA rang MR on 10 July complaining that he was not following instructions. I note also JA's email on 10 July in which he made a allegation that TJ " *sought to 'guide' me to put forward a part 36 offer which was contrary to* [his] *interests"* and indeed the Defendant's own letter of 10 July, referring as does to a rejection of the advice in respect of a Part 36 offer.

134. Quite apart from the surprisingly aggressive and intemperate tone of TJ's email of 10 July at 1.13 pm it is clear from the email exchange on this date that the dispute that had arisen between the parties was in respect of the advice to make a Part 36 offer. The email from TJ at 1.13 pm referred to him having persuaded JA to make a Part 36 offer "*in order to get rid of the claim"*; no mention is made of waiting to see what the strategy CW had advised should be followed, would yield.

135. If the Defendant were willing to accept CW's advice as to strategy I would have expected MR to have made this clear before seeking to terminate the CFA in his letter and to have emailed JA explaining that this was so and how the Defendant's advice to make a Part 36 offer fitted in with this strategy. But there was no such email or explanation. Indeed in the context of the pre-CFA reassurances set out above, it strikes me as significant that the Defendant did not involve CW in consideration of when to make and the amount of a Part 36 offer prior to getting JA's agreement to sending the same; if they were proposing that a Part 36 offer be made after the steps CW advised it difficult to see why he would not be involved.
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136. It would have been clear to the Defendant that in aligning himself on 3 July to the strategy advised by CW (as he did in his last email of this date), JA was not precluding a Part 36 offer at some stage. CW's advice envisaged steps to be taken to obtain documentation which had not previously been made available and then to put interrogatories to the former LDC Officers in order to give the Claimant the best chance of successful ADR. That this was the case is in any event clear from the contents of the letter of 11 July in which JA refers to his concern that he was required to make a Part 36 offer *"<u>prior</u> to having put forward our strongest argument"* (my underlining). Moreover, I do not accept Mr. Bacon's submission that the Claimant's case on this point only became apparent at the hearing. Quite apart from the contents of the letter of 11 July it was clear to me from JA's first witness statement that his concern with TJ's advice was as to the timing of a Part 36 offer: he says he had discussed with CW putting forward a Part 36 offer only after certain steps were taken. It made no sense to reject in principle the making of a Part 36 offer and, to my mind, he was obviously not doing so. Whether or not JA had at some very early stage harboured a desire to see the claim against LDC pursued to trial, JA's desire at the time of entry to the CFA, in agreement with CW's strategy, was to settle the case: at the very outset of instruction: CW's view that the "*prospect of settlement may be high regardless of legal merit*" must have been clear to JA.

137. Steps were being taken by the Defendant to prepare an application for the issuing of witness summonses in respect of the former LDC Officers (a response from CW was awaited) and in his emails TJ does not express disagreement with the advice of CW. Nevertheless in the email exchange on 15 April 2017 (which I have in part set out above) TJ sought to persuade JA there was no claim at all against LDC and such evidence as the ex-officers of the LDC might give were not going to make any difference. In my judgment TJ was paying 'lip service' to CW's advice. TJ set out in the exchange his concerns about

the time and resources the Defendant would have to commit to the claim against LDC: the longer the claim went on "*the greater the cost*". LDC had proved more determined to defend the claim without making the (nuisance) offer that had been expected, a matter to which TJ pointedly refers in his later email of 15 April. . In any event it seems to me to be clear that the Defendant did not accept the agreed strategy; in July 2017 it was seeking to 'shut down' the LDC claim because of their own exposure under the CFA.

138. CW had been a good friend of JA. They had known each other from childhood and attended football matches together. CW was careful to state only that which he could recall and was a witness of truth; in his evidence he recalled that " *the whole thing blew up in that sort of way where Josh was upset about – he felt being sort of, walked down the gangplank towards a settlement and what did I know about this… he felt sort of manoeuvred into Part 36 that he not want to go down".* I consider his account generally to be in keeping with a substantial dispute having arisen as to the timing of a Part 36 offer on 3 July. He said that he was not been previously been involved in any discussions about a Part 36 offer. It was also clear from CW's evidence that he had had some concern at the time that his strategy was not being followed.

139. There are perhaps other points to be made. CW's plan included the issuing of an application for witness summonses, the hearing of the application, the service of those summonses and, the drafting and service of interrogatories. It would have taken some time to implement (albeit CW envisaged that it would be done before "the summer break"). TJ's email of 4 July 2107 expresses some uncertainty as to how long it would take the court to determine the applications alone, "perhaps 2 -3 weeks". And yet TJ was already on 10 July 2017 in the process of drafting the offer for junior counsel to approve. The manuscript note of the conversation between TJ and MR states that the Part 36 offer was to be made "*in the next weeks*": it does not state in terms a 'few' weeks but it is notable that no mention was made of CW's strategy in the note and the time constraints it might impose. (Similarly perhaps, even on TJ's account the Part 36 offer was to be served with a "reply", the response to the Part 18 request, a document which was almost ready, or ready, for service, on 3 July 2017). Moreover, as CW said in evidence, the amount of any offer might depend on what turned up from the steps that were to be taken. There would not have been any need to ascertain with JA a figure for the Part 36 offer at that stage; indeed it might have been unwise to do so if an offer could be made at a later stage after the witness summonses had been served. Looked at individually or collectively in my judgment these matters were more consistent with the Defendant proceeding on the basis that the Part 36 offer was to be made imminently, before following through on CW's strategy, and less easily reconcilable with the Defendant's case.

140. I do not accept the Defendant's case that the Claimant could not have been compelled to make a Part 36 offer because it made no sense to get an agreement on the making of a Part 36 offer before such an offer had been be drafted: the precise terms of the written offer did not need to be ascertained before a decision in principle as to the making of an offer and its amount could be made. Mr. Bacon also said that as a matter of law the Defendant had no right to make an offer without the Claimant's instructions and that the Claimant was entitled to reject any advice requiring him to make a Part 36 offer; this, it was said, supported the conclusion that the Claimant must have manufactured his account as regards the Part 36 offer: I do not accept this argument which seems to me unrealistic in the circumstances. JA did, as I have set out above, attempt to persuade the Defendant to follow CW's strategy.

Moreover, it was because JA was being forced into making an offer, contrary to his best interests, that he considered instructing other solicitors.

141. To my mind JA's account of his advice on 3 July and the events thereafter is, for all the different reasons set out above, supported by contemporaneous documentation. In any event, I preferred the evidence of JA to that of TJ, supported as I consider it be by the account of CW. Whilst JA was perhaps mistaken as to some of the detail of for instance, the precise events or more particularly the precise sequence of events on 3 July any mistakes in the detail of his recollection did not, to my mind, detract from the essential reliability of his evidence. I have already set out my views on the reliability of TJ as a witness. I was unable to accept that the shock that he purported to express in his email of 1.13 pm on 10 July 2017 was as real as was contended by Mr. Bacon. TJ would, it seems to me, have been aware that JA had misgivings about his advice as to a Part 36 offer given, amongst other things, the email exchange on 3 July.

142. Further, I do not accept the Defendant's case that the Claimant rejected the Defendant's advice generally or that he had terminated the CFA agreement himself; nor do I accept that any instruction of another firm or communication of a wish to move his instructions to a new firm amounted to a general rejection of the Defendant's advice.

143. Had MR not known of the issue that had arisen between JA and TJ, I would have expected the accusation that the Defendant were not following instructions to have prompted MR to ask further questions and for him to record the answers to such question- given in particular its apparently serious nature. And yet in evidence MR said he did not believe he did ask or did not recall that he asked JA what instructions he claimed were not being followed. I found this account implausible. Moreover, I do not accept, given the seriousness of the accusation JA had made, the reasons MR gave for not preparing a fuller note (including the need for him to go into another meeting and that this was his last day before going on holiday; or indeed that the matter was adequately covered by later emails). I think it more likely that he was aware of the advice that TJ had given as to a Part 36 offer and JA's opposition to it (noting MR had been cc'ed into the earlier email string on 3 July). In short, the suggestion that JA might move his instructions did not emerge in a vacuum or as a result of a rejection of the Defendant's advice generally, as I understood MR to suggest. Both MR and JA understood from what said in the course of this conversation or otherwise what lay beneath the allegation that the Defendant was not following instructions; and it was, I find, likely to have been clear to MR that he was not happy about the advice that he had received about the making of a Part 36 offer.

144. It is only the advice as to the timing of the Part 36 offer that JA rejected. The termination letter refers to the Claimant's rejection of the advice in respect of a Part 36 offer; and to my mind the words '[be] *that is it may'* might also be read as referring to JA's assertion that the advice in respect of the Part 36 offer was against the Claimant's interests, rather that opening up a general allegation that the Claimant was failing to follow the Defendant's advice generally. Further and whatever the correct reading of this letter, no other specific advice was identified as having been rejected.

145. In early July 2017 it seems to me JA's fears (as he expressed them in the negotiation of the CFA) were being realised and he was now being required to make a Part 36 Offer in a position of weakness shortly after the Claimant had paid significant sum to enter into the CFA; this is what caused him to lose "faith". To my mind it is unsurprising that he should

want to consider the terms of the CFA and potentially obtain a further advice from other solicitors as to his position under the CFA, and indeed consider moving his instructions to another firm. But I do not accept that the fact that JA asked for copy of the CFA meant that he would necessarily move his case elsewhere or that his subsequent communications could properly be understood as communicating a decision that he was rejecting the Defendant's advice generally or terminating the CFA.

146. I accept JA's evidence that he did not instruct solicitors on the claims against LDC or HK until after termination of the CFA (I note the contents of a letter from the solicitors subsequently instructed to this effect) and I prefer his account as to what was said about this in the discussion to that of MR. I also accept JA's evidence that on 10 July his preferred option was to have the Defendant continue the claim in accordance with CW's strategy and but for the disagreement over the timing of the Part 36 offer he would not have considered withdrawing instructions from Defendant. JA's emails of 10 July seem to me to be consistent with this, referring as they did to the need for further discussions (and the need for resolution in respect of his previous "*suggestion as to how we proceed*"). The termination letter written by MR, moreover, referred to a wish to instruct other solicitors; had JA communicated that a clear decision to do so had been made his letter could, to my mind, have been expected to have said so. I also accept JA's evidence that instructing new solicitors involved yet further expense reading into the case which (particularly in the light of his earlier experiences) was likely to have been a significant matter to him (and in my judgement weighed strongly against moving to fresh solicitors). It would have made little sense to move the instructions if the Defendant could be persuaded to adhere to the agreed strategy.

147. Given the refusal to adhere to CW's advice it is understandable that JA would have wanted the Defendant to know in clear terms that one of his options was to move the case. JA was threatening to take the case elsewhere, but he did not communicate that he had done so. JA would have been aware that notice of termination had to be given in writing; so too would MR. The Claimant did not give notice in writing, as would have been required under Clause 14 (1) if it were to effect a termination. Even at this stage (and notwithstanding the tone of the emails from TJ), the situation with the Defendant was salvageable and I am satisfied that in the particular circumstances the request to make papers available (predicated as the initial request was in the email of 12.06pm of JA having heard from the Defendant *"regarding moving on"*) did not preclude and was not inconsistent with the continuation of the CFA. That this was clear to the Defendant is apparent from and confirmed by the 'termination' letter which proceeds on the basis that the agreement had continued to this point.

148. The name 'Cubism' appears on MR's note and the firm is mentioned in the 'termination' letter as the solicitors he 'understands' that JA wishes to instruct. On balance I accept that the name of the firm was mentioned or at very least that JA had given sufficient information to enable MR to identity at some point prior to the 'termination letter' that this was the firm which JA was considering instructing in the claim against LDC and HK. The note is brief, indeed there appear to be good reason why JA would not have told MR the name of the solicitors. But whatever the position I do not accept that this makes any difference to the conclusion that I should reach. It does not lead to the conclusion that JA had instructed solicitors (inter alia, as I have noted the letter refers to a 'wish' to instruct Cubism). Nor in my judgment would any mistake in JA's recollection in this respect affect his essential

reliability as a witness (given, amongst other things, the primary concentration in this telephone call was upon other matters).

149. Mr. Bacon argued in his final written submissions that Clause 14 (1) gave the Defendant a right to payment of normal fees on termination in circumstances where the client terminated the CFA. On the Defendant's case, this supported the contention that JA had manufactured a dispute about Part 36 offers, as by doing so he might facilitate the moving of instructions to other solicitors without an immediate liability to pay fees under Clause 14 (1). I do not however accept that this reading of the contractual provision[3] is correct. It is common ground that the Claimant continued both claims after the termination of the agreement with the Defendant, so the first sentence of clause 14 (1) does not apply; the second sentence of the clause placed an obligation to pay the 'Success Fee,' 'Normal fees' and disbursements if the Claimant were to continue with one or more claim and win either: the obligation to make payment was thus deferred and dependent upon success. In any event I do not accept that the Claimant having obtained a copy of the CFA contrived a termination under Clause 14 (2) (a) to avoid any adverse consequences under Claude 14 (1). Even if my interpretation of Clause 14 (1) were wrong or the position were more nuanced than I understand it to be, I accept that there was a real dispute as to whether any Part 36 offer would be made immediately and that JA would have continued to instruct the Defendant if they had agreed to follow the strategy outlined by CW.

150. As Mr. Mallalieu intimates in his reply submissions, Mr. Bacon's final written submissions say little (if anything) to justify their advice in the event that the Claimant is correct in his account of that advice. Indeed it was not clear to me that the Defendant sought to challenge the reasonableness of CW's advice in his email of 3 July; it was after all the Defendant's case that they were following CW's advice.

151. In any event, in my judgment, the Defendant's advice in respect of the Part 36 offer, as I have found it to be, was unreasonable. This was so irrespective of the assurances given by TJ before entry into the CFA. . In any event to require the Claimant to make a Part 36 offer straightaway particularly without undertaking the steps CW recommended was unreasonable, not least for reasons given by CW. CW envisaged the Claimant being in a better position to engage in ADR that was more likely to result in a satisfactory offer at a later stage and it is clear CW took the view that this a significantly better opportunity to engage in ADR would arise in the relatively short term.

152. Independently of the above, there were to my mind further bases for concluding that the Defendant's advice was unreasonable. There is no restriction in the CFA as to the circumstances relevant to a consideration of the reasonableness of the advice. As Mr. Mallalieu argued, and as seems clear to me, the assurances given by TJ prior to entry into the CFA were relevant to such a consideration. The very concern of JA which prompted the Defendant to give the assurances set out above was that the Defendant would not consult with CW in respect of any advice that might be relied upon under the termination provisions: if JA were not *"being stubborn or plain stupid" or "going against"* CW' s advice" and the Defendant's advice, it followed that their advice would not be reasonable. It is clear that JA, and thus the Claimant, relied heavily upon these assurances before making the payment of £50,000 and entering into the CFA. The decision to terminate the CFA

[3] Which, as I understand it, differs from the termination provisions found in other standard Law Society CFAs.

relying on Clause 14 (2) (a) was contrary to the Defendant's own assurances and, at the very least, rendered the advice unreasonable. TJ accepted in evidence that it was "*unquestionably correct*" that what CW thought about any advice was material to the interpretation of the termination provisions; the Defendant could not proceed until any disagreement between their advice and the advice of CW was resolved. CW did not have a veto but his advice was material to the reasonableness of any advice that the Defendant may give in respect of the operation of the termination provisions: CW would need to be involved and there would need to be consideration of the advice of CW in the formalisation of any advice by the Defendant. This did not occur; the Defendant unreasonably failed to involve CW in the formulation of its advice.

153. I also accept Mr. Mallalieu's further submission that even if the Claimant had misunderstood the advice by TJ on 3 July and that advice was in fact (contrary to my findings) in accordance with CW's advice, this should have been set out in writing if the Defendant were to rely upon it to terminate the CFA. At the very least the Defendant should have clarified how the advice was consistent with CW's advice, particularly in the light of the contents of his JA's first email on 3 July (and the confusion expressed in it). It seems to be clear that the requirement of 'reasonableness' in the agreement must, in context, apply both to the procedural and substantive aspects of the advice (if it were otherwise the provision would be open to abuse). In any event without further steps having been taken to clarify the further advice and without advice expressly dealing with CW's strategy and explaining how it was consistent, it seems to me, in all the circumstances, the Defendant's advice was unreasonable.

154. It follows from these findings that the Defendant is not entitled to rely upon the terms of 14 (2) (a) (or indeed Clause 14 (1)). The only advice rejected by the Claimant was unreasonable. Accordingly, to answer the question as I understand it to be framed, the CFA was unlawfully terminated by the Defendant and, as I understand it, it follows that the LDC bill should be assessed at nil.

155. Further, in my judgment, even if it were the case that JA had instructed other solicitors prior to the termination letter and even if I were not correct in my earlier conclusions such thar JA's request as to the papers should lead to the conclusion that the Claimant was rejecting the Defendant's advice generally or was terminating the CFA, that would not change my conclusion. Such steps would have been necessitated by the Defendant's failure to adhere to their contractual obligations and to act in the Claimant's best interests; it would seem to me that the Defendant was repudiating the contract, giving the Claimant no option but to consider instructing other solicitors in order to advance his claim in accordance with CW's strategy. Thus even if the Claimant had terminated the CFA he would have been entitled to do so on the basis of the repudiation by the Defendant such that no entitlement to payment under clause 14 (2) (a) or otherwise would arise.

156. In the circumstances it is not necessary for me to deal, at least in any detail, with the other issues that arise as to whether (i) any estoppel, or assertion of rights based on a collateral contract or (mis) representations by the Defendant was precluded by the Entire Agreement clause (clause 19); or (ii) whether this clause was unreasonable having regard to the relevant statutory test. I should however deal with the two matters upon which I formed a clear view.

157. I have already set out my findings as to the Claimant's reliance on the assurances. The assurances were given in order to induce the Claimant to enter into the CFA; and to the extent that representations made by TJ as to the operation of the termination provisions were not correct, they were misrepresentations. Both parties proceeded on the basis of a common understanding as to how the termination provisions would operate; if there were a mistake about how they would operate it was commonly held. It is clear to me that if and to the extent that the Defendant were now seeking to go behind those assurances their conduct would be unconscionable (I might add that I did not understand TJ to say or believe otherwise). Putting aside any effect of clause 19, I would have concluded that an estoppel, (applying the principles recently set out by Akenhead J in *Mears Limited v Shoreline Housing Partnership Limited* [2015] EWHC 1396[4] at [49] to [51])) precluded the Defendant from relying upon any interpretation of the termination provisions which was inconsistent with the assurances they had given.

158. Clause 19 does not expressly exclude misrepresentation *(*cf *Axa Sun Life Services PLC v Campbell Martin and others* [2012] Bus LR 203 Rix LJ [94]). Mr. Bacon however argued, relying upon obiter comments of Rix LJ at [94] of *Axa Sun Life*), that the non-reliance element of the clause was sufficient to preclude the Claimant from any assertion that the pre-CFA assurances or (mis) representations had in fact been relied upon. In response to Mr. Mallalieu's reliance upon the decision in *Mears* in support of the proposition that an estoppel would prevent reliance on entire agreement clause where such reliance unconscionable, he sought to distinguish this decision, contending that the decision was founded upon different wording and that the parties had contracted on the basis of a "*representation free state of affaris*" (see inter alia *Mears* [2013] EWCA Civ 638 [14]-[17]; and *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221)). But even if I were to accept Mr. Bacon's case on this point I would not accept that the clause satisfies the requirement of reasonableness having regard to the circumstances which were, or ought reasonably to have been known to or in the contemplation of the parties when the CFA was made (cf section 11 UCTA) bearing in mind also the matters stated in Schedule 2 of UCTA (see *Axa Sun Life*, [56].

159. The following passage in the judgment of Lightman J in *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's L Rep 611 was approved by Stanley Burton LJ in *Axa Sun Life* [63]:

> *The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause is not to render evidence*

of the collateral warranty inadmissible in evidence as is suggested in Chitty on Contract 28th ed. Vol 1 para 12-102: it is to denude what would otherwise constitute a collateral warranty of legal effect.

160. The representations made in this case were central to the reason for the Defendant's instruction and the facts of this case are a long way from the *"threshing through the undergrowth"* which such clauses are designed to avoid.

161. This was a contract between two commercial organisations. I accept that JA was, as Mr. Bacon put it , "no fool" and whilst it appears that he had previously entered into a CFA although I have no evidence that he was aware of such a term; or its use (cf Schedule 2 (c)). He was not a lawyer, nor in the circumstances could he be expected to have a sophisticated understanding of the relevant clauses at least as one might of a lawyer. Moreover, as TJ said the essence of the email of 20 February was "*mutual trust and respect*". JA cannot be expected to have sought separate legal advice. The imbalance in the expertise of the parties (by analogy with the matters stated in Schedule 2 (a) of UCTA) seems to me an important factor in determining the reasonableness of the clause. Moreover, in the particular circumstances of this case, I do not consider it reasonable to expect the Claimant to have taken from the pre-CFA communications any interpretation of the termination provisions which was different that which was explained to him by his solicitors, on whom he relied, and upon whose assurance and advice as to the effect of the termination provisions he was (per the email of 20 February 2017) being asked to trust and did trust.

162. I might add (although not part of my essential reasoning) that, as Mr. Mallalieu pointed out, the Defendant appeared themselves to rely upon representations made outside of the contract in their assertion that the CFA in this case was a 'CFA lite' (ie a CFA which provides the client will not be liable for the costs as the solicitor will accept those costs payable by the other party to the litigation) - a matter which might possibly call into question the practicability of this clause, or at least confirm that both parties considered it part of the 'small print' and not fundamentally governing their legal relationship.

163. Accordingly, in my judgment clause 19 would be of no effect.