



Case No: SCCO Ref JJ1602737

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Court 95, Thomas More Building,
Royal Courts of Justice,
Strand WC2A 2LL

Date: 20 August 2020

Before:

MASTER JAMES

Between:

GLOBAL ENERGY HORIZONS CORPORATION

Claimant

- and -

THE WINROS PARTNERSHIP
(formerly ROSENBLATT SOLICITORS)

Defendant

Mr Benjamin Williams QC (instructed by **Eversheds Sutherland**) for the **Claimant**
Mr Andrew Post QC and Mr Adam Zellick QC (instructed by **Rosenblatt Limited**)
for the **Defendant**

Hearing dates: (fact-finding/preliminary issues phase):
5, 6, 7, 10, 11, 12, 13, 14 December 2018, 28 March and 10 May 2019;
further written submissions from the parties on 16 August and 16 September 2019.

Approved Judgment

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

Master James:

Introduction

1. I heard this matter in December 2018, March and May 2019; there were subsequent written submissions in August 2019 (Defendant) and September 2019 (Claimant) on two cases raised by me as being of possible relevance (dealt with below from paragraph 118). I then requested sight of the Defendant's timesheets, which it was initially prepared to produce to the Court. However, the Claimant then indicated that if the Court was going to have sight of this evidence, it should have sight of it as well, to which the Defendant took exception. As will be seen below, Disclosure has been a contentious matter in these Part 8 proceedings and when the parties indicated that they both took the view I did not need to see the timesheets in order to decide the issues, I sent a message in January 2020 indicating I would proceed without the timesheets.
2. On any reading this Judgment has taken a long time to produce; the two main reasons for this are the fact that both sides submitted that the other was being untruthful, so that I have had to reach a decision upon the veracity of professional persons upon which not only substantial sums of money but (per their submissions) personal bankruptcy and potentially career-ending consequences, might depend, and the fact that the Claimant's submissions in relation to the invalidity of the retainers, sits uncomfortably alongside its acknowledgment of the sterling job done by the Defendant on its behalf. I have put a great deal of thought into both of these issues and I recognise the potentially swingeing effect of this decision upon either side.
3. Even so, I sincerely apologise to both parties for the length of time this has taken to produce and thank them for their patience and forbearance throughout. To assist in reading the following, the matters are addressed in the following order:

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Brief Introduction

4. The Claimant, Global Energy Horizons Corporation (“**GEHC**”), is a venture capital corporation which had invested in new technology in the oil and gas industry; the precise details of that technology are commercially sensitive and beside the point as far as these proceedings are concerned, but suffice to say it would be not only “green” technology but also potentially very lucrative indeed. Mr de Clare of GEHC believes the technology to be worth at least hundreds of millions of dollars. Whilst GEHC’s former Solicitors, the Winros Partnership (formerly known as Rosenblatt Solicitors) (“**RS**”) now say the technology is worth a fraction of that, they do agree that money accruing from its use should rightfully accrue to GEHC, which outcome they sought to achieve in proceedings on GEHC’s behalf.
5. Unfortunately, a Mr Robert Gray, described as formerly a Partner of GEHC, took the technology for his own and derived a profit from it. GEHC, through RS, sued Mr Gray for an account of the profit he had derived from the technology and ultimately for that profit to be disgorged to GEHC as its rightful owners (the “**Gray Proceedings**”). I use the foregoing abbreviations in place of “Claimant” and “Defendant” to avoid confusion between the two sets of proceedings.

6. GEHC has accepted in open Court through Mr Benjamin Williams QC, that RS (and in particular Mr Justin Nimmo, the Partner acting) did a sterling job on their behalf and achieved a famous victory in hard-fought litigation against Mr Gray, who not only defended the proceedings on the merits but attempted to conceal his assets and/or put them beyond the reach of his creditors. Hence the case involved RS not only proving who was entitled to the technology, and how much it was worth, but how much Mr Gray had to satisfy any award of costs or damages.
7. Mr Gray was found liable to GEHC for having wrongfully appropriated the technology, however, only at this point (some years into the litigation) was the technology or the profit derived from it, valued. Expert Evidence obtained by RS valued it at a fraction of the (minimum) hundreds of millions that Mr de Clare asserts it is worth; instead it was said to be worth only \$15 million or thereabouts. At that point, the views of GEHC and RS as to the merits of the case, were placed suddenly and greatly at odds.
8. The matter was being funded under a Conditional Fee Agreement (“CFA”); there were in fact several retainers, including CFAs, one after another. Funds for upfront payments or for ongoing disbursements et cetera were raised by GEHC through its investors. This model would work admirably if the technology were worth hundreds of millions; even given a litigation spend getting towards eight figures there was potentially a great deal to be gained so that the investors could be repaid and rewarded for their support, and GEHC could still recover a very substantial sum over and above its legal costs and investors’ compensation. However, if the valuation of the claim really was only \$15 million or thereabouts it was likely that nothing would be left once legal costs had been accounted for, and in fact the investors who had funded the case so far would be unlikely to recover their costs outlay, let alone any compensation for supporting GEHC.
9. RS’s case is that the valuation at around \$15 million, was accurate and that, whilst the firm was prepared to continue to act, they were concerned that to continue to fight on against Mr Gray on such returns, would expose them to a risk of not recovering their costs even though GEHC had already obtained Judgment on liability. They also expressed concern on behalf of GEHC’s investors, whose identities they do not know. I do not believe RS stated in terms that they wished to go over GEHC’s head to put the Expert Evidence before the investors, but there was reference to the ethical issue RS perceived, in knowing that investors were being approached for funds in a case where (per the Expert Evidence) the “investment” in the Gray Proceedings, was unlikely to produce any profit.

10. On behalf of GEHC they assert that the technology is worth a great deal more than the valuation, and that Mr Gray (or those backing him) are worth sufficient sums of money to make it worthwhile proceeding and entirely proper to ask the investors for the necessary funds to press on. However, GEHC stated that due to a shift in the focus of the litigation at the quantum stage (towards Patents Law) they wished to bring in a new firm, namely Messrs. Bird & Bird, who had the requisite expertise in that specific area.
11. RS took issue with Bird & Bird being involved, particularly given indications from GEHC that RS had to take instructions from Bird & Bird from now on, and that RS would remain liable for disbursements. For RS it was said that this created an untenable situation as Bird & Bird could have incurred disbursements of which RS had no prior knowledge and would not necessarily have approved, but RS would still have been expected to pay for them. In effect, RS asserted that they were being asked to write a blank cheque and were having all autonomy taken out of their hands. This they regarded as untenable and it was suggested that GEHC were deliberately making RS's position impossible so that they would have to walk away thereby (per the latest iteration of the CFA) potentially forfeiting their Success Fee.
12. For GEHC it was asserted that they intended Bird & Bird to work in tandem with RS; Bird & Bird focusing upon the Patents Law regarding the disputed technology, and RS presumably continuing to display the Litigation expertise gratefully acknowledged by GEHC in open Court in these proceedings. They asserted that there was never any intention to make RS's position untenable, and that contemporaneous documents showed, for example, Bird & Bird backing Mr Nimmo of RS and Counsel instructed by RS, as to strategy and tactics being recommended by Mr Nimmo.
13. Instead, GEHC say, the issue that poisoned the well, was greed on the part of RS. They had a succession of fee agreements with GEHC, each of which provided for substantial payments, in consideration of which RS were to fund disbursements (save for CFA3) and act on a no-win, no-fee basis. At the point that Judgment had been obtained against Mr Gray (on the liability issue; quantum is yet to be finalised) a Costs Order was made in GEHC's favour. There was a Detailed Assessment before Master Leonard and Mr Gray was ordered to pay around £2.6 million in respect of the costs of the Liability Trial.
14. It is GEHC's case (and as I understand it RS accept) that, given the retainer then in place, they had the legal right to insist that RS handed all of that money over to GEHC, to distribute among the investors who had been funding the case so far. It is apparent from the papers, and both sides agree,

that RS asked to retain a significant proportion of that money (around £1.5 million) to which GEHC agreed. It is said on GEHC's behalf that they were not aware that they had the right to all of the money and would (had they been so advised) have said no. Per RS, they told GEHC that GEHC were entitled to all that money, but asked if they could retain £1.5 million of it, to which GEHC gave informed consent.

15. Be that as it may, rather than retain only the agreed sum, RS in fact retained the entire sum recovered from Mr Gray, refusing to hand any of it, let alone the remaining £1.1 million as agreed, over to GEHC, who assert that when (and because) they refused to accept this state of affairs, RS purported to terminate the retainer due to the involvement of Bird & Bird. In reality, GEHC assert, RS had been working alongside Bird & Bird for some time and terminated because GEHC had turned off the spigot and demanded the return of funds received from Mr Gray.
16. It should be noted that RS take an extremely dim view of GEHC's conduct and motives, asserting in closing submissions that these proceedings are an unprincipled, unmeritorious and unjust attempt to deny RS any remuneration at all for 6½ years of impeccable work of the highest possible standard, and to garner a source of funds for the impecunious GEHC in light of the disastrous direction in which Mr de Clare has taken its case against Mr Gray since making it impossible for RS to continue to act in 2016. In short, per RS, these proceedings are an oppressive attempted shakedown; RS makes reference to a threat by GEHC to report RS to the SRA, including in the course of the oral opening {K1/p 82/25 – p 83/10} as being part of that process.

The Section 70 Proceedings

17. After the relationship between GEHC and RS ended on unfriendly terms, GEHC instructed Eversheds Sutherland, who issued proceedings under Section 70 of the Solicitors' Act 1974 (the "**Section 70 Proceedings**") seeking an assessment of invoices rendered to GEHC by RS.
18. The Section 70 Proceedings were issued on 31 March 2016 and at a Directions hearing on 16 June 2016, the Court ordered that the following be dealt with by way of preliminary issues:
 - i) Whether CFAs 1, 2 and 3 entered into between GEHC and RS were valid or were in breach of Section 58 of the Courts and Legal Services Act and thereby unenforceable?

- ii) Whether RS was entitled to terminate the retainer; specifically, whether CFA2 was wrongfully terminated, whether CFA3 was entered into as a result of a misrepresentation that CFA2 had ended, and is therefore tainted, and whether CFA3 was wrongfully terminated?
19. In addition, the parties agreed that GEHC's application to determine whether the invoice dated 21 December 2012 [G18], and all invoices arising under CFA2, are within or without the scope of the statutory right to Detailed Assessment (the "**Scope Application**"), should be heard following the provision of live evidence at the hearing in December 2018, hence that too is covered in this Judgment.
20. Thus, in this already long-running matter the ten days of Hearings referred to on the front page, and the further written submissions, were for preliminary issues only. The time spent reflects the fact that the consequences, if the retainer was invalid or if RS were not entitled to terminate it, would be highly significant. With no valid retainer, RS would not be entitled to claim any fees and even if the retainer was valid, if it was wrongfully terminated it then (per GEHC) RS's entitlement to its fees would fall away. Thus, if GEHC prevails on either of the preliminary issues, any fees as yet unpaid to RS will remain unpaid, and any already paid will have to be disgorged back to GEHC. Hence, depending upon the outcome of this Judgment, this might be the end of the matter; if not, there could still be a contested Solicitors Act Detailed Assessment of RS's costs, sometime in 2020/21.
21. As such, this is clearly a case in which the costs of the costs could rival the costs of the underlying litigation. On the Preliminary Issues alone, both sides appeared throughout the ten-day preliminary issues Hearing by Leading Counsel (Mr Williams QC for GEHC, Mr Post QC and Mr Zellick QC for RS). Mr Nimmo and ABC of RS attended throughout; both are Grade A fee earners and although they were attending as witnesses, at the very least they were not back in RS's office earning fees. Mr Newberry of Eversheds Sutherland, one of the most senior Costs Lawyers in the country, was there throughout and there were evidently other persons on both sides giving instructions, noting matters and handling bundles, whose names I do not recite here. Mr de Clare of GEHC, Mr Monych (formerly of GEHC) and Mr Reed of Reed Pope, GEHC's Canadian Counsel, all flew in from Canada in order to give evidence. The entire proceedings were not only recorded but a palantype transcription was made "live" during the Hearing, which is a rare development in a Solicitors Act Assessment case and would be a significant expense on its own.

22. GEHC asserts that it has paid invoices rendered by RS totalling approximately £7.6 million; **there** are unpaid invoices which total around £800,000 and GEHC has also paid several £million in relation to disbursements for which RS have not raised invoices. In addition, should GEHC prevail in the Gray Proceedings, GEHC could have a potential additional liability to RS of approximately £3.4 million (being the success fee claimed by RS for CFA3). As such, the total liability of GEHC as asserted by RS is up to £12 million.
23. GEHC asserts that it has paid approximately £7.3million in respect of RS's fees alone, as against RS's approximate base costs incurred during the retainer of £5.6million, hence (per GEHC) RS has been paid their base costs in full, plus a substantial uplift, in circumstances where GEHC have yet to receive any damages from Gray.
24. GEHC assert that it is not yet possible to say what proportion of any recovery it may receive from RS in these proceedings would potentially be to the credit of Mr Gray, since it does not know how the liability costs paid by Mr Gray fall as between profit costs and disbursements. This may be a relevant distinction; Mr Gray's liability for RS's profit costs would be substantially reduced by any finding that CFAs were unenforceable, this would not necessarily follow in the case of paid disbursements (*Hollins v Russell* [2003] 4 All ER 590 refers). RS have indicated that if the CFAs are ruled unenforceable, they would refund money, not to GEHC but direct to Mr Gray.
25. I am not at present asked to rule upon this, and as it appears to be an enforcement issue it may be that I am never asked to do so. I merely note that GEHC are RS's former clients and on their own best case RS assert that Mr Gray owes GEHC \$15 million or thereabouts for the technology. If GEHC prevail on enforceability and/or termination, RS may wish to reflect before sending Mr Gray a substantial sum of money, upon whether divesting themselves of funds that may ultimately be ordered to be repaid by them to GEHC, puts RS in jeopardy, and whether the better course is to refund the money to GEHC and let Mr Gray seek to offset it against the \$15 million or whatever other sum, is ultimately found due and owing by him to GEHC, if so advised by his Solicitors.

Part 7 or Part 8

26. The case began (as is usual in Solicitors Act Assessments) under the Part 8 procedure. That procedure is intended for situations where the major dispute is as to interpretation, rather than as to fact; interpretation of a Trust Deed, for example, involving no dispute upon whether the Trust Deed exists but as to how it should be interpreted, whom it was intended to benefit, et cetera.

27. In this case, there is no dispute that a retainer existed; it was reduced to writing and each side has a copy (or rather, copies, since there were several retainers – references to “the retainer” cover all of them and certainly all of the ones that are under challenge). However, as matters have developed, there has been a great deal of dispute as to the surrounding facts in relation to the retainer, alleged oral variations thereof and so forth.
28. Of the ten days of Hearings, opening and closing submissions took a day each and the remainder involved examination-in-chief and cross-examination (and re-examination) of witnesses of fact from GEHC and RS. Looking back after the Hearing, there was and very clearly remains, a great deal of factual dispute between the parties.
29. RS submits that the Part 8 procedure was not suitable for this case; whilst I already ruled at a previous Hearing that the matter was to proceed under Part 8 rather than Part 7 (and I do not resile from that decision) I note RS’s reservations; during the course of the case RS has asserted many times that it is having to conduct the litigation with one hand tied behind its back (in reference to the Disclosure ordered under Part 8, as opposed to the Disclosure that would have been ordered under Part 7).
30. Since the close of evidence, according to RS, GEHC has extended its campaign of oppression against RS by serving a separate Part 7 claim in the High Court (Business and Property Court) in relation to the same retainer and CFAs {J1431} (and despite previously arguing before this Court that a Part 7 claim was not appropriate). Unhelpfully (per RS) GEHC is refusing to provide Particulars of Claim for that action which would be of assistance to this Court in understanding the inter-relationship between the two sets of proceedings and in being able to make an informed decision as to how this Court may wish to frame its Judgment in the present matter, bearing in mind the concurrent proceedings.
31. RS asks the Court to be mindful in the present Part 8 action that Disclosure as would be required in Part 7 proceedings has not been given, and therefore care is needed in relation to findings of fact, especially where GEHC has consistently refused to give Disclosure (e.g. in relation to its instruction of Bird & Bird) which it may be expected would further reveal the duplicity of its position and the

falsity of its allegations¹. I deal with the instruction of Bird & Bird and the termination of retainer, below (from paragraph 300).

GEHC's motivation in bringing the Section 70 Proceedings

32. RS were at pains during the Hearing to highlight the fact that GEHC have yet to have any success in their efforts to secure a greater sum (than \$15 million) from Mr Gray and have indeed been subject to order(s) for costs in Mr Gray's favour. RS's position is that GEHC are throwing good money after bad and have belatedly realised that RS's advice, and the Expert Evidence, were right. As such the Gray proceedings are indeed worth around \$15 million rather than the hundreds of millions that Mr de Clare asserts the technology, and hence Mr Gray's liability for wrongly appropriating it, are worth.
33. Accordingly, it is said on behalf of RS that the Section 70 proceedings are motivated by a wish to claw back fees paid to RS in spite of the sterling job that GEHC freely acknowledge RS did, so that those fees can be repaid to the investors to save Mr de Clare's face if not his very career with GEHC.
34. As far as that goes, I fail to see how it has any bearing upon my decision. GEHC deny any such motivation exists; the fact that they are still pursuing Mr Gray with great persistence, suggests that they genuinely believe the valuation obtained by RS is way too low. There is also the question of why so much time and money was spent on this litigation before the \$15 million valuation was obtained. GEHC relied upon RS to advise them on the merits of proceeding against Mr Gray; it is a basic principle that the merits include the value of the case and that cost/benefit is something that should be kept in mind throughout.

¹ In its proposed corrigenda to this Judgment, GEHC stated the following which I append as a footnote, without comment: *Use of the Part 8 procedure is in fact mandatory for Solicitors Act proceedings of this nature – CPR 67.3(2): i.e. here it is not an elective procedure for simple cases, but the originating process which must be used. The court records the defendant's position on the Part 7 proceedings in the Ch D, but not the claimant's. For completeness, and as the claimant has made clear throughout, the Ch D claim form was issued protectively in order to preserve the claimant's rights in respect of the 2012 invoices in circumstances where the defendant asserted (contrary to the court's subsequent finding) that those invoices were outside the scope of s 70, and therefore could not be reviewed in the current proceedings. This was necessary for limitation reasons (e.g. any claim for breach of contract resulting from the 2012 invoices would need to have been made by 2019). The defendant was repeatedly asked to enter a limitation amnesty to avoid the need to issue such protective proceedings during the currency of the SCCO proceedings, but it refused. For this reason only, the claim form was issued in the Ch D in order to stop any limitation defence from accruing. It has never been GEHC's intent to have parallel proceedings, and of course this court has upheld its position on the scope of the instant proceedings. GEHC's position is set out more fully in the fifth witness statement of Glenn Robert Newberry at paragraphs 29 to 35 in support of the application that the judgment be handed down in public.*

35. I have not heard detailed submissions upon why the disputed valuation was not obtained until so much had been spent on the case, and I have not been asked to rule upon this. RS appear to rely upon the fact that what was initially sought was not a sum of damages but an account of profits unlawfully retained by Mr Gray, but in my view that does not answer the question of whether these proceedings would ultimately be worth the cost of pursuing them and whether RS can rely as they seek to do, upon the technology's low value when they did not seek a valuation any sooner. Per GEHC, the valuation RS did obtain was not only entirely incorrect and overly pessimistic, but thereafter coloured RS's approach to the litigation and to the limited pot of money as they saw it, now available, which they refused to share with GEHC for the investors' benefit.
36. I have not heard what evidence GEHC now have and are now using to pursue Mr Gray for many times the amount of the valuation obtained by RS; I anticipate that evidence is likely commercially sensitive. RS are keeping a close watch upon that litigation and they addressed me upon the lack of success GEHC continues to have, in valuing the technology above \$15 million against Mr Gray.
37. In terms of the preliminary issues, I do not find that RS's assertions about GEHC's motivation in bringing the Section 70 proceedings have been made out evidentially, and even if they had, I would not regard them as undermining those proceedings in any way. If RS's case on validity and termination is correct it should prevail; if it is not, then GEHC should prevail. GEHC's alleged motivation in bringing the Section 70 proceedings seems to me to be entirely beside the point.
38. Likewise, RS have asserted that the Section 70 proceedings and the holes being picked in their retainer documents, are a creature of Eversheds Sutherland and that GEHC would never have brought proceedings for such matters without Mr Newberry's involvement. Again, I think that is entirely beside the point. Solicitors (and Counsel) have to work within ethical boundaries so that, for example, it would be entirely improper for Counsel to say to a Criminal Defendant "you will be found not guilty if you say that you did x, y, z" in other words devising a defence and putting words into a Defendant's mouth.
39. However, that is not what happened here. The relationship between the parties had clearly deteriorated and GEHC sought advice from Eversheds Sutherland accordingly. I assume that because there was a CFA (or CFAs) in place, the matter was referred to Mr Newberry, who went through the papers and found what GEHC now say are fatal flaws in the retainer documents, of which they were unaware prior to his/his team's intervention. However, that is par for the course and exactly the same as when GEHC initially instructed RS; they knew that Mr Gray had made off

with the technology and wanted compensation for his misdeeds, but they relied upon RS to tell them whether they had a case arguable before the Courts in this jurisdiction, and the specific tort(s) upon which their claim for damages could be founded.

40. Any suggestion that GEHC's case under Section 70 is weaker because Eversheds Sutherland told them they had a case to begin with, seems to me to be without merit. As will be seen, there are numerous instances where, on RS's best case, binding decisions relating to large sums of money being volunteered to RS from GEHC, were made in the course of a single conversation between ABC and Mr de Clare or Mr Monych of GEHC. These alleged agreements were never reduced to writing, nor were the conversations even recorded contemporaneously on RS's own file. If it took a forensic examination by Mr Newberry's team at Eversheds Sutherland to locate these issues, it is hardly surprising since RS failed to ensure they were in plain sight.

Witness Evidence and Credibility

41. According to GEHC, RS's evidence is inconsistent with truth; they suggest it is so far from credible that I would be entitled to find that RS's witness, ABC, has lied to the Court. They go on to add that, since the standard of proof in these proceedings is the balance of probabilities, I may find that RS's version of events is less likely than GEHC's and leave it there. Aside from the factual unlikelihood of their case (as GEHC see it) RS's position is said to be untenable in law as well, for a multiplicity of reasons.
42. According to RS, GEHC's witnesses Mr de Clare and Mr Monych failed to manage anything like coming up to proof; they were described as dishonest witnesses making untrue and unfounded allegations. GEHC's case is said to be in tatters on its facts and hopeless in law from the outset, with a multiplicity of reasons again given for this.
43. Neither side appears to concede that anything damaging came out in their own evidence but both sides home in on what they see as significant weaknesses exposed by their opponent's evidence. As such, whichever party prevails, their opponent is likely to wish to refer this to a higher Court and as such I have endeavoured to ensure that this Judgment gives all, and only, the information necessary.
44. With regards to the witness evidence, in my opinion the parties were fairly evenly matched in terms of credibility. The most impressive witnesses were Mr Reed (Claimant) and Mr Nimmo (Defendant). Neither had had anything significant to do with the creation of the retainer or of any

variations thereto, and their candour would certainly not be hampered by the knowledge that, upon some of the most significant issues before me, neither of them had anything to say. The fact that both were credible witnesses, deserves to be recorded here as, in fairness, does the fact that GEHC accepts that Mr Nimmo may have been defensive, but was not dishonest. Similarly, RS submits that, to the extent that Mr Reed's recollection differs from RS's case, it should be rejected, but that is not put as dishonesty but as an error of memory: to the extent that Mr Reed remembers matters differently to RS's witnesses, (they say) he is misremembering them.

45. Mr Nimmo ran the litigation; it is common ground that he achieved a result on Liability over significant obstacles, having toiled for several years in order to do so. GEHC expressed gratitude for his efforts including stating in Court and on the record, that they were grateful for his hard work. Even so, on the advice of their new Solicitors, GEHC assert that due to flaws in the retainer documents, and to the way in which the retainer was terminated, it is not bound to, and does not volunteer to pay for his services. Mr Nimmo understandably takes this amiss; having worked so hard for GEHC only to be (as he sees it) cast aside, he confirmed in cross-examination that he felt like a jilted lover {K2/9/583}. That was an odd thing to say but is at least (painfully) honest.
46. Mr Reed is GEHC's Canadian lawyer; he did not (as I understand it) advise GEHC upon the retainer documentation and therefore would have nothing to fear from cross-examination on that issue. For RS, it is said that it is difficult to assess Mr Reed's evidence without Disclosure; it is also said that some of his evidence was decidedly odd, with the specific example of his recollection of a meeting with Mr Rosenblatt, which is (per RS) inconsistent with anything else in the case and makes no sense.
47. As to Disclosure that is in my view a null point; I was not given any reason why Mr Reed's advice to GEHC would not be privileged, nor why a Canadian lawyer would have advised on an English Solicitor/client retainer in any event. As to any meeting with Mr Rosenblatt, Mr Rosenblatt was not at the Hearing. He did not submit to cross-examination as to the meeting in question, nor as to his 90% equity share in the firm versus ABC's assertion that if RS loses this case ABC will be personally bankrupt (which suggests that the brunt of the loss will be borne by ABC). The only live, sworn witness I had as to that meeting, was Mr Reed, who gave honest and straightforward evidence.
48. Of the other witnesses, I formed the view that they were trying to fight their respective corners, but that nobody was trying deliberately to mislead the Court. Mr de Clare and Mr Monych were,

between them, cross-examined for several days and made a number of what RS would say were damaging admissions on the facts; indeed RS went further in saying that they were dishonest witnesses who came to Court to give untruthful evidence and to fail to recollect anything inconvenient.

49. I will return below to whether these witnesses made admissions that were damaging or not, but the impression I formed was that they were being truthful and that, if their evidence did not expose any smoking guns, it is because there were none. Putting it at its most neutral, in my view, these witnesses believed what they were saying, and I did not pick up on the signals of deceit that RS claims were there to be seen.
50. ABC was patently distressed and intimidated by the process, but ABC was equally clearly determined to do their best and to hold their head up whilst doing so. Given the reference to their personal bankruptcy if this case goes against RS, I must take account of the overlap between ABC's personal interests and their evidence on RS's behalf. Given a similar overlap between the personal interests of Mr de Clare and his evidence on GEHC's behalf, personal/conflict of interests as regards these individuals is a fairly neutral point and in my view does not weigh against one side, any more than it does against the other. I will return to conduct/conflict of interests as between the entities of RS and GEHC below (from paragraph 151).
51. I note that ABC admitted matters which were not to ABC/RS's advantage, much as Mr de Clare (and Mr Monych) admitted matters which were not to GEHC's advantage, and to which I shall return below, and this speaks to the candour of all three. However, without finding that ABC was lying to the Court I do have reservations about their evidence, which is in a number of key areas, simply not consistent with reality. This tension between ABC's demeanour and affect, which I took to be genuine, and the reality of the situation in which ABC found themselves, has been one factor in my spending such a long time in considering this Judgment. I have been presented with two opposing sides both telling the truth, or should I say "their" truth. In order to give a just decision, despite invitations on both sides to do so, I need not find that either side is lying but need only find that one side is wrong. I now turn to the effect of the evidence upon the issues in this case, dealing with each issue (and the relevant legal points raised) in turn.

The interim (statute) Bill/scope issue: GEHC's position

52. Invoice number 39618 [G18] rendered to GEHC in December 2012 in relation to fees that RS allegedly represented were now due following the liability Judgment, totalling £3,269,131.54, is in issue, on the question of whether that invoice is an interim statute Bill and thus outside the scope of the Section 70 proceedings for Detailed Assessment, or is an interim, non-statute Bill and therefore within the scope. In effect it is a question of whether or not Detailed Assessment is time-barred under the Solicitors Act 1974 at Section 70 (4).
53. GEHC states that CFA2 (the retainer under which this invoice was raised) made no provision for rendering an interim statute Bill, nor for seeking payments on account. Bearing in mind that CFA2 was a CFA with a £1 million Advance Fee, that is not surprising. GEHC go on to detail the information on the face of the invoice, which is ~~relevant~~ to whether it is an interim statute Bill or merely a request for payment on account.
54. In this regard, per GEHC, it is relevant that the invoice does not carry a date range (work done from x date to y date); it contains no details of the costs and the accompanying schedule simply refers to “*Total time recorded to 21.12.12*” adding that credit has been given for a series of invoices. Two of those invoices relate to work done prior to 30 September 2009; that is the effective commencement date of CFA2 under a term rendering CFA2 retrospective. RS subsequently conceded there had been an over-charge in the sum of £65,988 (for work done prior to CFA2’s effective date) but have not returned that sum.
55. A statute bill must contain sufficient information to inform the client as to the basis on which it was prepared and enable the court to check its propriety; see *Cobbett v King* [1908] 2 KB 420. GEHC cite Ward LJ in *Ralph Hume Garry v Gwillim* [2002] EWCA Civ 1500 stating that at paragraph 70 Ward LJ held:
- “70. *This review of the legislation and the case law leads me to conclude that the burden on the client under section 69(2) to establish that a bill for a gross sum in contentious business will not be a bill “bona fide complying with the Act” is satisfied if the client shows:—*
- i) *that there is no sufficient narrative in the bill to identify what it is he is being charged for, and*
 - ii) *that he does not have sufficient knowledge from other documents in his possession or from what he has been told reasonably to take advice whether or not to apply for that bill to be taxed.*

The sufficiency of the narrative and the sufficiency of his knowledge will vary from case to case, and the more he knows, the less the bill may need to spell it out for him. The interests of justice require that the balance be struck between protection of the client's right to seek taxation and of the solicitor's right to recover not being defeated by opportunistic resort to technicality.”

56. Per GEHC, in addition to the information contained within the invoice as to what it covered, RS were obliged also to explain the effect of the invoice, and specifically that certain time limits would operate so that if it was not challenged within a fairly short space of time, it could not be challenged under the Solicitors Act at all. Case law such as *Thomas Watts and Co v Smith* [1998] EWCA Civ 468 and *Turner and Co v O Palomo SA* [2000] 1 WLR 37 would, as I understand it, not have assisted GEHC in the present case because the sums allegedly due and owing, were paid several years ago (and, per RS from paragraph 76 below, because GEHC is the Claimant, not the Defendant, in these proceedings). Hence an investigation of RS's invoice by way of assessing RS's damages² for non-payment thereof, would not apply in the present case.

57. GEHC cite Fulford J, in *Adams v Al Malik* [2003] EWHC 3232 (QB):

“...the party must know what rights are being negotiated and dispensed with in the sense that the solicitor must make it plain to the client that the purpose of sending the bill at that time is that it is to be treated as a complete self-contained bill of costs to date.”

58. Per GEHC, RS should have explained that this was an interim statute Bill and advised GEHC of its right to have it assessed by the court. An explanation was provided in the original, 2009 terms and conditions, but was not repeated or explained at the time the invoice was rendered, some three and a half years later.

59. If RS sought to rely on the doctrine of “Natural break” to justify their position that this was an interim statute Bill and they were entitled to render such a Bill, GEHC would argue that a natural break is not consistent with a case being run under a CFA, and that the specific terms of CFA2 and in particular, the calculation of the success fee, show that there would be no payment of fees until the conclusion of the litigation and receipt of funds from Mr Gray. GEHC cited CFA2 (under the calculation of “Success fee”) [H16] which provides:

“The success fee percentage set out in the agreement reflects the following:

² See Mr Justice Males in *Ahmud and Co Solicitors v MacPherson* [2015] EWHC 2440 regarding the approach on a non-statutory assessment

.....

- (c) *our assessment of the risks of failing to recover monetary return and the further postponement of payment of these costs*
- (d) *the fact that if you win, we will not be paid our basic charges until the end of the claim;”*

60. The provisions of CFA2, “What is covered by this agreement” [H14] include:

“The claim brought by you against Robert Gray and others.... Any proceedings you take to enforce a Judgment, Order or agreement. Negotiations about and/or a court assessment of the costs of this claim.”

61. The latter provision also indicates that the CFA did not end until the final conclusion of the proceedings, including Detailed Assessment proceedings. For this reason alone, say GEHC, the 21 December 2012 invoice was never, and could never have been, anything other than an interim non-statute Bill and as such, all costs incurred under CFA2/under that invoice, are clearly within scope.

62. While RS may say that the parties treated this as an interim statute Bill and that GEHC did not object to its delivery, even if this were the position (per GEHC) it would result only from RS wrongly advising GEHC that it was then entitled to raise a Bill because the proceedings subject to CFA2 had concluded in a win. Given that it proceeded on this erroneous advice, GEHC cannot have given any informed consent to what GEHC characterise as a variation of RS’s retainer so as to allow it to submit an interim statute bill at this time.

RS’s Position on Scope:

63. RS assert that there is a fundamental incoherence to GEHC’s position respect of this invoice as the claim form seeks Detailed Assessment of Bill 39618, but then goes on to assert that it is not an interim statute Bill. If so (per RS) it is incapable of assessment and, on GEHC’s own case, the Bill is outside the scope of these Detailed Assessment proceedings, and the scope application should be decided against GEHC. In asserting that the Bill is an interim statute Bill, RS rely upon the definition of success in CFA2 {H/H20}:

You achieve a settlement or any other benefit arising out of the Claim, or if you do not achieve a settlement and you go on to issue proceedings, the Court orders in your favour and orders your opponent to pay you costs.

64. Thus (per RS) success could be achieved if GEHC achieved a settlement or any other benefit or if the Court ordered in GEHC's favour and ordered Gray to pay costs. At the point that Vos J's Judgment was handed down (21 December 2012) the first of the two alternative definitions of success had in fact been achieved. GEHC had achieved a benefit arising out of the claim, namely determination by Vos J that Mr Gray had acted in breach of his fiduciary duty to GEHC, and that GEHC were entitled to an account, an enquiry and the transfer of assets found to be held on constructive trust. Per RS, it cannot sensibly be said that this was not a benefit to GEHC even if at that time (and to date) no damages have been recovered under Vos J's Judgment.
65. Further, per RS, the Order of Vos J at {J1/J211-4} sets out the substantive order (paras 1 to 4), and the costs order (para 5). These make out the second definition of success. It cannot plausibly be argued that these provisions do not amount to the Court "ordering in the Claimant's favour" and ordering Gray to pay costs. There was some suggestion in cross-examination that this Order was rather akin to an interlocutory success but (per RS) that position is contradicted by comparing these paragraphs with the relief sought in the proceedings: see the Re-Amended Particulars of Claim at {J1/J104 to J106}. Rather than mere interlocutory success, RS say Vos J was ordering wholesale in GEHC's favour on every item of relief sought (including where no damages were sought).
66. As to the suggestion in cross-examination that, because the relevant CFA had originally been made at a point when no split Trial had been ordered, success within the terms of the CFA could not be achieved until both liability and quantum had been determined, RS assert that this argument was premised on a false description of the claim by characterising it as one which would only succeed if damages were secured. Per RS, no quantified damages were sought, but only an account as to whether Mr Gray had made any benefits. What happened in the Gray Proceedings is what happens on a very regular basis in (e.g.) Clinical Negligence cases: parties habitually enter into CFAs on not dissimilar terms to these, and where a split Trial is later ordered success is achieved if liability is decided in the Claimant's favour.
67. If, contrary to the analysis above, the Court were to hold that neither the Judgment nor the Order of Vos J entitled RS to render a bill, that Judgment nonetheless represented the end of the liability phase of the litigation, giving a natural break in the proceedings, entitling RS to deliver a bill (*Re Romer and Haslam* [1989] 2 QB 286).

68. In the further alternative, per RS, GEHC has by its conduct in accepting delivery of the Bill, paying the Bill and relying upon its liability for that Bill in the party and party assessment against Mr Gray, accepted it as a statute Bill under the principle in *Davidsons v Jones Fenleigh* [1997] Costs L.R. (Core Vol.) 70.
69. If none of the above arguments were to be accepted then, per RS, GEHC is in any event barred by estoppel by convention from denying the right to render a statute bill: GEHC and RS having proceeded on the shared basis that RS was entitled to deliver a statute Bill. In that Bill, rendered on the basis of that shared understanding, RS credited GEHC with the balance of the Advance Fee paid under CFA2 (in so far as it had not been spent on disbursements) in the sum of £706,780.12: see the calculation attached to the Bill at [G19]. It would be unconscionable for GEHC, having taken the benefit of that repayment, to which it would not have been entitled if a statute Bill had not been rendered, to be allowed now to deny that right, making out an estoppel by convention.
70. It would further both be contrary to the doctrine of approbation and reprobation and an abuse of process in the light of the decisions of Master Leonard on the Detailed Assessment between GEHC and Mr Gray, given that GEHC had claimed a success fee in that Detailed Assessment, and Mr Gray had disputed it in the Points of Dispute: see General Point 3 at {J493}:

Furthermore, according to the terms of the two CFAs as summarised on page 8 of the Bill of Costs, the success fees were set, inter alia, on the basis of “the fact that if you win we will not be paid our basic charges until the end of the claim”. This anticipates that the success fee would not be recoverable until the end of the proceedings as a whole.....It is the Defendant’s case that the success fee is not recoverable until the end of the proceedings/claim, which will be when quantum has finally been determined. Accordingly, success fees are not to be determined now

71. Contrary to that argument made by Mr Gray, Master Leonard did assess success fees, and thereby rejected the argument raised on behalf of Mr Gray. It was put to ABC in cross-examination that the transcript of Master Leonard’s Judgment at {J575} did not deal with the point, but per RS this was a piece of misdirection and the Judgment that was shown to ABC to make this point was on an application to adjourn, not on the assessment itself: see the Order at {J574} and paragraphs 20 and 22 at {J580-1}. The issue of recoverability of the success fee had to be dealt with, not as part of that adjournment application but as part of the Detailed Assessment proper. On the Detailed Assessment ‘proper’, the success fee was indeed allowed although reductions were made.

72. As to the alleged defects in the Bill, even in closing submissions RS assert that GEHC cannot rely upon the absence of a narrative, as the evidence establishes that a time report was delivered with the Bill and that it was given to GEHC again at a meeting in January 2013: ABC, WS2 at paras 12 and 13 {C/C47-8} refers and further Mr Monych is said to have accepted in evidence that, although he had not recalled being given the printouts, this had in fact occurred and that his witness statement was wrong in this regard: {K5/pp 149-150}.
73. GEHC relies on the existence of errors, many of which are disputed, but even if and insofar as it is found that errors were made, RS assert no basis exists for contending that errors prevent interim Bills from being statute Bills, and that any such contention would be inconsistent with practice. Per RS the line of authority which establishes that the presence of errors may amount to special circumstances for the purposes of section 70(3), could not arise if the presence of errors prevented Bills from being statute Bills.
74. As to GEHC seeking an order that the Court reopens accounts and enquires into their correctness, per RS the grounds for such an order are obscure. The client is the Claimant, not the Defendant, so the *Turner v O Palomo* principle does not apply. Certainly, as stated above, the fact that these costs have long been paid, seems to me to put them outside both that case and *Thomas Watts and Co v Smith* besides, and I certainly agree with RS's view that the principle does not apply.
75. Per RS, if there is any jurisdictional basis, the Court should be very slow to exercise it in favour of a commercial client with the benefit of advice from Canadian lawyers, particularly in circumstances where the order sought would amount to an undermining of the express statutory time limit in section 70(4) (and where GEHC has issued separate Part 7 proceedings which it says is for matters held outside the scope of the present assessment proceedings). I deal with the relevance of Mr Reed's availability to advise on nice technical CFA points below (from paragraph 169). In short, I do not accept that his involvement has any impact whatsoever on this point. I am not aware that he practices law in England and Wales much less that he is alleged to have expertise in CFAs and I do not place any onus upon GEHC to seek his advice upon retainer documents produced by RS.

Court's Decision on Scope

76. I deal very briefly with the above legal points, for the simple reason that the scope issue has in my view turned upon which of the two parties' accounts of events I should accept. As such there is no need to go into great detail on the rest.

77. If GEHC have fallen into error by framing their case in terms of the invoice from December 2012 being within the scope of the Section 70 proceedings, no doubt that will sound in the costs of these proceedings. However, the real battle line between the parties on this invoice, was very clearly as to whether the costs billed in that invoice, are outside the scope of Detailed Assessment. If the invoice had been ruled as outside scope on the grounds upon which this issue was principally argued, namely elapse of the relevant time limit for challenging an interim statute Bill under Section 70, then the substantial costs contained within it, could not have been challenged by GEHC. As such, if as a result of these proceedings, GEHC have the right to have those costs assessed, that is a real and not a mere technical victory and is what both sides' arguments were directed towards, throughout this process. It is entirely routine for clients to seek Section 70 Detailed Assessment and for there to be a dispute between the parties as to whether the Bill in question is an interim statute, or interim non-statute, Bill. If the Solicitor prevails in arguing that it is an interim statute Bill and beyond the scope of Detailed Assessment, that is the end of it. However, if the client prevails in arguing that it is an interim non-statute Bill, the usual outcome is for an order that the Solicitor should render a final Bill for those costs, that will enable the same to be assessed as the client wishes.
78. In their evidence, ABC accepted that CFA2 could only work as a commercial proposition if it covered the proceedings until the point at which compensation was recovered, as without compensation GEHC would not have the wherewithal to pay the sums which fell due upon a 'win' {K1/6/367 pp 185-188}. ABC could scarcely do otherwise given the emphasis that RS has placed upon GEHC's impecuniosity throughout these proceedings. However, despite this, when GEHC succeeded at the first Trial in front of Vos J, RS asserted both that there had been a 'win' under CFA2 and that CFA2 was at an end: '*A win has been secured on the Trial of liability... The previous CFA arrangements are now at an end. New arrangements have to be entered into to deal with the further funding of the case...*' (Briefing Note of 11/1/13 [J1/196]).
79. CFA2 continuing was not presented to GEHC as a possibility; the reasons RS has subsequently offered for CFA2 being replaced (including alignment of risk between RS and GEHC and the suggestion that, because risk under CFA2 would have receded after the first Trial, Mr Gray would have exploited that to avoid paying the success fee) are discussed below from paragraph 166.
80. As to whether RS were entitled to raise a Bill in December 2012, albeit the definition of success in CFA2 upon which they rely, appears to have been met by that date, I am in some doubt. CFA2

defines success {H/H20} as GEHC achieving a settlement or any other benefit arising out of the Claim, or (if it does not settle and GEHC issue proceedings) the Court orders in GEHC's favour and Mr Gray to pay costs. However, in discussing the level of success fee (which was set at the maximum 100%) it states that '*... if you win we will not be paid our basic charges until the end of the claim*' [H/3/16 at (d)]. The definition of what is covered by the agreement, includes the claim brought by GEHC against Mr Gray, any proceedings taken to enforce a Judgment, Order or agreement, and dealing with party and party costs; it specifically excludes any Appeal (by GEHC or Mr Gray) against a final Judgment or Order [H/3/16].

81. There is a tension between those provisions but on its face CFA2 is stated to cover all work on the claim, up to a final Judgment or Order, excluding only work done on any Appeal therefrom. If RS wished to provide for recovery of the maximum 100% success fee under CFA2 on the basis it would not be paid until the end of the claim, it cannot (in my view) then rely upon the definition of success elsewhere in CFA2, to render a Bill at the earliest opportunity i.e. in December 2012.
82. As for estoppel this is in my view a bad point. RS credited GEHC with the balance of the Advance Fee paid under CFA2 (in the sum of £706,780.12) against their interim Bill, but that sum has not been irretrievably surrendered (or repaid). GEHC are not arguing that, if RS did not raise an interim statute Bill in December 2012, they have no right to render any Bill for those costs; subject to the Court's decision upon the validity of the retainer and the termination thereof, it seems to me that RS can simply render a final Bill for the disputed costs now, applying the same credit to it; the sum of £706,780.12 would presumably appear in the Cash Account.
83. As for RS's arguments regarding GEHC having relied upon the retainer in the party and party proceedings against Mr Gray, I deal with these under the validity of the retainer, rather than in the context of the validity of this particular Bill, below from paragraph 214.
84. On the *Davidsons v Jones Fenleigh* point, Roskill LJ in that case specifically stated that if a Solicitor wishes a Bill to be treated as a complete self-contained Bill of costs to date, he must make it plain to the client that that is the purpose of sending that Bill to the client at that time; the client's actions (in accepting and paying such a Bill) will be relevant on any subsequent challenge to that Bill. Given GEHC's case that it was never made plain, plus the fact that it is not stated on the face of the Bill, nor – since there was none – in any covering letter, that this was RS's intention in sending it, I do not find that point persuasive in RS's favour either.

85. My decision is ultimately based upon the parties' evidence in regard to this Bill which was, for GEHC, that the Bill was sent to them via email only, with no covering letter or other documentation. For RS, it was initially stated that the Bill was never emailed, it was sent through the post, with a timesheet attached by way of breakdown of time spent/work done. The timesheet would have been a bulky document, whether on paper or electronically, and it was put to Mr de Clare that he was wrong in stating that RS's bill of 21 December 2012 was emailed not posted {K1/3/118-119, pp 72-73}. RS's evidence prior to the Hearing was very clear that the Bill was not sent by email at all, and there was no question that it went by email alone.
86. Specific detail was given in ABC's evidence before the Hearing, as to how the Bill could not possibly have been sent via email, and that, because an email had previously "bounced back" from GEHC's server, the timesheet attachment would not have sent via email as it would be too large, hence post was the method of service, and ABC was adamant (and RS's case was) that it had not been sent by email at all.
87. The significance of the method of service is that the Bill itself is a single sheet and its contents are of the briefest gist. In order to be an interim statute bill, it must comply with certain formalities as set out above; the single sheet Bill would not suffice but (per RS) the single sheet Bill accompanied by the timesheets, would give sufficient information to bring it within the test.
88. As at the commencement of the Preliminary Issues Hearing, those remained the parties' respective positions and indeed it was put to Mr de Clare in cross-examination that he was wrong when he said that this Bill had been sent via email. Key to that line of questioning by RS, was the fact that GEHC had not been able to produce the email in question, which would of course have been the simplest way of proving its existence once and for all.
89. However, by the time ABC came to be cross-examined, there had been a new development in that GEHC had found the email sending the bill, which was duly produced as a late addendum to their Bundle [J177d and J177e]. At that stage, when ABC was cross-examined, ABC's evidence changed; ABC now accepted that the Bill had been emailed {K1/7/K428, p 122}. However, ABC asserted that ABC still very clearly remembered that it had been sent by post as well, with a timesheet attached, but without any covering letter {K1/7/428-432}.
90. The email, so belatedly found, contained no reference to a timesheet or covering letter to follow by hard copy, and nothing in writing exists to show that GEHC were told what the timesheet was, how

to read it and so on. Hence ABC's clear recollection is an interesting and (in my view) a somewhat unlikely state of affairs. For a Solicitor in ABC's position to recognise the significance of sending a hard copy Bill with a timesheet, so as to remember very clearly that it was posted (out of thousands of items of post that must go out from the firm every year) but not to think that significance warranted the safeguard (or the courtesy) of a covering letter, is extraordinary. A copy of a covering letter on RS's file, would have been compelling evidence of service by post: there was none, and ABC's explanation, which as I understand it is that ABC did not think it would be necessary, and did not expect GEHC to deny it so long after the event, was not persuasive.

91. There had been previous bills as referred to above, but they had never been sent with timesheets. This Bill was for a seven-figure sum and was the first Bill allegedly sent with a timesheet, yet there was no covering letter, nor any explanation of what the timesheet was, nor of how its contents were supposed to explain the contents of the Bill. The emailed copy (when it came to light) did not state that a hard copy, with timesheet to accompany it, would follow.
92. In the absence of any contemporaneous written evidence, in order to accept RS's case, I would have to prefer ABC's uncorroborated recollection (many years after the event) of a paper Bill sent by post, over GEHC's evidence (supported by the email) on this issue. I would have to do so even though ABC's initial, equally clear recollection, was that the Bill was never emailed at all and that RS's witnesses were lying when they said that it was.
93. This is one of a number of occasions upon which a very important event, involving a large sum of money, has allegedly happened but in respect of which there is no paper trail to verify it, in spite of the fact that RS is a commercial law firm and well-versed in the importance of reducing important agreements to writing. An additional complication is the answer given by Mr Monych in cross-examination, to having no recollection of having received timesheets in a meeting in January 2013 but accepting their existence.
94. I have to say the evidence on that point is far from as helpful as RS would appear to think; what the transcript shows is Counsel for RS putting to Mr Monych, ABC's Witness Statement in which ABC asserted that *"I recall printing off the stack of time reports of our pre-21 December 2012 costs for a second time and giving them to Perry during the meetings I had with him, to discuss costs when he came to London"*. Mr Monych replies, when asked if he remembers this, *"I don't, but if ABC says it's-that was the case, and I don't recall it but ABC says it's the case, so...You know, you don't make something up that's that detailed, so I accept it...I don't recall ever getting a*

breakdown at the time...I don't recall ever getting a breakdown at the time. It was never – I don't recall ever getting a posted Bill. I do accept that ABC printed all this stuff up for me and we went over it after the fact."

95. If we take references to time reports, time prints, breakdowns et cetera, as references to timesheets, with the exception of his final answer, Mr Monych's evidence is to the effect that he has absolutely no recollection of receiving a posted Bill or of receiving timesheets, but that he does not like to gainsay ABC's recollection of events and that if ABC says it is so, he will accept it. That is far from compelling and aside from his innate courtesy Mr Monych's evidence is very clear: he has no memory of ever receiving the timesheets as alleged.
96. As to Mr Monych's final answer, I note that in contrast to the complete lack of a contemporaneous paper trail for the December 2012 Bill, on 6 February 2013 [J1/249] ABC wrote to Mr Monych stating, *"As discussed, I have extracted from the last time report I sent you all stage 2 costs, leaving behind those costs attributable against the stage 1 CFA. Attached is that time print together with invoice..."* Stage 1 was the Liability matter, so that reads as though, on 6 February 2013, [J1/249] Mr Monych was sent the timesheets to match the Bill from December 2012. That would be late in time but if correct could arguably affect GEHC's ability to assert that it had not received enough information to take advice upon, nor to challenge, the December 2012 Bill.
97. However, noting that the email refers to correcting the *"...last time report I sent you..."* to remove stage 2 (quantum) costs, no such costs would have been incurred as at 21 December 2012 as RS rendered a Bill to GEHC very swiftly after the Judgment of Vos J . As no Stage 2 costs would have been incurred at that point (when ABC allegedly posted timesheets to GEHC with the Bill) it becomes clear that the 6 February 2013 email refers to the 4-page timesheet for work done during December 2012 and January 2013, sent with the invoice of 1 February 2013 [G/11/22] which specifically references the time print attached, on its face. That timesheet can clearly be seen to mix liability and quantum costs [G/11/23-26], even though the invoice itself only relates to stage 1 (again, this is stated on its face).
98. In cross-examination, I understood ABC to have accepted that this was probably correct, and that the email was not probative of timesheets being sent with or after the December 2012 Bill after all, but given the order in which the witnesses were cross-examined, at the point where it was put to Mr Monych that he had been sent time sheets, it remained RS's position that the 6 February 2013 email, proved that to be case.

99. There were other invoices and other timesheets sent by RS to GEHC, and Mr Monych clearly recalls having sight of timesheets in this matter, but having weighed the evidence on service of this Bill and its timesheets very carefully, on balance of probabilities, I prefer GEHC's version of events. ABC's memory is clearly not reliable, given that ABC was prepared to accuse their own former client of lying when the question of an emailed Bill was first raised by them; Mr Nimmo refers to their dispute on the December 2012 Bill as wholly without merit and vexatious [F53] and ABC states that ABC does not know how Mr Monych can say these things [C46, C47].
100. I am not aware of any explanation, much less any apology, from ABC and/or RS, following on from GEHC's (admittedly late) production of the email in question, but it seems to me clear from the above that ABC misremembered the email of 6 February 2013, as supporting their claim to have sent GEHC timesheets for the Bill rendered in December 2012, and in asserting that that email proved their assertion ABC was, quite simply, wrong. The final answer given by Mr Monych above, needs to be viewed through that prism.
101. Not only is the sequence of events as described by ABC/RS extremely unlikely but the way that this issue played out before the emailed Bill came to light, should have been impossible. Of course, people lose things all the time; car keys, cash money and passports turn up with luck and patience, but something that should be impossible to lose, is an email. Any well-run Solicitors' firm ought to have systems and practices in place whereby emails to clients, particularly those sending Bills, are retained and can be recalled from the server, archive or wherever they have been consigned. Even if such systems and practices have gone awry, an emailed Bill should not just go missing; it is, or should be, traceable by the firm sending it out.
102. Starting with the fact that there is no suggestion that the emailed Bill now produced, is not what it purports to be, RS evidently acknowledges that it was indeed emailed (as ABC acknowledged in cross-examination). How then did ABC come to give such specific evidence up to the last possible minute, that the Bill had never been emailed and that GEHC's witnesses were lying when (as we now know) it had? At the time that ABC was setting out to assist the Court with evidence on the question of the emailed Bill, it seems to me that one of three things would have to have happened.
103. Firstly, it could be that ABC was so sure of their own recollection that ABC made no attempt to check with RS's Accounts or IT Departments to see whether there was any record of such an emailed Bill having been sent. That would be an extraordinary way of proceeding given that, as a senior Solicitor, ABC would know very well the importance of verifying such a matter if possible.

One would expect the necessary checking to take a matter of minutes, given that the date and number of the Bill, the amount thereof and GEHC's contact details, could have been used to narrow down the search. Given that GEHC's right to challenge a seven-figure Bill, hung in the balance, it would have been a reasonable and proportionate step and consistent with their duty to the Court, for ABC to contact those Departments before asserting that this Bill had never been sent by email but had only ever been sent by post.

104. Secondly, it could be that ABC did check with their firm's accounts and IT departments and they advised ABC that they were unable to find any record of a seven-figure Bill being emailed to GEHC. That would be better, in that it would mean that ABC had taken reasonable and proportionate steps to comply with their duty to the Court. It would also mean that their firm's record-keeping systems were in a poor state, given that an emailed Bill has now surfaced and is accepted by RS as being genuine.
105. The third option would be that ABC did ask, was told that the email did exist and chose to state that it did not, in the hope that GEHC had mislaid it (and given the late stage at which it was produced, it clearly took some finding). I have already indicated that I do not find ABC has been trying deliberately to mislead the Court and as such this option can be discounted.
106. However, options one and two are really little better and I do not believe that the question of what steps ABC took to discharge their duty to the Court, to check whether the December 2012 Bill had indeed been sent by email, has been dealt with satisfactorily in their evidence. The upshot of all of this is that where the only evidence of something having happened is ABC's unsupported recollection, I am unlikely to accept their version of events. Where their recollection differs from the contemporaneous documents and/or the logical way that such matters ought to have played out, ABC has in my view most likely misremembered.
107. I appreciate that I have been asked to rule on whether there is a valid retainer, or whether for other reasons RS's costs are not recoverable, yet I have begun with the question of whether a Bill raised under that retainer, is still capable of Detailed Assessment. The foregoing indicates that I found it convenient to take the scope issue out of turn, due to the insight that it has given into ABC's uncorroborated recollections, upon which a great deal of RS's case depends. I did not understand there to be similar issues with Mr Nimmo, who was running the case rather than setting up the retainer but who also seems to have been much more punctilious about note-keeping and following matters up in writing.

108. Based upon the above, in my judgment the costs contained within the Bill, the subject of the Scope Application, are still capable of Detailed Assessment because I find as a question of fact (on the balance of probabilities) that it was only ever emailed to GEHC as a single sheet, with no timesheets provided in December 2012 or thereafter. ABC is (in my view) mistaken and has simply misremembered events when ABC says it was posted as well, with the timesheets but without any covering letter.

Other issues depending upon ABC's recollection

109. I now turn to the other issues upon which ABC's recollection is key; I do not assert that all of those issues fall away without any further consideration, but having given them that consideration, and having heard evidence upon them over many days, I deal with each of them as follows.

Notice of Funding and consequences for recovery of the success fee:

110. There was a party and party assessment of the costs for the liability Trial; it concluded in February 2015. RS did not serve a Notice of Funding upon Mr Gray at the requisite time; in consequence, during the period when he was not on notice that there was a CFA, Mr Gray was able to avoid payment of the success fee on RS's profit costs and indeed although a success fee was claimed in the party and party Bill it was partly conceded upon the point being taken by Mr Gray.

111. The part of the recoverable success fee conceded for non-notification (c.f. former rule CPR 44.3B), being the success fee for the period covered solely by CFA1 (30 September 2009 to 30 October 2010) which it was agreed on a party and party basis, could not be recovered from Mr Gray due to lack of Notice, came to £148,680. This sum has not been repaid to GEHC, notwithstanding the industry standard provisions of CFA1 (and CFA2) that RS would rebate any success fee conceded on party and party assessment and further, notwithstanding that by this juncture GEHC had apparently paid the liability costs in full.

112. The relevant paragraph of CFA1 (an identical paragraph appears in CFA2) [H6 and H18] reads as follows:

"If we agree with your opponent that the success fee is to be paid at a lower percentage than is set out in this agreement, then the success fee percentage will be reduced accordingly unless the court is satisfied that the full amount is payable"

113. Per GEHC, they had no idea that a Notice of Funding was required in these circumstances; had they been advised they assert that they would have insisted it was served in order to allow for the opportunity to recover the success fee from Mr Gray. Per RS, the question of a Notice of Funding was specifically discussed with Mr de Clare and he was opposed to serving such a document; his view was apparently that it would portray weakness to Mr Gray if such a Notice went out as it would tend to suggest that GEHC could not afford to run the case out of its own resources.
114. There was much to and fro between the parties, including in their closing submissions, as to the relative likelihood of each side's version. For RS it was asserted that Mr de Clare is a venture capitalist and by no means risk-averse; for him to write off a modicum of success fee would be a drop in the ocean compared to the hundreds of millions that he believed (and still believes) the intellectual property misappropriated by Mr Gray, is worth.
115. For GEHC it was pointed out that having a CFA is not an admission of weakness; one is not obliged to divulge the level of success fee, which might give some indication of the Solicitor's assessment of risk of losing the case. Certainly, per GEHC, the fact that a firm of the calibre of RS was prepared to take this on as a no-win, no-fee matter ought to have made Mr Gray somewhat nervous; he need not suppose that GEHC would run out of funds to pursue the case, on the basis that RS proposed to carry the burden thereof for the promise of more on a "win" at the end.
116. Hence it was said by GEHC, that if RS had given Mr de Clare adequate advice, he would never have come to a decision to refrain from serving the Notice, because it would have been made clear to him that it is by no means an admission of weakness. In any event it mattered not because Mr de Clare was never given any advice and had not made any such decision. He was simply never asked to choose and would have remembered if the conversation alleged had actually happened.
117. ABC stated in their oral evidence on day 6 {K1/6/139-146} that ABC very clearly remembered that Mr de Clare was asked and did indeed instruct them not to serve the Notice, however, yet again, despite such a clear recollection many years after the event, ABC did not reduce the alleged agreement to writing. There is thus a disconnect between their very clear recollection, which might suggest that ABC thought this decision by Mr de Clare not to serve the Notice, was a significant matter (causing it to stick in their memory) and the lack of any written advice, written follow-up or even contemporaneous file note referring to the oral instructions that ABC says were given by Mr de Clare.

118. It is impossible to verify by reference to any writing (for example) what Mr de Clare was allegedly told about a Notice of Funding or what Mr Monych was told about the reduction in success fee from 95% to 70% before Master Leonard. Hence it is impossible to gauge thereby whether they/GEHC gave informed consent to withhold that Notice or to allow RS to retain the difference between 95% and 70%; see *Nicky Herbert v HH Law Limited* [2019] EWCA Civ 527. That is one of two cases upon which (at my request) the parties made written submissions in August and September 2019; as both agree that the other case was of no application here, I will say no more about it.
119. Dealing with *Herbert*, RS assert that it relates to the proper meaning and application of CPR r 46.9(3), and with Detailed Assessment of solicitor/client costs and the presumptions which apply as a Costs Judge works through disputed items in the Bill. The case describes the burdens of proof in the direct application of the sub-paragraphs in CPR r 46.9(3) and is not authority on the burden of proof generally or outside of the operation of the specific provision contained therein, and has no bearing at this stage.
120. GEHC disagree and assert that *Herbert* is relevant in general terms, because it shows that the mere fact that a client agrees to onerous and unusual terms in a retainer is insufficient to justify those terms: the Solicitor must show that it disclosed that the terms were onerous and unusual such that the client's consent was properly informed. Here, GEHC say, RS's CFAs are riddled with terms of an unusual and onerous nature, which were never flagged with GEHC, and to which GEHC obviously therefore did not give informed consent.
121. I agree with GEHC that *Herbert* has relevance, not least because advice about the party and party recovery of costs of an unusual nature or amount (cf CPR 46.9(3)(c)) should be given. In my experience, a non-refundable fixed fee is an unusual charge that could not be recovered inter partes unless the costs could in fact be justified on a time spent basis; and for a solicitor to charge a 95 per cent success fee when a large part of its fees were not at risk is obviously wrong. The 5% "delay" fee may be equally wrong, given the large Advance Fees and "voluntary" payments made, but that is not recoverable and was not claimed against Mr Gray and so is not relevant under *Herbert*.

Court's decision on Notice

122. I note that this is one of the areas in which it was said that GEHC's witnesses made damaging admissions; Mr de Clare certainly referred in cross-examination to recalling a discussion to do with

success fees which, per RS, is close to an admission that RS's case is correct. I respectfully disagree. His evidence on Day 5 {K5/p 79} was as follows (in reply to a question from Counsel as to whether he could remember receiving advice from RS about Notice of the existence of a CFA):

“Yes, there was a conversation around it, yes. I think it came up after it was realised there had to be – I think there was a time lap that had missed or something...”

Later he adds (in response to the suggestion that RS say that Mr Gray was not given Notice was because GEHC told them not to give it,

“No, we didn't say not to do so.” {K5/p 80}.

RS relied upon the answer in bold above, as being close to an admission that RS's case was correct but that has been extracted from a single answer in which Mr de Clare's evidence clearly was that the discussion took place after it was realised that Notice had not been timely served. That is not helpful; there are mountains of evidence in this case and this could have been overlooked.

123. On this matter, in order to find in favour of RS I would again have to find that ABC's uncorroborated recollection of this exchange (because I have seen nothing in writing) is accurate, and I do not so find. This would be an extraordinary (and hence unlikely) way of proceeding, based upon the amount that hinged upon the failure to serve the requisite Notice. It ended up a six-figure sum and yet there is nothing in writing to record what advice ABC claims to have given to Mr de Clare, nor to record his alleged instructions not to serve the Notice in full knowledge but in spite of the consequences of that omission.
124. RS's assertion that the sum involved was de minimis for someone who was playing for such high stakes, is said with the benefit of hindsight. Evidently the Notice situation was remedied, because GEHC did succeed in recovering some of RS's success fee from Mr Gray. However, at the time that ABC says ABC discussed this matter with Mr de Clare and took his instructions to refrain from serving the Notice, ABC could not have foreseen how much might be at stake.
125. Had this case remained in RS's control through contested Hearings over many years (and Mr Gray is still being pursued by GEHC in 2020) the amount of success fee, at 100% of profit costs, could well have gone into eight figures. All of that money could have been forfeit as against Mr Gray due to the lack of a Notice of Funding. Yet ABC writes nothing down about either their "advice" to,

nor the “instructions” from Mr de Clare, to put GEHC in sole jeopardy for the success fee. ABC does not even keep a file note to assist their Partners should ABC leave RS.

126. It is inherently unlikely that this “agreement” was created and not reduced to or memorialised in writing, and the fact that Mr de Clare refers in evidence to a vague recollection of a discussion about success fees after it became clear that Notice had been missed, does not make it any less so. He is the driving force behind GEHC, but the risk that GEHC might hold him personally responsible for such a loss, would surely weigh upon him to the extent of running it past the other Board members (or Mr Reed) before agreeing. Mr de Clare has a fiduciary duty to GEHC; there is a Board and there are investors and it is in my view unlikely that he would have committed to such a major step without referring this matter to them.
127. CFA1 was intended to cover the costs of preparing a letter of claim and attending a mediation; at the time it was entered into (December 2009 but retrospective to 30 September 2009) there were no proceedings imminent and it would be understandable if Notice was not to the forefront of anyone’s mind. CFA2 was intended to cover “the claim” and was entered into on or around 30 October 2010 but was again made retrospective to 30 September 2009.
128. Of course, at the point that CFA1 and CFA2 were entered into, there would have been discussions around success fees. GEHC was after all being asked to sign up to CFAs entitling RS to a 100% success fee and Mr de Clare accepted this in cross-examination. However, his admission that there was some discussion around success fees, comes nowhere near to verifying the version of events put forward by RS especially when his full answer is read. RS have not made out a case as to clear advice to Mr de Clare that the lack of a Notice of Funding would deprive GEHC of the opportunity to recover the Success Fee from Mr Gray, that RS would still insist upon payment of the Success Fee by GEHC, and clear instructions from Mr de Clare to refrain from serving the Notice of Funding, given in the knowledge of the ramifications thereof.
129. What is much more likely, and what Mr de Clare’s evidence certainly suggests, is that Notice was not viewed as a priority when CFA1 was entered into (given the parameters of the work envisaged under it) and was simply overlooked when CFA2 supplanted it and matters moved towards issue of contested proceedings.
130. There is also the very significant matter of Mr de Clare not being the client. He is the driving force behind GEHC, but it is incorrect to say that Mr de Clare “is” GEHC, any more than Richard

Branson “is” Virgin Atlantic. GEHC is a corporation as its name suggests; RS asserts that GEHC has been somewhat coy as to who its officers, or certainly its investors, are. Even so, certain decisions should surely be taken at Board level; a decision not to serve a Notice of Funding in form N251, as required by CPR 44.15 and Costs Practice Direction 19, leading to a possible irrecoverable exposure for GEHC, running into seven or eight figures is evidently such a decision.

131. A prudent solicitor in ABC’s position, would wish to be able to say to the Board (should anything happen to take Mr de Clare out of the equation) that ABC had been diligent to protect their interests by making sure, not only that Mr de Clare knew and agreed to this state of affairs, but that ABC had taken steps to ensure that the Board had approved it. The obvious means of achieving this would be to reduce the advice to writing and put it to the Board (or ask Mr de Clare to do so and revert to ABC thereafter).
132. Only the success fee prior to the Notice of Funding, would be in peril and if, after a few weeks, Board approval was not forthcoming, the necessary Notice could have been issued thereby minimising the loss in terms of irrecoverable success fee.
133. Instead, as things stand, ABC claims to have a very strong recollection that ABC advised Mr de Clare about the Notice of Funding and the consequences of not serving it, and advised him that if he declined to serve it, RS would still charge the success fee to GEHC but GEHC would not be able to recover it from Mr Gray. ABC asserts that advice was given verbally, in a single conversation, which was never reduced to writing nor even recorded in a contemporaneous attendance note.
134. On its own best case, RS does not assert that they waited for Mr de Clare to obtain Board approval, but even if they had, what control (on their own best case) had they taken over what he might have put to the Board? None whatsoever that I can see. For any Solicitor, but in particular for a Company/Commercial Solicitor this is not only an extraordinary, but in my view a highly unlikely, scenario and one which I do not accept.
135. If ABC had sufficient insight into the importance of such advice, so as to remember it so clearly years afterwards, surely ABC would have recorded it at the time or put it in writing for Mr de Clare to take to the Board.
136. In my view the reason why there is nothing in writing, is that this did not happen as ABC remembers, and their recollection is again at fault. Far more likely is that ABC (who appears to be

ill-versed in the rules and regulations around CFAs and Detailed Assessment, as is not uncommon in the legal profession) simply overlooked sending the Notice of Funding, probably because CFA1 did not contemplate contested proceedings and it was not then picked up on the changeover to CFA2.

137. RS failed to serve the Notice of Funding in a timely manner, and as a question of fact I find that it was not withheld upon GEHC's (nor Mr de Clare's) instructions. There was a simple oversight on ABC's/RS's part and as such, the success fees lost by the delay in serving Notice of Commencement are not recoverable from GEHC as RS allege. Absent persuasive evidence that the Notice was withheld on GEHC's instructions, clearly I have no evidence that, if such instructions had been given, they had been given by way of informed consent per *Herbert*, but on the facts I do not think this reaches that point: there were no instructions, informed or otherwise.

Reduction to recoverable success fee on Detailed Assessment, from 95% to 70% (Master Leonard)

138. The balance of the success fee claimed was reduced on Detailed Assessment by 25% (from 95% - party and party Bill at page J381) to 70% to take account of the Advance Fee of £1 million being a sum of money which was never at risk. It is said by GEHC that it was unclear whether the court was aware, or took account of, the earlier payment of CAN\$315,000, but in any event that payment related to the CFA1 period where the success fee between the parties was conceded as set out above.
139. The 25% reduction in the risk element of the success fee for CFA2 (£1,874,518.50) came to £493,294.34; again, that has not been repaid to GEHC, notwithstanding the industry standard provisions of CFA2 (and CFA1) that RS would rebate any success fee disallowed as unreasonable on party and party assessment and notwithstanding that by this juncture GEHC had paid the liability costs in full.
140. The relevant paragraph of CFA2 (an identical paragraph appears in CFA1) reads as follows [H6 and H18]:

“If the court carries out an assessment and reduced the success fee because the percentage agreed was unreasonable in view of what we knew or should have known when it was agreed, then the amount reduced ceases to be payable unless the court is satisfied that it should continue to be payable...”

141. This is yet another situation whereby GEHC's evidence and the written record (here in the form of the CFA) says one thing – any reduction to success fee is to be passed on to GEHC – but RS says another. To be specific, ABC again specifically remembers Mr Monych agreeing to their suggestion that the amount taxed off (to use the old terminology) by Master Leonard, should still belong to RS. This was said to have happened in a single conversation between ABC and Mr Monych; ABC gave evidence about it {K1/7/417} but Mr Monych remembers no such agreement and his evidence was that he was certainly never advised that GEHC were entitled to this money but that RS would like to keep it, and if he had been so advised, he would have demanded the money be returned expeditiously to GEHC. In their oral evidence, ABC eventually accepted, three and half years after the event and two and a half years after the commencement of these proceedings, that the success fee disallowed by Master Leonard on this issue, should have been repaid to GEHC {K1/7/417, p 80}.
142. This is another matter upon which, in order to find for RS, I would have to prefer ABC's own uncorroborated recollection to all of the other evidence, and again I do not. As well as the divergence between what ABC claims to remember so clearly, and the absence of any steps to reduce it to writing (even a file note) the reservations expressed above with regards to Board approval, are even stronger in relation to Mr Monych. Mr de Clare is further up the GEHC hierarchy than Mr Monych and the actual (rather than the potential) sum at stake is almost half a million pounds.
143. It is in my view inherently unlikely that ABC would reach agreement with Mr Monych on such a significant matter, in the course of (yet again) a single conversation, and yet would make no attempt to write it down. There is no logical reason why a Company/Commercial Solicitor of their experience would not wish to ensure that GEHC was protected, to say nothing of their own firm's position being secured, by the very simple expedient of reducing their request for this money to writing and asking for Board approval. An email to Mr de Clare, cc'd to Mr Reed as GEHC's Lawyer, about this money would have carried great weight; ABC's unsupported recollection of a conversation with Mr Monych, does not.
144. I have no evidential basis, other than ABC's own uncorroborated recollection, for finding that this conversation ever took place; if there was ever a discussion about retaining this money I am in very grave doubt as to whether Mr Monych was ever advised that, per the CFA, GEHC could insist that

RS relinquish this money, and that he gave his agreement not to do so in a manner that was (a) informed and (b) binding upon GEHC.

145. I ask myself why someone in Mr Monych's position would accede to a request from ABC in respect of such a large sum of money, if he knew (as RS asserts) that RS was not entitled to it, and I cannot think of any cogent reason. Mr Monych owed a fiduciary duty to GEHC and again the risk that GEHC might hold him personally responsible for such a loss, would surely weigh upon him to the extent of running it past the other officers (or Mr Reed). If CAN\$315,000 is £179,000 then this would be CAN\$868,000 or thereabouts; if RS's exchange rate at £210,000 is correct, it would be CAN\$739,941 or thereabouts. In either case, it is in my view not credible that Mr Monych would agree to relinquish that much money in the knowledge that GEHC was entitled to demand its return.
146. Accordingly, my finding of fact is that the conversation with Mr Monych, as remembered by ABC, as far as an agreement to voluntarily give up GEHC's legal right to recover this money, did not take place. As such I have not had to go into the legal niceties to any great extent but I would be very doubtful as to whether a single conversation between ABC and Mr Monych, which was never reduced to writing or put to the Board, could bind GEHC as RS asserts. Certainly, I have no evidence of informed consent and therefore, whilst if there was consent it would be in jeopardy under *Herbert*, on these facts I do not believe that it reaches that stage. There were no such instructions, informed or otherwise.

Oral variation to Written Retainer

147. As GEHC also invite me to consider, the retainer was of course a CFA and one of the few remaining make or break provisions in relation to a CFA is that it must be in writing. The Courts and Legal Services Act ("CLSA") Section 58 of which is referred to in the Particulars of Claim provides at 3(a):

"(3) The following conditions are applicable to every conditional fee agreement—

(a) it must be in writing;"

148. Per GEHC all terms of the CFA must be in writing also; it is impossible to have a valid verbal CFA and I agree (as a matter of law) with GEHC's assertion that if RS wished to vary the terms of the CFA in the manner above described, that would have to be done in writing to be effective. Thus

even if GEHC had consented (which in my view it had not; on RS's own best case GEHC was not asked, Mr de Clare and Mr Monych were) nothing was done to put their purported consent in writing, so that it would be ineffective.

149. There is in addition case law on the above points, that where there is a dispute between a Solicitor and their former client about the terms of an oral retainer, the word of the client is to be preferred to the word of the Solicitor, or at least, more weight is to be given to it. The reason is plain. It is because the client is ignorant and the Solicitor is learned, or should be, in the law. If the Solicitor does not take the precaution of getting a written retainer, he has only himself to blame for being at variance with his client over it and must take the consequences. The onus is upon the Solicitor to establish the terms of the retainer and in the absence of persuasive evidence the Court should prefer the client's version. *Gray v Buss Merton (a firm)* [1999] PNLR 882 and 892, *Sibley and Co v Reachbyte Ltd and Kris Motor Spares Ltd* [2008] EWHC 2665 (Ch).
150. I appreciate there is a technical distinction between an oral retainer, and an oral variation of a written retainer, but the principle in my view holds good; on a number of purported oral variations to the CFAs, RS have failed to produce persuasive evidence and I find in favour of GEHC. This brings me to the question of Conduct.

Conduct including Conflict of Interests between GEHC and RS

151. RS refer to a compendious and generalised allegation of RS preferring its own interests; specific aspects of the dealings between the parties, challenged by GEHC under Conduct, are set out by RS who assert that each of these, on proper consideration, demonstrates that RS was acting properly and in the best interests of its client. The issues listed by RS, have been dealt with elsewhere in this Judgment on their merits, as set out below.
- (i) the decision not to give notice of CFA1; this is dealt with elsewhere [paragraph 122 onwards, under the heading Court's decision on Notice]
 - (ii) continuing to carry out work after CFA1 had come to an end; ditto [paragraph 173 onwards, under the heading of CFA1]
 - (iii) the decision to make CFA2 retrospective; ditto [paragraph 181 onwards, under the heading of CFA2]

- (iv) the decision to replace CFA2 with CFA3; ditto [paragraph 200 onwards, under the heading of CFA3]
 - (v) the decision in October 2015 to retain £1.1 million on client account instead of paying it to GEHC; ditto [paragraph 277 onwards, under the heading The August Agreement]
152. The reason these issues appear elsewhere is because, in the event, issues other than conduct alone, have been involved in my decision. Hence for example (i) above, on the decision not to give Notice of CFA1; my finding is that this was never a “decision” at all; it was simply overlooked by RS and ABC has misremembered events when ABC asserts otherwise.
153. Given that RS refer to the Amended Particulars of Claim making a whole kitchen sink of allegations of misconduct, and to the core of GEHC’s case being that RS preferred its own interests to its client’s interests (an allegation repeated within the first few paragraphs of GEHC’s oral opening {K1/p 6/line 21 – p 7/ line 2}) it is nevertheless worth setting out my views.
154. Per RS, the answer to the issue of whether RS preferred its own interests to its client’s interests is that the evidence establishes that it did not; Mr de Clare’s evidence show he was far from a naïve client who was willing to take on trust what his Solicitors said to him about fees, and that he treated the instructing of Solicitors as a hard-headed process in getting the best possible deal out of his Solicitors (see, e.g., {K2/p 31/lines 15 to 23 – p35/lines 2 to 14}). Per RS, GEHC continue to adopt Mr de Clare’s hard-headed approach, relying upon the fact that GEHC is now on its fourth set of Solicitors in the Gray matter, Bird & Bird and E&M, having each come off the record since RS’s retainer ended, and E&M in the period since Mr de Clare’s evidence {K5/p 92}).
155. I accept the assertion that Mr de Clare is a hard-headed businessman; he is the driving force behind GEHC, a venture capital corporation involved in the oil and gas industry; it is part of the job description. However, the flaw to RS’s hypothesis is the implication that Mr de Clare possessed the requisite knowledge of the rules surrounding CFAs, so as to be able to negotiate favourable terms with RS to GEHC’s advantage.
156. That is not made out on the evidence; first and foremost it does not seem to me that the CFAs have operated to GEHC’s advantage in these proceedings in the way that one would expect if a hard-headed business brain had negotiated RS to the wall. The “no-win, no-fee” nickname of CFAs infers that Solicitors will not be paid until there is a “win” and RS’s case is that they have never said there was a “win” at least under CFA3.

157. Yet RS have been paid all of their base fees amounting to some £5.6 million, with other sums paid by GEHC, either to RS or various disbursements paid direct, totalling several millions more. As I understand it RS assert that GEHC were so impressed with RS that they volunteered to pay them very large sums of money, early. RS cannot have it both ways; what they are describing would be the opposite of hard-headed business practice from GEHC (whose case is that they were never told that these were voluntary payments, and if they had been told, would have refused to pay them).
158. According to RS, the contractual arrangements entered into between GEHC and RS reflected in particular GEHC's desire to bring a large and legally and factually difficult claim against a wealthy and determined opponent; and GEHC's impecuniosity, meaning that it did not have the funds that would allow it to bring such a claim under a conventional retainer. Hence, per RS, the series of CFAs that were entered into allowed GEHC, notwithstanding its own precarious financial position, to pursue a difficult claim at RS's financial risk, a stance they maintain in closing submissions, despite acknowledging that the "impecunious" GEHC had raised millions of pounds to pay to RS and to third parties, without difficulty, and had "volunteered" sums in excess of £2 million, rather than demand their return as RS state GEHC were fully aware they were entitled to do.
159. RS maintain that a fair analysis of the development of the retainer demonstrates that the parties agreed to change and develop the terms on which they contracted so as to ensure that the claim could continue to be advanced in the best interests of GEHC; they say that for six years, the parties were agreed that the CFAs, the contractual dealings between the parties, the retainer, and the way the litigation was being handled were all in apple pie order and that GEHC considered that all aspects of the relationship were in GEHC's best interests.
160. When that relationship broke down in late 2015 and early 2016, per RS, it was not because RS supposedly preferred its own interests over its client's over a period of more than 6 years before that, as no such complaint was ever even suggested until service of the Particulars of Claim in July 2016. GEHC's case as to the breakdown is that this was a consequence of the decision on the part of RS not to pay £1.1 million over to GEHC, as had been agreed in August 2015, which RS say Mr de Clare wrongly sought to characterise as RS seeking to keep those funds for itself. Far from it, RS say; that sum remained on client account to be available for the benefit of GEHC to pay disbursements after GEHC told R that they had no more funds to meet disbursements.
161. In my view, that overlooks the fact that the proximate cause of GEHC's lack of funds at this time was the further "voluntary" payment to RS of £1.5 million, despite there being no "win" under

CFA3. RS assert that GEHC did not treat that as a repudiatory breach of the retainer, nor did they accept any alleged repudiation by RS. Rather, GEHC wished RS to continue to act (and indeed GEHC's own case is that Bird & Bird were meant to work alongside RS). As such, per RS, whilst it might have contributed to tension, any dispute about the implementation of the August Agreement cannot have been the cause of the end of the retainer given that GEHC was seeking for RS to continue to act. RS state that GEHC's case also makes no sense in the face of its assertion that it could always raise funds whenever needed and that in truth the retainer came to an end because of GEHC threatening to sue RS, and maintaining, completely wrongly, and in breach of the terms of the retainer, that RS was obliged to fund the disbursements.

162. RS assert that this was a most serious breach of retainer, going to the root of the contract and the ability of the solicitors to continue to act. On the facts of this case they assert that the consequences for RS would have been disastrous, as is clear from what Mr de Clare had to say about the consequences if his approach was right {K5/p 67/lines 3–8} – to the effect that, had they stayed on board, RS would still be funding GEHC's disbursements three years later. Mr Nimmo observed {K9/p 137/lines 2–3}: *I don't believe there is a solicitors' firm in the country that would have stood for that.*
163. Again, I follow the logic, but the argument misses the point. This was a no-win, no-fee situation yet, in spite of RS accepting there was as yet no "win" (certainly under CFA3) and asserting they had never told GEHC there was, they billed and were paid their base costs of £5.6 million, in full. I do not have a total figure for the disbursements in the Gray proceedings (I would need to see the disbursements incurred by Bird & Bird and by their successors to try to put a figure on it). As such I have no evidence that those disbursements are equal to let alone greater than the £5.6 million, or than the "voluntary" payments (rather less but still seven figures) paid to RS by GEHC.
164. However, it is apparent that if RS had adhered to the "no-win, no-fee" part of the retainer rather than seeking such substantial "voluntary" payments from GEHC towards costs that were not yet due and owing, GEHC would have had those amounts available, to put towards disbursements. At the very least it sits uncomfortably on RS's shoulders to point to impecuniosity on GEHC's part given the sums they say GEHC handed to them voluntarily. I should add, on RS's own best case, GEHC "volunteered" these sums only after RS asked for them outright, and where RS cannot point to any written advice to GEHC, written consent from GEHC or even a file note made at the time.

165. As to GEHC's alleged breach of retainer in insisting that RS pay disbursements going forward, that was retracted albeit there is a disagreement as to how promptly this was done. I accept that, for as long as that remained GEHC's position, it would have been a serious concern to RS. However, it is again in my view an uncomfortable argument for RS to assert that it asked GEHC to volunteer millions of pounds when the retainer did not provide for them to be paid as yet, and then to argue that a mistake by GEHC, later corrected, regarding payment of disbursements by RS, was the straw that broke the camel's back.
166. RS argued before me that RS and GEHC were in this together, working as a team to see off Mr Gray with CFA3 being entered in the interest of alignment of risk to ensure this took place. However, the direction in which the limited resources that were available, flowed prior to the retainer ending, was all from GEHC to RS. At the one point where RS agreed that funds (£1.1 million) would flow back to GEHC, they did not.
167. RS indicate in closing that it is unclear how seriously GEHC really contends that any other alleged failings, for example to confirm all of its oral advice in writing, falling short of breaches of the fiduciary relationship, should have the draconian consequences for which GEHC contends. As will be seen elsewhere, I took GEHC to contend those issues very seriously indeed and in my view the case has been determined, more on the basis of those issues than on conduct per se.
168. As such, whilst I note RS's position in relation to the Solicitors' Code of Conduct 2007 (and the like provisions in the 2011 version) that RS acted in the best interests of GEHC and were not in breach of rule 1.04; that the information contained in the CFAs and other documents supplied to GEHC and in oral discussions amounted to compliance with rule 2.03(2) and that the close relationship between RS and GEHC and their regular discussions rendered it inappropriate for all the costs advice to be confirmed in writing, precisely as envisaged by rule 2.03(7); I refer to the decisions on the individual issues which make it clear that I do not agree with them.

GEHC's ability to seek advice from Mr Reed of Reed Pope

169. Most lay persons and many in the legal profession in England and Wales, are unaware of the legal niceties around CFAs, and I heard nothing in evidence to suggest that Mr de Clare or Mr Monych were any different. As to RS's suggestion that, if GEHC were concerned about the fee arrangements, they had Mr Reed of Reed Pope on hand to advise them, I view that as an extraordinary submission. Mr Reed is a Canadian lawyer; North America has long had contingent

fees, and fees based upon lawyers retaining a percentage of damages won, are common. However, as far as I am aware, RS has produced no evidence that Canada has conditional fees along the lines of those in this jurisdiction, nor (if they do) that Mr Reed would have the requisite knowledge and experience to advise GEHC upon them.

170. Assuming Canadian codes of ethics to be congruent with British ones, Mr Reed would surely be astute not to give advice if this were a subject of which he has little if any knowledge, in a jurisdiction where he does not practise law. To suggest that, because they did not seek the advice of their Canadian corporate lawyer on the CFAs put before them by RS, GEHC are in any way the authors of their own misfortune, or are somehow prevented from raising issues upon the CFAs at a later stage, is not sustainable. RS were GEHC's Solicitors, they drafted the CFAs and they (not Mr Reed) had a duty to advise GEHC appropriately upon them. If that advice were flawed or absent, the fact that a lawyer from a completely different jurisdiction, did not challenge it (and as far as I am aware was never in a position to do so) has no bearing.

Erroneous invoice of pre-CFA work

171. RS have conceded that they incorrectly invoiced GEHC for base costs and a success fee incurred during the period prior to 30 September 2009, when a capped fee agreement was in place. The sum conceded in respect of this error amounts to £65,988; it was brought to the Court's attention, and the sum was taken into account at a security for costs hearing in October 2018. However, I gather that, along with every other disputed sum, it has not been repaid and is still in the hands of RS.

The retainer/CFAs

172. The retainer between GEHC and RS commenced in July 2009 with two separate capped fee agreements (the first for £15,000 and the second for £5,000). It continued by virtue of three separate Conditional Fee Agreements, known in the Section 70 proceedings as "CFA1" (8 December 2009), "CFA2" (31 October 2010) and "CFA3" (6 March 2013). I now turn to these CFAs accordingly.

CFA1

173. After the two capped fee agreements funded RS's investigation of the claim, RS offered to act for GEHC under CFA1, which was designed to cover the costs of preparing a letter of claim and

attending a mediation. CFA1 [H1] was a one-page document accompanied by the Law Society's "Conditional Fee Agreements: what you need to know" document [H2].

174. As such, per GEHC, CFA1 appeared to be the Law Society's standard CFA, save that it (and in due course CFA2 and CFA3) provided for an upfront payment, the "**Advance Fee**" which was to be kept by RS regardless of the outcome of the claim (win or lose) but would, in the event of success, be credited against the fees due under the CFA.
175. CFA1 was entered into in December 2009 (but was stated to be retrospective to 30 September 2009) and called for an Advance Fee in the sum of CAN\$315,000; that is stated to be around £179,000 (GEHC) or £210,000 (RS) and is a sum "*which will be retained by us whether or not you are successful*". CFA1 carried a success fee of 100%, as to 95% risk and 5% deferment cost (similar provisions applied to CFA2 and CFA3). CFA1 also provided that disbursements were to be funded in the first instance by RS. The intention appears to have been that the CAN\$315,000 would be drawn down as needed, against those disbursements. Given the limited scope of CFA1, it appears likely and was the case, that nowhere near CAN\$315,000 of disbursements was incurred under it. In fact, RS raised an invoice in the full sum of CAN\$315,000 shortly after the money arrived from GEHC.
176. It is common ground between the parties and is clear from the file that any attempts to settle the Gray Proceedings pre-issue proved unsuccessful; it appears also to be common ground that this would constitute a "loss" under CFA1. The normal result of a "loss" on a no-win, no-fee agreement would be no fee, but instead RS retained the CAN\$315,000 Advance Fee; GEHC did not demur but as I understand it, their case is that they had no idea that they were entitled to demand that RS claim no fee for this work.
177. RS's case is that GEHC agreed to pay RS for the work undertaken under CFA1 because they were impressed with RS's performance so far, were keen to proceed expeditiously against Mr Gray and would not have wished GEHC to walk away at that stage (which RS would have done, if GEHC had insisted upon no Bill being rendered for the early work). CFA2 was made retrospective to cover those costs but per RS that was done with GEHC's full knowledge.
178. ABC's evidence was that RS would never have pursued GEHC for these costs – not least because GEHC had no assets – but that they would either have been covered by a funding arrangement in

due course or, if there was no funding arrangement **and RS had to cease to act**, those costs would have been written off (my emphasis).

179. In effect, per RS, had GEHC insisted upon adherence to the strict terms of CFA1 as regards the “loss” on the mediation costs being written off, RS would have walked away, but deny this was prejudicial or detrimental to GEHC as RS continued work (with GEHC’s full knowledge) to keep the case moving and to support GEHC in the hope that GEHC’s funding situation could be resolved, and (per RS) at RS’s cost if funding could not be resolved. ABC’s evidence {K7/p 8/lines 12– 20} stated:

So that CFA1 had come to an end, so I could have hoisted the surrender flag then and just decided to say to GEHC, "Well, I'm sorry, we can't take it any further", but what instead we chose to do was to -- we, as a firm, Rosenblatt, and together with the cooperation of the clients -- chose to actually, no, we won't do that, we'll continue on and see whether we can make this claim work in terms of its funding requirement.

180. Thus (per RS) GEHC is criticising conduct which in fact demonstrates that far from RS preferring its own interests, it went beyond its obligations to seek to advance the Gray proceedings notwithstanding GEHC’s impecuniosity, and at its own risk, thereby preferring GEHC’s interests to its own. I deal with the issue below (under CFA2) as entering into CFA2 to cover costs already “lost” under CFA1, spans both CFAs to a degree.

CFA2

181. GEHC and RS subsequently agreed to enter into a new CFA, CFA2, to cover the “claim”. CFA2 [H14] was again a one-page document accompanied by the Law Society’s “Conditional Fee Agreements: what you need to know” document [H15] and as such, it again appeared to be the Law Society’s standard CFA.
182. The Advance Fee under CFA2 [H14] was significantly higher, at £1 million “*which will be retained by us_whether or not you are successful*”. CFA2 was also given retrospective effect to 30 September 2009, so as to cover the same period as CFA1. CFA2 was executed on or about 30 October 2010 and so was retrospective for around 13 months and therefore covered the period during which a loss had already been incurred under CFA1.

183. In effect, having incurred a loss under CFA1, RS acted to claw back its lost fees by adding them into CFA2. Per GEHC it did so without explaining to GEHC what the situation was; per RS it was only prepared to go forward if it received coverage for the work already undertaken, and GEHC knew it.
184. As to making CFA2 retrospective, RS state that not doing so would have let Mr Gray off the hook as his total adverse costs liability for the period from the summer of 2009 when RS were first instructed until the end of October 2010 would otherwise have been limited to the review fees of £15,000 + £5,803 and the Advance Fee of CAN\$315,000. The relevant party and party costs (part 3 of the Bill, at J337) are clearly well in excess of CAN\$315,000.
185. It was (say RS) in GEHC's interests to maximise Mr Gray's exposure to adverse costs as soon as any costs orders were made against him; certainly, it would apply pressure to Mr Gray and those backing him, and might concentrate their minds. RS add that Mr de Clare made clear in his evidence that GEHC's business model required its lawyers to have an "alignment of risk" with GEHC and that he wanted RS to keep working on the case in the period after CFA1 came to an end {K2/p 75/line 11 to p 76/line 13}.
186. However, it is said that by RS that GEHC could not realistically expect RS (or any other firm) to show that commitment if it insisted that all the work done under CFA1 and between CFA1 and CFA2 (which was said to include drafting the Particulars of Claim and preparing witness statements) had to be written off. Effectively, if GEHC wanted R to remain committed to the cause, it was entirely reasonable to require the recoverability of RS's costs if success was later achieved, to be part of the retainer going forward, and this was exactly what was agreed.
187. It is unobjectionable for CFAs to be retrospective: see *Birmingham City Council v Forde* [2009] EWHC 12 (QB) and I did not understand GEHC to object in principle to retrospectivity, rather, their issue is with costs already lost under CFA1, being clawed back under CFA2, with a 100% success fee added to boot.
188. At the point where it became clear that the Gray proceedings would not resolve through ADR pre-issue, if GEHC wanted RS to stay involved, RS assert that GEHC knew they would have to provide for RS's mediation costs. That is a straightforward commercial agreement between GEHC and RS and relatively uncontroversial in my view, notwithstanding that GEHC now assert that they were never given the option to walk away.

189. However, CFA1 was poorly thought-out, given that the almost-certain outcome was that ADR with Mr Gray would not succeed, yet RS drafted CFA1 in such a way that if the case did not resolve through ADR pre-issue, that would be a loss. Yet under CFA2 RS purport to claim a success fee on mediation costs when there was already a “loss” on mediation under CFA1 and assert that that was in GEHC’s best interests.
190. Whilst I have been unable to calculate, by reference to the party and party bill, how much time spent/work done, was after CFA1 ended and before CFA2 was signed, I fail to see how the need to cover that work by way of a retrospective CFA, conflates with claiming full costs and a 100% success fee in respect of the costs already “lost” under CFA1, by dint of making CFA2 retrospective to the commencement of CFA1 (30 September 2009).
191. RS have overreached themselves, and certainly left GEHC’s best interests in their rear-view mirror, in redefining a “loss” under CFA1 as a “win” under CFA2. I disagree with GEHC’s view that the only advice that GEHC could properly have been given about the handover from CFA1 to CFA2 was that the costs under the former should be written-off for good, but certainly the advice that should properly have been given was that, pursuant to the “loss” under CFA1, RS was only entitled to its fees up to the limit of the CAN\$315,000 Advance Fee; in not giving this advice, I agree with GEHC that RS favoured its own interests over its client’s.
192. CFA2 provided that disbursements, save for Counsel’s Brief and refresher fees, were to be funded in the first instance by RS. Again, the intention appears to have been that the £1 million Advance Fee would be available to defray such expenses. It should be noted that at the time CFA2 was entered into, a split Trial had not yet been ordered, and nor was it envisaged. As such, per GEHC, the disbursements which RS agreed to fund would have included those relating to quantum as well as liability.
193. An invoice (number 36403) [H7] for £1 million “fees” was raised on 1 November 2010, relating to the Advance Fee referred to above, and contained within CFA2 executed a matter of days prior (on or about 30 October 2010). Proceedings against Mr Gray were issued in December 2010 and in June 2011 an order was made for a split Trial; Judgment on liability, in GEHC’s favour, was handed down in December 2012.
194. At around the same time, GEHC was advised by RS that as a result of the liability phase concluding, CFA2 had come to an end and that new arrangements would need to be put in place for

the funding of the quantum phase of the case; evidence of this relied upon by GEHC included for example the email at J180 and the briefing note at J196/197. Of course, there was also the Bill in December 2012 which (per RS) was an interim statute Bill that they were entitled to raise based upon a “win” under the terms of CFA2.

195. RS assert that, even if CFA2 had encompassed the totality of the proceedings, it would be wrong for GEHC to assert that no payment could fall due until the proceedings were at an end, as payment became due under CFA2 once success was achieved, adding that it is normal for a CFA to cover work following the achievement of success: CFAs universally or near universally cover the assessment of costs, and they sometimes cover enforcement. However, this does not mean that no payment is due until such time as an assessment of costs and enforcement proceedings are at an end. On the contrary, per RS, once success has been achieved, the Solicitor has the right to bill the client for its base costs and success fee for the work to date, and to bill the client for its ongoing work (relying upon the decision of the Court of Appeal in *Halloran v Delaney* [2002] EWCA Civ 1258).
196. The fact that a “win” was defined in CFA2 in such a way as not to include a successful recovery from Mr Gray, meant that RS had no obligation to wait until its efforts had borne tangible financial fruit before billing GEHC its fees under CFA2 in full. RS accept that they could have continued to act under CFA2 even after success was achieved by virtue of the decisions of Vos J, adding that if it had done so, since success had already been achieved, RS would have been entitled to charge both basic costs and success fees for all the work that it undertook thereafter, exactly as happens on a regular basis in Clinical Negligence claims. However, per RS, Mr de Clare made it clear that he was not happy for solicitors to be instructed on such a basis, citing his reference to alignment of risk at {K2/p 35/lines 7–11}. It is asserted that by entering into CFA3 RS’s right to charge costs was once again rendered conditional on success being achieved and meant that risk was “aligned” as Mr de Clare put it.
197. I have addressed above my concerns about “alignment of risk” given the one-way flow of funds from GEHC to RS and it is interesting to note that despite entering into CFA3, the invoice of December 2012, number 39618 [G18] to GEHC in the sum of £3,269,131.54, was raised under CFA2. As to whether this Bill is within the scope of the Section 70 proceedings, that is dealt with from paragraph 52 above. RS rely upon Mr de Clare’s requirement to align risk between GEHC and RS, in support of entering into CFA3, yet they billed a substantial sum, years before GEHC

and RS parted company. They have argued very strongly in these proceedings, that it was an interim statute Bill and no longer susceptible to Detailed Assessment.

198. There is as yet no recovery of damages from Mr Gray, and in my view RS's explanation of the reasons for entering into CFA3 are inconsistent with their own actions in raising this invoice and their characterisation of it as a final Bill in December 2012. I do of course appreciate the distinction between CFA2 and CFA3, but the point is that RS acted according to its usual wont in these proceedings, and billed GEHC as much as it could, at the earliest opportunity.
199. In my view, RS wish to have their cake and eat it too; alignment of risk does not sit comfortably with such a substantial "final" Bill, nor with the fact that, including this invoice, RS has long billed and been paid its base costs (some £5.6 million) in full from GEHC despite the normal expectation in "no-win, no-fee" cases that Solicitors are paid when the clients are in funds following a successful outcome. The risk in these proceedings, far from being aligned, is to be entirely on GEHC's side.

CFA3 and the Timing of Invoices

200. According to GEHC, following advice from RS that CFA2 had come to an end (such advice being given in a series of undocumented meetings in early 2013 followed by the briefing note on 11 January 2013 [J195]) GEHC agreed to enter into a new funding agreement, CFA3 [H26]. This was an 8-page document plus an annex (which was blank); per GEHC it was completely different in format and content from both CFA1 and CFA2 and did not include the Law Society guidance document (or crest). CFA3 appears to be a bespoke document drafted by or at the behest of RS.
201. CFA3 provided for an additional Advance Fee of £300,000, once again to be "*retained by Rosenblatt whether the claim is successful or not*", and also included a number of new conditions which GEHC assert were detrimental to GEHC, favoured RS and were not explained at the time CFA3 was entered into. The following is GEHC's "non-exhaustive" list of such conditions:
- i) it provided for the further Advance Fee of £300,000 already referred to;
 - ii) it provided for the burden of paying disbursements to shift from RS to GEHC;
 - iii) it removed the contractual provision that a reduction of the success fee on a party and party basis would require RS to reduce their success fee as between themselves and GEHC accordingly;

- iv) it no longer covered enforcement proceedings;
 - v) it provided that RS could “...end this agreement if it believes the Client no longer has a reasonable prospect of success. If this happens, the Client will only have to pay Rosenblatt’s fees and disbursements.” [H13 Clause 14.4]. In effect, in GEHC’s view, this provision removed the element of risk to RS (that they would not get paid at least their basic charges and disbursements under CFA3); and
 - vi) despite the provision above, and the fact that CFA3 was meant to cover the quantum phase following success on liability, it included provision for a 95% success fee based on risk, and despite a further £300,000 having been paid as an Advance Fee, a further 5% success fee based on deferment.
202. I do not at this stage have to decide upon the level of success fee; I note that Master Leonard already reduced the success fee between the parties, apparently because, with such substantial Advance Fee payments, the risk element was not as high as RS assessed. Likewise, whilst not an issue between GEHC and Mr Gray, it is arguable between GEHC and RS that a 5% success fee based upon deferment is odd given that there were such substantial Advance Fees and other payments taken, and that RS have already been paid the entirety of their base costs in the sum of around £5.6 million. This is even though the Gray proceedings are still in progress, with GEHC continuing to argue that the technology is worth a lot more than RS’s Expert Evidence indicates. GEHC has yet to receive any damages from Mr Gray and has apparently had several adverse costs decisions made against it in Mr Gray’s favour.
203. In February 2013, and despite RS’s subsequent evidence that the Advance Fee was only to be charged in the event of a loss [TM1 para 22 at C8], RS again issued an invoice promptly upon receipt of and in respect of the Advance Fee [G20].
204. Per RS, ABC was concerned at the time of setting up CFA3 to avoid the risk of an argument which might have prevented recovery of the success fee {K7/pp 149-151}; the risk might, by the lights of costs specialists, in fact have been modest, but (per RS) Solicitors are not required to be costs specialists, being entitled to act reasonably in the light of their limited knowledge of CFAs, and of the advice they have received. This was particularly so as, if a new CFA was to be replaced, this had to occur before April 2013 when, under new rules, success fees would become irrecoverable

between the parties. In the event, CFA3 was made on 6 March 2013, just weeks before the deadline.

205. As to clause 14.4 of CFA 3, which GEHC decries as allowing RS to withdraw from the claim if RS concluded that GEHC no longer had a reasonable prospect of success, and still to charge its basic fees if it did so; RS rely upon the fact that RS did not use this provision to terminate the agreement when Mr Gray adduced evidence from 7 witnesses that he had not benefitted from the technology {K2/p 7/lines 19–21}. RS did not terminate or even consider doing so, instead it ran the risk of the enquiry hearing before Asplin J failing to prove Mr Gray had secured any benefit from his breach, even though (per RS) they knew full well that if GEHC failed to prove this, RS would have to write off all but £300,000 of the more than £3 million of work it had undertaken. If, as Mr Williams QC suggested in GEHC’s opening submissions, RS really had “sought to favour their position over GEHC at every juncture”, which RS assert is self-evidently not the case, RS would have exercised clause 14.4 to avoid that risk.

206. I follow that logic but RS have stated elsewhere that the six-figure sum forfeit by the failure to give Notice of Funding at the relevant time, was a “drop in the ocean” to GEHC given the sums at stake. In that context I note that, at the time that CFA3 was entered into, Mr de Clare was (and remains) adamant that the technology was worth hundreds of millions, and RS had yet to obtain the valuation at \$15 million, that it now relies upon in saying that Mr de Clare has taken the Gray Proceedings down a disastrous wrong turn. If RS thought that the technology was indeed worth something in the higher range (and if they did not, they would be under a duty, surely, to reality-check GEHC’s/Mr de Clare’s aspirations) and given that they acknowledge and rely upon the fact that Mr Gray has sought to conceal assets or put them out of reach, the fact that RS continued to represent GEHC whilst in no way to their discredit, was not a wholly altruistic act on their part. At the relevant time it was in the contemplation of both parties to CFA3, that a massive payday (in the hundreds of millions) may be within reach. RS’s decision to keep going, needs to be viewed in that context as well as in the context of the substantial sums already billed to and paid by GEHC.

The Courts and Legal Services Act/validity of CFA1, CFA2 and CFA3

207. The Courts and Legal Services Act 1990 (“CLSA”) Section 58 referred to in the Particulars of Claim at 2(a), 2(b), 4(a), and 4(b) states as follows:

“For the purposes of this section and section 58A—

- (a) *a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances;*
- (b) *a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances*

.....

- (4) *The following further conditions are applicable to a conditional fee agreement which provides for a success fee—*

.....

- (b) *it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and*
- (c) *that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor”*

208. GEHC’s position in relation to all three CFAs is that, by operation of the payment of an upfront Advance Fee, which was expressed as to be retained by RS in all circumstances, and which is provided for within the body of all three CFAs, creates a situation whereby early settlement of the claim would lead to RS receiving and retaining fees which would exceed the sum of double the base costs incurred to that point. As such, the success fee, being the difference between the fees which would in fact be billed, and the time “on the clock”, would be in excess of 100%. That, it is said, is a breach of Section 58(4)(C) of CLSA and as a breach of one of very few “make or break” provisions regarding formation of a CFA within the Act, would thereby be fatal to recovery of any of RS’s base costs or success fees thereunder.

209. Further or in the alternative, per GEHC, all three CFAs provide for RS to receive substantial upfront payments (or Advance Fees) which are to be retained by RS whatever the outcome of the litigation. The receipt of an unconditional and upfront Advance Fee, which was in each case more or less immediately invoiced (certainly within a matter of days) is part of the consideration for proceeding under a CFA. As such, in providing for a 100% success fee plus this additional

Advance Fee, RS have received or at least provided for a total benefit which exceeds a simple 100% success fee.

210. RS stated in evidence that even were this not a CFA case, they would have required a payment on account on or at a sum approaching the level of the Advance Fees. Leaving aside whether RS would realistically have required a payment on account of £1 million, GEHC assert that even if this were correct, a payment on account would not provide to RS the same benefits as they derived from the Advance Fees, as it would not be invoiced in full (and transferred from Client to Office account) immediately and would not be invoiced in any event if fees (and disbursements) did not reach the level of the payment on account. In any event, under a standard retainer, if a payment on account of £1 million had been required, a success fee of 100% (including 95% “risk” and 5% “delay”) would not be charged on top.
211. RS have sought to contend in these proceedings that the reality is that the success fee under these CFAs was never going to be more than 100% and that in reality there is no breach. They claim that the fact that costs for each CFA exceeded the level of the Advance Fee shows this in real terms (see my comments above regarding Part 3 of the party and party Bill, and the CAN\$315,000 Advance Fee).
212. However, GEHC rely upon the Court of Appeal in the cases of *Garrett v Halton Borough Council and Myatt v National Coal Board* [2006] EWCA Civ 1017 which, when considering the issue of materiality, held:
- “...focus on the adverse effect was on the protection afforded to the client, not whether, as a matter of fact, the client had actually suffered any prejudice”*
- The court when considering a departure from Section 58 went on to say:
- “...focus of the scheme was on whether the CFA satisfied the applicable conditions, not on the actual consequences of a breach...”*
213. In other words, whether or not the client went on to suffer actual prejudice is immaterial; what is key (per GEHC), is the fact that the client’s position was not protected. GEHC contends that it is hopeless for RS to assert that they would have charged a non-refundable Advance Fee of £1 million in this case were it not subject to a CFA; in reality, rather than limiting their charges to the maximum reward permitted by law for a CFA – a success fee of 100% - RS instead attempted to

reward themselves even further for entering into the CFAs by creating a hybrid of a CFA and a fixed fee arrangement,. In doing so, they charged a substantial non-refundable fixed fee (under CFA1 CAN\$315,000, under CFA2 £1 million and under CFA3 £300,000) plus a 100% success fee. GEHC contends that this is contrary to the provisions of the Courts and Legal Services Act at Section 58 and that in consequence the CFAs entered into are invalid/unenforceable against GEHC.

214. RS assert that CFAs 1 and 2 were before the Court (with Silks instructed), for the purposes of the Detailed Assessment between the parties, and that there is no evidence that anyone (including Mr Gray) ever suggested that the CFAs were unlawful or unenforceable on the grounds now advanced. Master Leonard's assessment of costs accepted the validity of the CFAs and it has been submitted that, having endorsed the CFAs in order to seek costs against Mr Gray, GEHC are estopped from challenging their validity now, or have forgiven or adopted them in some legally binding way, despite their flaws (if any flaws exist).
215. As far as that is concerned, I accept the submissions of GEHC to the effect that they were guided through the party and party Detailed Assessment, by RS. It was never brought to their attention (prior to Eversheds Sutherlands' involvement) that there were any potential issues with the validity of the CFAs. The fact that the party who drafted and advised GEHC upon the CFAs, is the same party who now asserts that GEHC's failure to complain any sooner, estops them from challenging the CFAs, exemplifies the flawed logic employed by RS. It cannot be right (in my view) that RS should lead GEHC through the party and party assessment and then allege that GEHC have, by not raising issue with the validity of the CFAs during that process, been forever barred from raising that issue before this Court. To the extent that RS could be said to have failed in their duty to advise GEHC appropriately, such an approach would reward them and punish GEHC for that failure. As to why Mr Gray did not raise such issues, or did not raise them successfully at any rate, that is for those advising him and is entirely beside the point on Solicitor/Client Section 70 proceedings before me.
216. RS assert that, in construing each of the CFAs in this case, I must objectively interpret the words used, citing *Wood v Capita Insurance Services Ltd* [2017] AC 1173, at [10]-[13], and that the subjective opinions of those who were contracting is (RS say) as a matter of general law irrelevant and inadmissible. Hence, although a considerable amount of the hearing was devoted to questioning ABC as to their understanding of the way that the CFAs were to work, that evidence is of doubtful admissibility and little relevance to the issues that the Court has to decide.

217. In this regard, I note that on day 2, it was put to Mr de Clare that he was wrong that the Advance Fees would be lost for ever as soon as they were paid – it was said that if the case was lost they would be refunded *pro rata* to the extent that time costs had not been incurred {K1/2/76}. However, ABC themselves later confirmed that ABC understood the Advance Fees to operate in the same way as Mr de Clare did: “*Q. If the case loses you keep [the Advance Fee] come what may? A. Yes. Never expected to be in that situation. Q. Even if your fees are less than a million pounds you keep it? A. Yes.*” {K1/7/409}
218. RS challenged GEHC’s case that if base charges had not yet exceeded 50% of the Advance Fee at the time of settlement, then the total amount of profit costs due would exceed basic costs plus 100%. It is common ground that that stage (settlement or other conclusion to the Gray proceedings) has not yet been reached and the Gray proceedings are still ongoing, but per GEHC it does not matter. The fact that there was potential for this to happen, is in GEHC’s submission, enough to defeat the CFAs.
219. Per RS, these arguments are based on GEHC’s “untrue” (not mistaken, not erroneous – untrue) assertion that the Advance Fee was a fixed fee that was not to be credited against the fees for the work that had in fact been done, based on the words in the CFAs “...*which will be retained by us whether or not you are successful in the claim*”, and on Mr de Clare’s assertion that the advance payment was “*money that wasn’t coming back to us*”. RS assert that this is palpably wrong, and that Mr de Clare conceded as much under cross examination {K3/p 30/line 25 to p 31/line 1} {K3/p 85/lines 4–16}.
220. I do not agree that that is what Mr de Clare said; his evidence is that he could see that the CFAs provided for the Advance Fee to be credited against billing, but that he had no recollection of it, and he repeats numerous times that, “*Well, all I know is that they can keep the £1 million...It almost doesn’t matter, does it, because they keep the £1 million...All I knew was, we gave them the money and that was the last of it...*” His evidence, that once the £1 million left GEHC’s hands, it was never coming back to them, was unshaken.
221. The CFAs drafted by RS, provide for two potentially incompatible outcomes. One, that the Advance Fee will belong to RS, win or lose, and two, that it will be set-off against billing. RS assert that this means that any excess, after the matter has been billed, would of course be refunded to GEHC (and that GEHC knew this perfectly well). GEHC assert that this means that, if the matter had settled or folded at an early stage, RS would have retained the Advance Fee, even if it meant

retaining more than disbursements including Counsel's fees, plus VAT (if applicable) plus base costs plus 100%.

222. RS assert that on the plain terms of the CFAs the Advance Fee will be set off against the total of basic charges and success fee {H1 for CFA1, H14 for CFA2}; and that credit will be given for the Advance Fee in the event that further fees are payable {H30 for CFA3}. GEHC's case is said to be inconsistent with the plain terms of those CFAs and with discussions between the parties before entering into the CFAs, as well as with the way in which the CFAs worked. The words "*retained by us whether or not you are successful in the claim*" are stated to mean simply that fees capped at the level of the Advance Fee, are payable in the event of failure. The reference to an Advance Fee is said, in the natural meaning of the words, to mean a payment in advance of fees falling due. In contrast, a fixed fee which is payable whether or not fees fall due is not an Advance Fee: it is a fixed fee. Finally, RS rely upon their terms and conditions, asserting that section 5 of the terms of engagement at [J9] provide for fees to be charged on the basis of hourly billing.
223. Hence, per RS, the answer to the issue of whether the CFAs are in breach of section 58 is simple: they are not because GEHC's case that the Advance Fee was not repayable is based on a fallacious factual case and unsustainable construction of the CFAs, in addition to which RS assert that GEHC's case is wrong because the CFAs expressly provided that the fees paid in the event of success under the CFAs could not exceed 100%. In addition to the terms of the agreements identified above, the CFAs expressly provided that the success fee inclusive of any additional percentage relating to postponement could not be more than 100% of the basic charges in total {H1 }
224. RS assert that, were there any ambiguity (which there is not), GEHC's approach is also contrary to the principle of the presumption of validity, which requires as a general presumption of law that where two constructions of a contract are alleged, one of which leads to invalidity but is not a necessary, unavoidable construction of the words, that the construction of validity be preferred. The effect of the express wording that the success fee could not be more than 100% is exactly as it says, but also requires that the contract is to be construed in such a way as to be efficacious and valid, to give effect to the clear objective contractual intention that it should be legally enforceable and meet the requirements of the legislation.
225. Nor is GEHC's case saved by seeking to characterise the existence of the Advance Fee as part of the consideration for entering into the CFA and thereby bringing the benefit to the solicitor to greater than the permissible 100% maximum. Per RS, the Advance Fee is not payable in the event of success and

therefore cannot be characterised as falling within the definition in subsection 58(2)(b) of CLSA. It is not a success fee and does not increase the amount which would be payable if it were not a CFA.

226. RS assert that GEHC is not assisted by the evidence of ABC in cross-examination that the Advance Fee in CFA2 would be retained in full in the hypothetical and wholly unrealistic event that the claim had failed at an early stage. That evidence does not (per RS) affect the analysis above for three reasons.
227. Firstly, it is said that GEHC would no doubt have sued RS had it sought to retain the Advance Fee in full (if, say, the case had ended at an early stage so that retention of the fee meant way more than base costs plus success fees if there had been a “win” had been charged by RS). Secondly, the meaning of contracts is to be determined by objective construction of their effect, not by extrinsic evidence of the belief of a witness when provided with a hypothetical situation on cross-examination, even a witness (ABC) involved in drafting the agreement. Thirdly, the effect of the CFA is that the Advance Fee is only retainable in the event of a loss only in so far as profit costs and disbursements have been incurred, as is apparent from the use of the word “advance” and paragraph (a) of the success fee provisions at H16. Thus, the advance is only retainable “against” costs, a phrase which would be meaningless if RS had an absolute right to the Advance Fee in the event of a loss.
228. Even if, contrary to that analysis, the Court concludes that the Advance Fee would have been retainable in full on an early loss, this does not, self-evidently affect the level of the success fee under the CFAs as it is a payment in the event of a loss, not of success, and section 58(2) does not regulate payments in the event of a loss.
229. Finally, RS assert that GEHC’s proposed approach of seeking to label the payment arrangements in the event of failure as enhanced consideration, and then to say that such enhanced consideration is unlawful, is an impermissible attempt to rewrite section 58(2). It also requires a counter-factual inquiry into the deal that the parties would have done if they had not contracted under CFAs, contrary to the decision of the Court of Appeal in *Gloucestershire CC v Evans* [2008] EWCA Civ 21 at [32]:

The words “the amount of the fees which would be payable if it were not a conditional fee agreement” do not invite a factual inquiry as to what bargain the parties would have struck if they had not entered into a CFA. That would be a difficult, if not impossible, task to perform.

230. As regards the argument at paragraph 4 of the Re-Amended Particulars of Claim, that the workings of the Advance Fee could mean a success fee in excess of 100% if the settlement was early enough, RS submit that this argument too is wrong. Firstly, the evidence shows that the Advance Fee was to be credited in the event of success (and was in fact so credited); without reciting the illustrative table at Appendix 1 of the Re-Amended Particulars of Claim, per RS, it is not mere assertion that the crediting of the success fee would work in a certain way, but the calculation at {G19} shows that is exactly how the arithmetic did work in practice.
231. Even if, contrary to this analysis, the Court held that the effect of the agreements was not that credit would be given in these circumstances, there were no circumstances realistically in the contemplation of either party that would enable the case to settle before basic charges exceeded 50% of the relevant Advance Fee: paragraphs 23.4 and 40 of the First Witness Statement of ABC refer {C1}, and were not contested in the evidence of GEHC's witnesses, nor challenged in cross-examination of ABC.

Court's Decision on Validity of CFA's

232. Along with the evidence of ABC on those issues where no written record of various "agreements" with GEHC, exists, this is the issue with which I have had the most difficulty in deciding this case. On the one hand, in practice, RS has incurred many times the Advance Fee in terms of base costs alone. Interestingly, GEHC assert that RS has had £5.6 million of base costs and £1.6 million of other monies; £1.6 million is more than the total of the Advance Fees (CFA1 CAN \$315k, CFA2 £1 million, CFA3 £300k). On that reading, to disallow the CFAs on the grounds of a hypothetical overcharge based on Advance Fees that – in practice - look like they would not quite cover the disbursements, seems entirely wrong.
233. On the other hand, that comparison can only be made with the benefit of hindsight. The simple fact is that the CFAs were poorly drafted insofar as they said two conflicting things. They stated that the Advance Fee would be credited against future billing, but they also stated that the Advance Fee would belong to RS, win or lose.
234. The latter is in my – reluctant, because I think it is an old-style technical point going right back to the early days of satellite litigation under CFAs– opinion, fatal to CFAs 1, 2 and 3. Given that CFA1 sustained a loss and no costs have been claimed under it, it may be a nullity but as there is

the question of CAN\$315,000 Advance Fee paid under CFA1 and apparently not accounted for anywhere else, it needs to be recorded here along with CFAs 2 and 3.

235. All of RS's carefully-phrased arguments about how the Advance Fee would operate in case of an early win, miss the point; the Advance Fee would indeed have been credited against any billing greater than the amount thereof and GEHC do not dispute it. However as a question of fact, the Advance Fee (which belonged to RS, win or lose as the CFAs stated in terms and as ABC agreed in cross-examination) meant that RS would never have rendered a final Bill lower than the amount of the Advance Fee, even if the matter had settled at an early point where time spent/work done, plus success fee, plus disbursements, came to less than the Advance Fee at that time.
236. The assertion that RS would have kept £1 million under CFA2 if they had lost at an early stage, but would not have claimed that sum if they had won (or secured a settlement) at an early stage is not only unlikely in the extreme, it is not what the CFAs themselves provide for and I do not accept that ex post facto justification (for such it is) for the flawed CFAs entered into in this matter.
237. In regard to the side issue of timesheets, I wished to know what RS's work in progress and disbursements were at the time each CFA was signed; I wished to gauge the accuracy of the suggestion that conclusion of the litigation shortly after levying the Advance Fees, by settlement or otherwise, would have left RS with more than base costs plus 100% plus disbursements. However, although it is RS's case that GEHC received the December 2012 Bill by post with a full timesheet, when I asked to see the timesheet RS were extremely resistant to letting me see it.
238. I was curious to get to the bottom of this issue and I suspect that the timesheet may have assisted RS on this point, but whereas RS were initially going to courier one to me, when GEHC stated that if the Court was going to see the timesheet they wished to see it also, RS dug its heels in and expressed the view at one point that if I were to insist upon further Disclosure at such a late stage, they would consider whether the entire fact-finding exercise to date was a waste of time. The costs implications of that, would be catastrophic. The result is that I do not have the timesheet but both parties assert that the point of principle is key. The question hinges on whether the CFAs as drawn could potentially lead to a claim that (in effect) was in excess of 100% success fee, rather than upon a forensic dissection of whether, on a hypothetical end date, the claim was ever actually in excess of 100%.

239. On that basis, and since I find that the CFAs as drawn could indeed lead to a claim in excess of 100% success fee, I find that GEHC prevail and that CFAs 1, 2 and 3 are invalid due to breach of CLSA 58(2)(b) accordingly.

Other issues of fact in relation to the CFAs

240. Given the above I will deal with the remaining issues of fact briefly. The question of whether RS's initial failure to give Notice of Funding to Mr Gray resulted from GEHC's instructions, has been answered above from paragraph 110; I find that it did not, it was a mere oversight. Whether RS advised GEHC that the retrospective nature of CFA2 meant that it was volunteering to pay costs (under CFA1) that it was entitled to have written-off has been answered above from paragraph 181; I find that they did not so advise GEHC and that (certainly as far as the success fee is concerned) RS preferred its own interests to GEHC's by redefining a "loss" under CFA1 as a "win" under CFA2 so as to enable the billing of those costs plus a 100% success fee after the event.

241. As to whether RS delivered an interim statute bill for the work done under CFA2, this has been answered above from paragraph 76; I find that it did not, but as the reasons for this were lengthy I do not repeat them here. As to whether Mr Monych agreed to RS keeping the success fee disallowed by Master Leonard, this has been answered above from paragraph 138. I find not only that he did not as a question of fact, but that given his position relative to GEHC I am of the view that he could not as a question of law. As to whether Mr de Clare agreed to RS keeping the success fee conceded as against Mr Gray because of the failure to give Notice of Funding (which is subtly different to the question of why Notice of Funding was not given) that has been dealt with above from paragraph 110; no such instructions were ever sought or given, it was simply overlooked by RS in my view.

242. That leaves the following questions of fact, not dealt with elsewhere in this decision: Did RS simply advise GEHC that CFA2 had ended, so that a new CFA was necessary, did RS advise GEHC that there had been a win under CFA3, was the November 2015 costs estimate used to justify retaining £1.1 million to cover disbursements a mere device and did a difference of opinion about disclosure and/or the instruction of Bird & Bird cause the breakdown in relations between GEHC and RS or was that due to a breakdown in the relationship due to RS's failure to honour its agreement to pay £1.1 million to GEHC? I deal with each of these in turn below.

Did RS advise GEHC that CFA2 had ended so that a new CFA was necessary?

243. It is common ground that RS advised GEHC that a win had been achieved under CFA2 as a result of Vos J's judgment and that costs were therefore payable; as to whether GEHC was told CFA2 was at an end, or was instead advised that CFA2 might continue, but that this would be contrary to its interests, is in dispute. GEHC assert that RS simply stated that CFA2 had ended, and that a new funding arrangement was required.
244. There was some dispute at the hearing about whether GEHC was ever given any advice about the impact of the split trial on costs in advance of that trial. In §21 of his first statement, Mr Monych said he did not recall GEHC being given any advice about the impact of the split trial on CFA2 when the former was directed [B/3/14]. In their statement in response [C/1/10, §27], ABC replied to that specific paragraph, and corrected Mr Monych on a question of the date, but took no issue with his statement that he recalled no funding advice being given when the split trial was directed.
245. Per GEHC, it was only in their second statement [C/3/45, §8] that ABC asserted that not only had ABC given Mr Monych advice at that time, but purported to recall it in considerable detail (even to the extent of reporting indirect speech). Asked in cross-examination how ABC had remembered this between their first and second statements, ABC answered that '*I got carried away*' when preparing §27 of their first statement {K1/7/420, internal p 90} later accepting that ABC had no explanation as to why an account of funding advice had not been given in a first statement which had been directly responsive to Monych 1, §21.
246. As has been common in this matter, no attendance note records any advice being given about funding at the point the split trial was ordered, and GEHC ask the Court to find that there was no such advice (or in any event that none has been proved). GEHC point to the first written funding advice connected to the split trial in the briefing note of 16 October 2012 [J1/153], prepared by RS after Vos J had reserved judgment. This briefing note simply took as its premise that success before Vos J would immediately crystallise liability under CFA2; it was not (per GEHC) presented as something that admitted of doubt, and nothing was said about whether or not CFA2 would continue.
247. On the day that Vos J handed down judgment (21 December 2012), ABC emailed GEHC to confirm that '*costs under the CFA now all become payable*' and told it to expect an invoice [J1/176]. Nothing was said about future funding. ABC's statement that a win had been achieved at this point was in fact wrong even on RS's reading of CFA2 as Vos J had yet to make a costs order: the definition of 'win' under CFA2 required a costs order to be made [H/3/20]. Indeed, as the same

email records, Mr Gray was at this time resisting any costs order, and hence that was an issue which Vos J had adjourned, and any 'win' still remained in the balance.

248. The very next day, however, (a Saturday) GEHC was emailed an invoice for £3,269,131.54 [J1/177d-e], either by Mr Rosenblatt himself or someone in his office. This invoice, and whether it was posted or emailed, has been addressed at length above. On 31 December 2012 [J1/180] ABC emailed Mr de Clare to ask him (i) what arrangements he was making to pay that invoice; and (ii) to raise the issue of how the second trial was to be funded. ABC said that ABC had given this much thought, and asked *'Do you want me to consider a CFA arrangement again? / what other funding options are available?'*
249. Per GEHC, this email simply takes as its premise that CFA2 was at an end and needed to be replaced. On 2 January 2013, Mr Monych stated in writing (via email) that the intention had always been for CFA2 to cover both liability and quantum and confirmed that therefore a further CFA was preferred [J1/187]. Per GEHC this email shows nothing more than Mr Monych simply accepting GEHC's solicitors' advice that a new funding arrangement was required. This then led to a detailed note on funding of 11 January 2013 [J1/196], which identified four options, including a new CFA, but not continuing under CFA2.
250. Per GEHC, in oral evidence, Mr Monych was clear that GEHC was only ever presented with the option of a new CFA, and that there was never any choice involved in ending CFA2: {K1/5/284-285; K1/6/323}. In his words, *"We were told we had no choice...We had a win, CFA2 was done"*. Per GEHC there is nothing at all to suggest that RS and GEHC agreed to end CFA2 in the rational service of GEHC's best interests and that, if this had been the position, there would be a record of this advice in one or both of the two detailed briefing notes [J1/153 & 196]. As such, the court should find that GEHC was simply told that CFA2 had ended, and that a new CFA was required.
251. For RS it is said that any assertion that CFA2 encompassed the totality of the proceedings, and that no payment could fall due until the proceedings were at an end, is wrong as a matter of analysis. Payment becomes due under a CFA once success is achieved and it is normal for the CFA to cover work following the achievement of success: thus CFAs universally or near universally cover the assessment of costs, and they sometimes cover enforcement. This does not mean that no payment is due until such time as an assessment of costs and enforcement proceedings are at an end. On the contrary, once success has been achieved, the solicitor has the right to bill the client for its base costs and success fee for the work to date, and to bill the client for its ongoing work. As success has

already been achieved, the solicitor is entitled to bill both base costs and success fee. This has been clear since at least the time of the decision of the Court of Appeal in *Halloran v Delaney* [2002] EWCA Civ 1258. This case appears above from paragraph 195 but is in my view on a rather different issue; RS appear to have focused on whether they were entitled to Bill under CFA2 at the point that they did so, rather than whether they presented GEHC with a *fait accompli* by saying that CFA2 had come to an end.

252. RS accept that they could have continued to act under CFA2 even after success was achieved by virtue of the decisions of Vos J, and assert that if they had done so, as success had already been achieved, RS would have been entitled to charge both basic costs and success fees for all the work that undertaken thereafter. RS asserts that this is precisely what happens on a regular basis in Clinical Negligence claims: success is achieved at the Liability trial and the client is then liable to pay the solicitors' base costs and success fees for the whole of the Quantum phase of the litigation.
253. Mr de Clare's views on alignment of risk are relied upon, and RS say that entering into CFA3 meant that RS's right to charge costs was once again rendered conditional on success being achieved, and that risk was "aligned" as Mr de Clare wished. In the event RS incurred base costs of more than £3 million which were at risk in circumstances where RS would receive only the advance fee of £300,000 in the event of failure (see invoice 45420 at G33). In contrast, if RS had continued to act under CFA2 it could have billed both for its base costs and the success fee as the work was undertaken.
254. RS seek to rely upon ABC's entirely mistaken concern that a "win" before Vos J might make it harder to recover the success fee on the Quantum phase, and to their linked concern that, if a new CFA was to be put in place, this had to occur before April 2013 when success fees would become irrecoverable. In the event CFA3 was made on 6 March 2013, just weeks before the deadline. RS also rely upon clause 14.4 of CFA 3 which GEHC assert would allow RS to withdraw from the claim if RS concluded that GEHC no longer had a reasonable prospect of success, and to charge its basic fees at that stage; that has already been dealt with above from paragraph 205.
255. I am not persuaded by RS's submissions which in my view go more to whether the win before Vos J entitled RS to render a Bill in December 2012, than to whether they advised GEHC that CFA2 had come to an end. I find that on the contemporaneous documents, and the evidence of GEHC's witnesses, RS clearly did advise GEHC that CFA2 had come to an end and were wrong to do so.

256. I have dealt with the fact that I believe RS were not entitled to raise a Bill in December 2012, above from paragraph 76. Whilst I note RS's comments upon what happens in (e.g.) Clinical Negligence Trials, that comparison does not bear close scrutiny (although in fairness it may have been me who first proffered it during the Hearing). It would be extremely unusual for Solicitors in a Clinical Negligence case to render a Bill upon completion of the Liability phase; there are various reasons for this but they include the fact that it is not industry standard practice, the fact that Claimants, particularly in catastrophic injury claims, tend to lack funds to pay any such fees until damages are recovered at the end, the fact that Clinical Negligence claims will often be underwritten by an After the Event policy, the terms of which would not tend to favour a Bill at such an early stage etc.
257. Perhaps more useful are two points applicable to this case, rather than just to a hypothetical Clinical Negligence case. Billing at such an early stage is unusual because there is many a slip twixt the cup and the lip; whilst a finding of negligence (or other tortious wrong) is indeed a major step, it is far from a guarantee that money will flow in the Claimant's direction. Cases where (for example) a Defendant NHS Trust has handled a child's birth in a completely inadequate way so that there is no question that negligence is made out, but where the Court ultimately prefers the Defendant's medical evidence, to the effect that the injuries sustained are not a result of birth trauma, or are due to Fragile X or whatever, may not abound but are far from unheard-of.
258. The fact that the valuation of the technology in this case stands at a "mere" \$15 million, rather than hundreds of millions as Mr de Clare still hopes it is worth, is an example of the above in practice. However, in this case the distinction between GEHC's litigation and a hypothetical Clinical Negligence case, is even more striking. RS rely upon the fact that in the case as originally pleaded, no quantified damages were sought, but only an account as to whether Mr Gray had made any benefits. That may be, strictly speaking, true, but the whole point of pursuing Mr Gray for that account, was that it was believed that the technology was worth enough money (in Mr de Clare's view, hundreds of millions) and that Mr Gray had or had access to, enough money to make it worth pursuing. A Clinical Negligence Claim Solicitor would be highly unlikely to render a Bill at such an early stage and in my view, RS are attempting to divorce the "win" under CFA2 from the "claim" as a whole. This has been dealt with above from paragraph 243 and is in my view not sustainable.

259. I prefer the evidence of GEHC, coupled with the contemporaneous documents, to ABC's recollections years after the event, and find that RS did indeed advise GEHC that CFA2 had come to an end. As I understand it, RS do not demur from the suggestion that CFA2 had not in fact come to an end, and as such as a question of fact, GEHC could (had they been so advised) have continued to litigate against Mr Gray under its terms.

Did RS advise GEHC that there had been a win under CFA3?

260. Per GEHC, the contemporary documents show both directly and inferentially that GEHC was indeed advised that there had been a win under CFA3. GEHC rely upon an email of 30 July 2015, whereby ABC emailed Mr Monych to say that ABC needs to discuss the CFA '*as under the terms success has been achieved for this stage...*' [J2/636]. The same email goes on to say that '*I need to know where we are with funding the next steps...*'.

261. GEHC describe this as history repeating itself. Vos J's judgment was treated as (i) a win which (ii) required a new funding arrangement and now Asplin J's judgment was being treated in the same way. Per GEHC, that is clearly how Mr Monych understood it, as he emailed on 3 August 2015 to ask why CFA3 could not continue, as the quantum stage had not been concluded [J2/639].

262. ABC's response to him was not to say: there has been a misunderstanding; of course, CFA3 can continue. It was '*The answer is that the threshold has been met – a damages award made in GEHC's favour – that would mean that the whole of the WIP plus uplift would become payable*' [J2/640]. Per GEHC, these two emails seem entirely clear: '*under the terms success has been achieved for this stage*'; '*the threshold has been met – a damages award in GEHC's favour*'.

263. RS placed emphasis on the use of the word 'would' (*that would mean*) in the second of these emails; per GEHC, that invests far too much significance in the precise use of tense in an informal and staccato exchange. Secondly, if the word "would" has any significance, it is simply a reflection of commercial reality. Regardless of whether a win had technically been triggered under CFA3, RS knew that there was no actual prospect of the full payment of its WIP until funds were recovered from Mr Gray; that had not happened as a result of the Asplin order [J2/629], because ABC had adjourned all issues of damages and costs for a significant period.

264. Per GEHC, RS also ignore the closing words of the second email, which also clearly communicate a win: '*the other side could argue that we are no longer entitled to the uplift from here on in as the risk element has been removed as there has been a win for the purposes of the CFA*' [J2/640]. As

well as these emails, GEHC rely upon powerful indications to the same effect in the surrounding circumstances. They list these as:

(a) Clear echoes of the position presented to GEHC under CFA2. If a remedy from Vos J was a win, which crystallised liability under CFA2 (cf ABC's email at [J1/175]) it is hardly surprising that RS took the same approach to a remedy from Asplin J under CFA3.

(b) GEHC's initial agreement to RS taking the whole of the sum (£2.523 million) being paid by Mr Gray. GEHC assert they would never have agreed to this absent advice that a win had been achieved under CFA3 as (absent such a win) the money was GEHC's outright.

(c) The August agreement, in which the split in the Gray money was agreed, only makes sense (per GEHC) if it had been advised that further sums were owing to RS.

(d) Emails between Mr Monych and ABC which led to the August agreement; email 9 August 2015 [J2/647] from Mr Monych to ABC to say that GEHC is in a '*predicament*' because £1.1 million in loans (from the investors) are falling due, and wanting if possible to retain that amount from the Gray payment. He clearly believed that it was GEHC which was asking RS for a favour and would hardly have described GEHC as in a predicament if he had in fact been advised that at this time GEHC owed nothing to RS, and that it was in fact RS which was asking for a favour, because GEHC was legally entitled to the whole of the £2.523 million.

(e) Emails sent by Mr Monych to investors after the August agreement [J2/652], again clearly indicate that it is ABC who has done the favour and not (as RS now assert) that GEHC was making a massive voluntary payment to their firm: '*ABC... has agreed to let us keep £1.1 or thereabouts to repay the loans... ABC had to convince their partners, which ABC did today.*'

(f) In what GEHC call a deafening silence later in the case, at the point that a dispute arose over RS's right to appropriate the whole of the Gray payment, purportedly because of the future disbursements of £1.1 million, not once does GEHC refer to a recent "voluntary" payment well in excess of that sum and ask RS to be flexible. Had GEHC in fact been advised that the payment was voluntary, that is the most obvious point that it could possibly have made, and it would inevitably have made it.

(g) In the complete absence of any note – still less formal advice – from RS concerning GEHC making it a voluntary payment of over £1.4 million, on the basis (per GEHC) that any solicitor who

had in fact advised its client that a payment on this scale was voluntary, would have prepared such a note, to protect their own position if nothing else.

265. These points are (GEHC say) fortified by GEHC's own evidence. Mr Monych was clear that he had been advised that was a win and that payment was due. GEHC asserts a strong objective indicator of the accuracy of Mr Monych's account in his evidence on day 5 {K1/5/288} is that, in describing a debate with ABC about whether a fourth CFA was required post-Asplin J, Mr Monych recalled discussing the impact of the LASPO reforms, and the fact that a success fee would no longer be recoverable. Those are not issues which Mr Monych would likely have known about absent the discussions with ABC which he asserts and it is said that this therefore corroborates his account of those discussions, and in particular that ABC had advised him that CFA3 was complete.
266. Per GEHC, particular weight should be given to Mr Reed's evidence, as he was a peculiarly cogent and careful witness with no axe to grind. At {K1/6/333} he recounts his meeting with Mr Rosenblatt himself on 19 November 2015 and asserts that Mr Rosenblatt asserted that there had been a win, and that he was entitled to keep the full £2.523 million paid by Mr Gray.
267. Had GEHC been in any doubt that RS's position was that a win had been achieved, such doubt was dis-spelled by a letter from ABC on 6 January 2016 [J3/794] in which ABC states '*The litigation has been won following the determinations by the Judge in July...*', that being reference to the Asplin J order, and continues '*Global owes this firm in excess of £7million which it is liable to pay whether Gray pays or not.*' For these reasons, GEHC asks the Court to find that RS did indeed advise GEHC that there had been a win under CFA3 or to conclude that, at the very least, RS was content to allow GEHC to think there had been a win, and to take no step to correct that mistaken belief. Even if the points above do not persuade the Court that RS actively asserted a win, they should still persuade the court that GEHC genuinely believed that CFA3 had been triggered as, without such a belief, why else would GEHC have agreed to pay such large sums to RS, and think it was being done a favour in being allowed to keep anything at all?
268. Clearly, it suited RS for its client to believe that there had been a win. In their oral evidence, ABC stated that ABC was under internal pressure to get the money due from Mr Gray {K2/8/495}. That was also vividly illustrated in the 'cat among the pigeons' email [J2/633] and may (per GEHC) be explained by RS's own financial position at this time. As ABC agreed in evidence {K1/8/494} its accounts for 2015 show that it was heavily in debt. Hence, actively or passively (but GEHC's

primary case is the former), RS falsely represented to its client that there had been a win under CFA3.

269. RS have again approached this from a rather different perspective; they go into detail in closing submissions on whether they were entitled to retain £1.1 million under the August agreement, but not into great detail as to whether they told GEHC that there had been a win under CFA3. It appears that their position is, there was not a win under CFA3, and they never told GEHC that there was.
270. Given the contemporaneous documents in the bundle, the clear evidence of Mr Monych and the surrounding actions of the parties, in particular GEHC giving up £1.5 million or thereabouts, at a time when its investors were clearly starting to press for funds, as a question of fact, and on balance of probabilities, I find that RS did advise GEHC that there had been a win under CFA3.

Was the November 2015 costs estimate a mere device?

271. GEHC assert that RS's 'need' to retain £1.1 million to cover disbursements cannot be taken at face value, as it was founded on the estimate of 20 November 2015, which GEHC describe as an extraordinary document even by the standards of this case [J2/751-752]. They invite the court to find that it was a transparent construct, devised to allow the £1.1 million promised in August 2015 to be wrongly retained.
272. The estimate amounted to just over £1.1 million, and was based not only on requiring GEHC to pay the whole of the remaining disbursements for proceedings at first instance up-front on account (something which RS had never previously sought, and to which, per GEHC, it had no contractual entitlement), but also the disbursement cost of two full appeals and a fully contested Detailed Assessment.
273. The relevant CFA did not even cover appeals (see clauses §§3.2 & 3.3 [H/5/29]), and GEHC say it is absurd to suggest that an appeal and cross-appeal would be dealt with by the Court of Appeal separately, and that RS had a contractual right to payments on account of the full disbursement costs of appeals which would probably never happen, and which would be years away even if they did. The contested estimate contained a host of other "obviously unreal" assumptions including all interim applications requiring three counsel; £102,000 in counsel's fees for a three day hearing; a three counsel team for the handing down of Judgment; two separate permission to appeal hearings

(an issue the Court of Appeal primarily deals with on paper); both such hearings to be attended by all three counsel (the Court of Appeal typically listed such hearings for 30 mins, including Judgment) and retaining leading counsel to conduct a detailed assessment at a cost of £100,000.

274. Thus, per GEHC, RS contrived a position whereby it retained the entirety of the £2,522,840 paid by Mr Gray. While in fact it had no right to any part of that money, GEHC would have been content for RS to keep all save the £1.1 million and assert that it was solely because that was not enough for RS that the relationship broke down. GEHC assert that the relationship broke down but that this would never have happened but for RS's wrongful appropriation of the sums paid by Mr Gray.

275. RS have again, as I understand it, approached this from a rather different direction; they refer in closing to the case of *Garbutt v Edwards* [2005] EWCA Civ 1206. The relevant part of the ratio is (per RS) properly summarised in the headnote to the WLR report:

A solicitor's obligation to provide costs information, contained in rule 15 of the Solicitors' Practice Rules 1990, was "to give information about costs" in accordance with the applicable Costs Information and Client Care Code; that the code was incorporated by reference into the Rules and was binding and had statutory effect, but a breach of the requirement to make a costs estimate was not of itself sufficient to render the performance of the contract of retainer between the solicitor and his client unlawful and unenforceable.

276. In my view, the November 2015 estimate is an extraordinary document and the close proximity to the figure it gives for future disbursements (generously provided for) and the sum of £1.1 million that RS wished to retain being the balance of the monies recovered from Mr Gray, is certainly striking. However, I do not believe that I have enough evidence to find that it was a mere device rather than (say) an over-zealous attempt by RS to cover all eventualities, and I do not believe that GEHC's case on this particular issue, is made out. That said, it does not appear that a great deal hinges upon it in any event.

The August Agreement

277. On 28 July 2015, a preliminary damages order was made (and stayed) in the Gray Proceedings, and a stay previously imposed on payment of the balance of the liability costs was lifted [J629]. Further, an order was made for the taking of an account of damages, with Mr Gray's right to appeal extended to the conclusion of the quantum phase.

278. Per GEHC (and I do not understand RS to demur) GEHC had already paid the entirety of the costs of the liability phase, by the time that the costs which were to be paid by Mr Gray for that phase (just under £2.6 million) were assessed. As such, GEHC assert that those costs belonged entirely to GEHC, referring to the order of Asplin J sealed 31 July 2015 [J629]. However, following the hearing at which that order was made (28 July 2015) GEHC assert that RS misrepresented that a “win” had been achieved under CFA3 in respect of quantum, and as such, and despite there still being no actual damages payment and Mr Gray not having exhausted his rights of appeal per the terms of CFA3, that RS was entitled to be paid its fees to date incurred under CFA3 in full, together with a 100% success fee. As shown above I find as a question of fact that RS did say there was a “win” under CFA3.
279. RS’s entitlement was expressed to be a total of some £6.5 million (emails from ABC to Mr Monych of 30 July 2015 at J636 and 4 August 2015 at J640). RS repeated, several months later, in a letter from ABC to Mr Reed dated 6 January 2016 [J794], that there had been a ‘win’ under CFA3 and that as a result, GEHC owed RS “£7 million”.
280. RS has subsequently confirmed during the course of the Section 70 Proceedings that there was no such “win”/entitlement to payment, but despite the above correspondence, deny that they ever misrepresented the position to GEHC as being otherwise.
281. During August 2015, having (per GEHC) been advised that a win had been achieved and that £6.5 million was “owed” to RS, GEHC agreed to split the monies due from Mr Gray (the “**August 2015 Agreement**”). GEHC advised RS that they required approximately £1.1 million to repay a number of their investors; RS were already aware of how the matter was being funded and of the need to feed some money back to investors.
282. Having been led to believe (per GEHC) that RS were entitled to keep the entire sum recovered from Mr Gray it was agreed that RS could retain the balance of the monies after deduction of the £1.1 million (or thereabouts) that GEHC needed to repay to investors; hence a further £1.5 million to which it is now common ground that RS were not legally entitled, was retained by RS.
283. GEHC do not dispute agreeing to this retention, but the events leading up to the agreement remain disputed and in particular RS’s assertion (yet again) that it advised GEHC that it had no right to the money but wished to retain it anyway, was strongly denied by GEHC, who assert that RS told them it was due and owing because of a “win”.

284. On or about 31 August 2015, RS raised, and purported to send by post under cover of a compliment slip, an invoice number 44539 [G32] for the portion of monies that they were going to retain £1,367,000. That invoice was not received at the time by GEHC (it was evidently not emailed, as previous invoices including seven-figure invoices had been). Its existence did not come to light until February 2016 when it was in any event reversed and replaced.
285. RS assert that the August agreement is of little consequence, but confirm the essentials thereof, namely that agreement was reached in August 2015 that on receipt of the c. £2.5 million due to be received from Mr Gray, £1.1 million would be paid to GEHC, with the balance retained by RS and paid to RS on account of RS's fees and that, in the event, by the time that the moneys were received from Mr Gray in October 2015, RS did not release the £1.1 million to GEHC. Instead, RS held it on client account for GEHC's benefit.

Breach of the August 2015 agreement

286. On or about 8 September 2015, Mr Gray issued an application seeking to extend the timeframe for payment of the costs due [J667]. There followed an exchange of emails between ABC and Mr Monych [starting at J677] culminating in GEHC paying an additional CAN\$140,000 on account of future disbursements. Despite this sum appearing on RS's ledger [H1400] in the sum of £90,587.14, and being referred to on 24 February 2016 as being credited against "Our Disbursement Bill", a credit for this sum does not appear on any of the invoices rendered to GEHC.
287. RS issued a disbursement-only invoice on 24 February 2016 [G35] for £106,612.12, but despite being the same day it shows no credit for the sum of £90,587.14 instead showing the entire amount, £106,612.12 as being due. That invoice was credited and reissued on 20 September 2016 [G83], but for the same amount and yet again, without showing a credit. GEHC are unaware what has happened to this payment, and RS have never accounted to GEHC in respect of the same; it is not a mere bagatelle, it is a five-figure sum and in many parts of the UK would still buy a home outright, but it has (per GEHC) simply disappeared.
288. Following the slight delay whilst Mr Gray sought to extend the date of payment (on the basis that he was insolvent) on or about 14 October 2015 a payment was received from Mr Gray in the sum of £2,522,840. Shortly after receipt of that payment, RS contacted GEHC and advised that, notwithstanding the August 2015 Agreement, they were not going to release the £1.1 million balance which GEHC had already stated it needed to pay to its investors. RS cited a number of

reasons, and have amplified those reasons in evidence; principally, they expressed concern about GEHC's ongoing liquidity and ability to meet its obligations to pay disbursements for the balance of the quantum phase.

289. In response, on 12 November 2015, Mr Reed wrote to RS [J720] as GEHC's Canadian Lawyer, referring to the breach (as GEHC saw it) of the August 2015 Agreement, and asking for a meeting to discuss the position; that meeting apparently took place at the offices of RS on 19 November 2015 but did not resolve the issue of the outstanding payment.
290. RS assert that the position under the August Agreement is irrelevant, albeit that it was also justifiable, and say that it had no effect on the retainer. It had nothing to do with the parties agreeing to enter into CFA3, which by that time had been on foot for over two years, and it did not end CFA3 either, given that GEHC expressly wished RS to continue to act, even after Bird & Bird were instructed. As such, it is impossible (per RS) to see how it can have any bearing on the Preliminary Issues or be said to affect the enforceability of CFA3.
291. It is notable that GEHC now seeks damages relief in relation to the August Agreement in its separately issued Part 7 claim. Per RS, the supposed non-compliance with the August Agreement was in fact, in GEHC's interests. If, as GEHC had wished, the funds (as to the whole sum or even just the £1.1 million) had been paid over to it in October 2015, there would not (as GEHC presented the matter to RS) have been funds available to pay for the disbursements required as part of the strategy developed by Mr de Clare at that time.
292. Furthermore, per RS, what was in GEHC's best interests has to be seen in the context of what GEHC was telling (and not telling) RS at the time, including in particular GEHC's position to RS that GEHC had no other money to fund the case (with no suggestion originally that any other law firm might become involved and no notice at the relevant time, that GEHC had started discussions with Bird & Bird). As ABC explained {K8/p 66/line 24ff}:

I was worried the case was about to collapse because we didn't have funding going forward and I didn't think that was in the interests of the client.

293. Thus, the retention of the funds in client account for GEHC's account and benefit was in RS's interests because it was a proper step to protect RS's position, but it was also (say RS) in GEHC's interests. RS's case is that it was fully entitled so to do, given that funds were by this time required to pay the disbursements that would be required to continue the claim, in circumstances that prior to

the receipt of funds from Gray GEHC had confirmed that it was down to its last CAN\$140,000 and that subsequently GEHC had not managed to raise money to fund disbursements from any other source. GEHC's case that RS was not so entitled, and that this conduct amounted to RS preferring its own interests to its client's interests, cannot be correct for a simple reason: the £1.1 million was not paid into office account to benefit RS, but remained in client account to be used to fund disbursements.

294. RS asserts that the court need not detain itself for long on this issue, because whatever the rights and wrongs of the non-payment over of the £1.1 million (and RS could make yet further points in relation to this), and whether or not this amounted to a repudiatory breach of the August Agreement (it is not alleged to be a repudiatory breach of the retainer), GEHC does not and cannot assert that GEHC accepted a repudiatory breach **of the retainer**, because apart from anything else the acceptance of a repudiatory breach of the retainer would bring the retainer to an end. It is absolutely clear that GEHC was insistent that RS should continue to act for them under CFA3, albeit yoked uneasily into harness with Bird & Bird. See {I23} and Mr de Clare's evidence at {K5/p 63/line 19 to p 64/line 9}. If a repudiatory breach is not accepted, then the retainer continues.
295. With the retainer on foot, and any right of GEHC to terminate it not having been exercised, the contract remained in place for both parties and RS's rights to terminate the retainer if GEHC committed a repudiatory breach were fully preserved. RS assert this is a matter of clear and long-established law: e.g. *Fercometal Sarl v Mediterranean Shipping Co SA* [1989] AC 788, 800-801, HL; *Segap Garages v Gulf Oil (Great Britain)*, transcript 7 October 1998, *The Times*, October 24, 1988, CA; and for a recent example: *Cantt Pak Ltd v Pak Southern China Property Investment Ltd* [2018] EWHC 2564 (Ch) at [127]-[128], *per* Barling J.
296. In short, therefore, any departure by RS from the August Agreement can (RS say) have no bearing whatsoever on the question of the termination of the retainer in February 2016. Nor could any departure by RS from the August Agreement affect the enforceability of CFA3, not least in circumstances where GEHC expressly decided to affirm and continue CFA3 in full knowledge of the position under the August Agreement, and where GEHC's remedies at law (if any) for any breach of the August Agreement, and for which it is suing separately in its Part 7 claim, do not and cannot include removing the enforceability of CFA3.
297. Nor can GEHC properly rely on entry into the August Agreement itself as any basis for impugning CFA3; RS state that GEHC cannot invoke the August Agreement, and indeed seek to enforce it as

binding and applicable (including in separate proceedings) and at the same time suggest that the August Agreement was in some way wrongful or undermining of the relationship between the parties. Any departure from the August Agreement by RS is therefore irrelevant as regards the Preliminary Issues to be determined by the Court.

298. Given that GEHC has issued separate Part 7 proceedings in which it is seeking damages for breach of the August agreement, I wish to express myself carefully. Clearly RS agreed to pay £1.1 million over to GEHC and clearly they did not. In my view, the argument that in doing so they were protecting GEHC by ensuring there were funds in hand to pay disbursements going forward, falls down on the basis that the only reason GEHC were short of funds (if indeed they were – it remains GEHC’s position that they are and have always been, able to raise money to fund the Gray proceedings, via their investors) was that RS had prevailed upon GEHC to make yet another “voluntary” payment, this time in the sum of around £1.5 million.
299. On my reading, as set out above from paragraph 161, the correspondence relied upon by GEHC bears out their submission that this was not requested as a “voluntary” payment at all; rather they were told that money was due and that was behind their agreement to pay the £1.5 million that RS now accepts was not yet legally due. It sits extremely uncomfortably on RS’s shoulders to assert that they were protecting GEHC when the greatest drain on GEHC’s scarce resources, was RS’s repeated requests for “voluntary” payments ultimately totalling in excess of £2 million and on the question of whether the relationship between RS and GEHC foundered on this particular issue, I find that it did.

Bird & Bird/termination of retainer

300. The involvement of Bird & Bird has been described in brief above, from paragraph 10. It is common ground that the retainer was terminated when RS “sacked” GEHC by letter dated 24 February 2016 [I28] but what remains in dispute, is whether RS did so wrongfully. This is significant because, as a general rule, when a client retains a solicitor for a particular purpose there is an entire contract, i.e. the solicitor contracts to finish the business for which he was retained (*Re Romer and Haslam* [1893] 2 Q.B. 286 at 298).
301. When considering termination, GEHC state that it is necessary to decide whether the retainer is an “entire contract” or not. An entire contract is one to complete the work for which the retainer was given. This is most easily demonstrated by instructions to conduct a particular piece of litigation, or

the conveyance of a particular property. The basic common law rule is that where an entire contract exists, a solicitor cannot discharge himself until the completion of the business unless there is good reason for doing so and the client has been given reasonable notice (*Re Hall and Barker* [1878] 9 Ch. D. 538).

302. If the solicitor terminates the retainer without good cause he is not entitled to recover any remuneration either contractually or on a quantum meruit basis (*Wild v Simpson* [1919] 2 K.B. 544). Conversely, where a retainer is terminated without breach or frustration or is repudiated by the client, the solicitor is entitled to recover costs for work done up to the date of termination (*Re Lane Joynt* [1920] I.R. 228; *Colgrave v Manley* [1823] Turn. & R. 400).
303. Conversely, where a client accepts the termination of a retainer following the unjustified withdrawal by the solicitor (or other breach) the client is not liable to pay for any costs for work done under the retainer. It is therefore said on behalf of GEHC that if RS were not justified in withdrawing from the Gray proceedings, they – no doubt unknowingly – absolved GEHC of liability to pay their fees and are bound to refund to GEHC any fees already paid.
304. RS have submitted that they have had to conduct these proceedings with one hand tied behind their back; they would like to inspect the Bird & Bird correspondence because they are convinced GEHC were trying to freeze them out. GEHC assert privilege over the Bird & Bird correspondence and say that, even under Part 7, RS could not inspect it, so that the distinction between Part 7 and Part 8 Disclosure, is of no consequence.
305. At the turn of 2015/2016, GEHC refer to a disagreement about disclosure strategy. RS, supported by counsel, wanted to present a limited claim which would conclude with the further hearing in March 2016. GEHC wanted to adjourn that trial and conduct much deeper enquiries in order to obtain more money. RS refers to this as Mr de Clare taking the litigation in a wrong direction; GEHC assert that they were right to pursue that line and are still doing so. In any event, GEHC state that the case did not founder on the difference in disclosure strategy as clients and their lawyers reasonably differ about case strategy all the time and there was no suggestion at the time that the approach that GEHC preferred was unreasonable.
306. GEHC cite a long note of the consultation on disclosure with counsel on 4 February 2016 [J3/819], wherein counsel states, without anyone disagreeing, that if GEHC sticks to its instructions, then the team will go ahead as instructed [*id*, p J822]. By the end of that meeting, after counsel and Mr

Nimmo explain their strong reservations, the instructions to press ahead with the adjournment are accepted, and Mr Nimmo says that he will put together the necessary statement [*id.*, pp J834-835]. In the consultation of 11 February 2016 [J3/836-838], Mr Nimmo records his advice that GEHC are taking what its lawyers advise to be its third best option not its best. Having recorded that, the lawyers nevertheless press ahead with option 3.

307. Both these notes, and earlier documents recording the debate about disclosure (e.g. Mr de Clare's long email to Mr Nimmo on the issue at J2/716a-b) show that it is conducted courteously, constructively and professionally on all sides with Mr de Clare going out of his way to assure Mr Nimmo of his regard for his advice despite their different views of strategy. Even at the very end of the solicitor-client relationship, Mr Nimmo sent Mr de Clare a detailed email of advice (22 February 2016) on how to implement the disclosure strategy that GEHC had preferred, showing the next steps which he intended to take [J3/844].
308. Per GEHC, CFA3 would have allowed RS to terminate the relationship if instructions were unreasonable or non-cooperative [H/5/33, §§13.1 & 14.3]. These clauses were never invoked, or even referred to, in the context of the disagreement on disclosure, and in their evidence, ABC confirmed that ABC did not rely on these clauses. ABC specifically accepted that differences on disclosure were not the cause of the breakdown between the parties giving on day 8 {K2/8/513}: after reference to the email at [J3/844] to the question “...*doesn't it show that however strong you and Mr Nimmo may have disagreed with what Brian de Clare's instructions were on the disclosure aspects, that issue alone was not something that would have brought your relationship to an end?* ABC replies: *No. we were trying to see if we could make the disclosure strategy work. Q. Yes, you thought it was the wrong strategy, but you were willing to try to make it work? ... So, it wouldn't be your case that the difference of opinion on disclosure was the real cause of termination here? A. Not from our position.*”
309. Per GEHC, disclosure can therefore be rejected as a material cause of the demise of the relationship. As far as the instruction of Bird & Bird is concerned, although Mr Nimmo seems to have found it more objectionable, ABC, the conducting partner, initially welcomed it and their IP expertise [K2/8/502, internal p 85]. Per GEHC, Mr Nimmo tried to give the impression in evidence that Bird & Bird behaved objectionably, but in fact their interventions as recorded in the documents are measured. For example, in the long consultation of 4 February 2016, ‘Morag’ of Bird & Bird joins company with Mr Nimmo in warning Mr de Clare that his strategy is high risk, and that it

could imperil compensation then thought to be secure (*'... a bird in the hand is worth, you know, two in the bush, because hand on heart I cannot tell you if we will find anything more if we had an adjournment and we do have quite a serious risk'* [J3/823]).

310. Here too, GEHC assert that it is significant that until the relationship with GEHC collapsed over RS's appropriation of the whole of the Gray payment, it was never once suggested that instructing Bird & Bird breached the 'your responsibilities' section of CFA3 so as to give rise to any freestanding right by RS to complain of a breach of contract. Mr Reed's evidence is submitted to be extremely helpful, and untainted by the personal feelings of Mr Nimmo. Mr Reed was clear that there was no intention to oust RS, and that Mr Nimmo's abilities as a litigator were held in the highest esteem, and stated emphatically that the dispute with RS was all about the appropriation of the Gray money: {K1/6/338}. As to supplanting Mr Nimmo, Mr Reed asserted that: *'I explained to you the confidence in Mr Nimmo. He was a walking database about the litigation. The idea of somebody being able to acquire his knowledge and experience – would be an incredibly costly affair. No, it was not to end relationship'* [id].
311. In response to questions along the lines that the dispute was being "set up" to induce RS to pull the plug, that Mr de Clare wished Bird & Bird to take over and Mr Reed was being asked to get the best position he could, for GEHC, Mr Reed asserted, *"If you mean handle the situation and make certain that there was a capacity for the two firms, Bird & Bird and Rosenblatt, to work together so that Bird & Bird's expertise and -- especially in the intellectual property area and patent law, was brought into the discussion, then, yes, that was my role."* He specifically denies that he was ever instructed, or ever behaved, in such a way as to try to have Bird & Bird take over the case from RS.
312. Per GEHC, this is all of a piece with the forthright correspondence between RS and Eversheds Sutherland at the end of the retainer [I1/1-32]. Mr Nimmo's immediate response [I1/3] to Eversheds' letter alleging RS was in breach of August 2015 agreement and demanding repayment of the Gray money [I1/1] was to say that this created a conflict of interest, and that RS would cease to act. This response did not even mention Bird & Bird.
313. In Mr Nimmo's next letter [I1/5], it is said that unless Eversheds' allegation about the appropriation of the Gray money was withdrawn, RS would cease to act. Again, there is no suggestion that there was any issue with Bird & Bird; there is no suggestion (for example) that ceasing to instruct Bird & Bird is also a condition of RS continuing to act. The same is true of Mr Nimmo's third substantial email [I/12]. It identifies the sole source of conflict as being Eversheds' demands for

payment of the Gray money. Bird & Bird are actually mentioned both in this communication and its predecessor, in neither instance with any disapprobation.

314. Mr Nimmo's next email [I1/15] specifically lists what is required of GEHC in order for RS to continue acting in four numbered points. None of them relates to Bird & Bird (nor the disclosure strategy). It is only in RS's letter of termination of retainer itself [I1/28] that there is an assertion that instructing Bird & Bird is a repudiatory breach of CFA3. This is stated in the final paragraph (§19) and is obviously an afterthought. (This letter also contains no suggestion that the relationship foundered because of disagreements about the disclosure strategy.)
315. In these circumstances, GEHC invites the court to find that the breakdown in the relationship between GEHC and RS was solely the result of RS's appropriation of Mr Gray's payment of £2.523 million, and if it had not been for that, then the relationship would have continued.
316. RS asserts that GEHC's case that RS wrongfully terminated the retainer is hopeless and untenable. It is plain beyond argument that GEHC was in repudiatory breach and that RS was entitled to accept that repudiation. Although GEHC originally reserved the right to seek damages for RS's supposedly wrongful termination {I34}, GEHC's Part 7 claim {I2/I1431} does not include any claim for wrongful termination of the retainer by RS which (per RS) can only be plausibly explained on the basis that GEHC does not wish to have to give disclosure in relation to the issue and which would show the duplicitous nature of GEHC's conduct towards RS, including from the time of its instruction of Bird & Bird (GEHC having previously refused to disclose to RS its communications with Bird & Bird on multiple occasions); and that GEHC is aware that any such claim would not be seriously arguable.
317. In circumstances in which GEHC has also brought Part 7 proceedings and cannot (as RS puts it) under a Statement of Truth allege wrongful breach of the retainer in those proceedings, it cannot seriously ask the Court in these proceedings to find that the termination by RS was wrongful. In any event, RS say it could not be clearer that they were entitled to terminate. At the point of termination and as set out in RS's letter of 24 February 2016, GEHC was insisting: (i) completely incorrectly and contrary to the clear express terms of the retainer, that RS had to meet disbursements as they fell due all the way through to the final stage enquiry (which apparently finally commenced on 5 May 2019); (ii) inconsistently with RS having conduct of the matter, that RS accept direction from Bird & Bird (and including for the case to proceed contrary to the advice of RS and counsel), including for RS to meet disbursements incurred at Bird & Bird's instruction; and (iii) that it was making and

maintaining allegations of misconduct and intending proceedings against RS, placing RS in a position of conflict.

318. That each of those was GEHC's position is indisputable. It also appears straightforwardly from the correspondence. Per RS, each of those alone was a repudiatory breach, entitling RS to terminate; collectively and cumulatively, they in fact gave RS no choice but to terminate. No Solicitor could conceivably continue to act in that situation and RS had no choice but to accept GEHC's repudiatory breaches. As Mr Nimmo said [C2/41/para 38], which was unchallenged in cross-examination, he gave repeated opportunities for GEHC to revise its position; but those were brushed aside. The suggestion that termination was wrongful in such circumstances is manifestly absurd and wholly unsupportable. GEHC's case that RS was not entitled to terminate has to be rejected
319. RS say that GEHC's second point (an argument that the termination took effect under clause 14.3 of CFA3 and not by acceptance of repudiatory breach at common law) is misconceived. The reason GEHC tries to take this point (say RS) is that a clause 14.3 termination would limit RS to its fees for work done to the termination date and disbursements (i.e. without any success fee), whereas common law damages would entitle RS to any success fee uplift under CFA3.
320. GEHC's argument is said to be wrong as a matter of law as a contractual termination provision does not take away the common law right to terminate for repudiatory breach unless there are clear words to the contrary. Here, there are no such words at all and CFA3 did not exclude RS's right to terminate at common law. RS terminated effectively pursuant to common law and elected to exercise its common law rights, including its right to damages to be assessed in accordance with common law principles. RS rely upon *Newland Shipping and Forwarding Ltd v Toba Trading FZC* [2014] EWHC 661 (Comm), where Leggatt J (as he then was) explained the relevant law, including as follows (at [51]): "*It is also clear that the inclusion in a contract of an express cancellation clause will not be treated as excluding the right to terminate the contract under the general law upon a repudiatory breach unless the contract clearly says so*".
321. RS also rely upon *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep 599, where Christopher Clarke J (as he then was) held that even where the contract provided that the consequences of termination stated in the contract "represent[ed] the full extent of the parties' respective rights and remedies arising out of any termination", this was "not sufficiently clear, as it would need to be, to exclude the parties'

common law right to accept a repudiatory breach of contract ... and to claim damages for the loss of the contract” (at [21]).

322. RS also rely upon the Court of Appeal in *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75, [2010] QB 27: “The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently clear that that was intended” (at [23]). *Gearbulk* further confirms (e.g. at [42]), as does *Dalkia* (above), that where the common law right to terminate for repudiatory breach remains, that includes a right to damages at common law and not only a contractual measure of loss.
323. CFA3 is silent regarding the effect of the termination provisions, such as clause 14.3, upon common law rights, and so does not contain clear words to overcome the presumption against exclusion of the common law right to terminate. Accordingly, and applying the clear position from the authorities, RS was not confined to terminating under clause 14.3 and was entitled to exercise its common law right to terminate (as it did), and to claim damages at common law, which it clearly and unequivocally elected to claim.

Ruling on termination

324. In my view, the key question on termination is whether RS acted reasonably in walking away when they did, in the light of what RS knew at the time, and what is shown by the contemporaneous correspondence and other evidence, as their motivation for doing so. On the one hand, the fact that there may be correspondence, which has never been shown to RS (nor to the Court) purportedly indicating that everything was above board, is not material. GEHC are of course entitled to maintain privilege over this material but equally they could have chosen to waive privilege over correspondence – redacted if needs be – that would prove one way or another, whether Bird & Bird were meant to work alongside RS or to oust them. GEHC has chosen not to do so and in considering what weight to give to their evidence on Bird & Bird’s instruction, that must count against GEHC³.

³ In its proposed corrigenda to this Judgment, GEHC stated the following which I append as a footnote, without comment: *In the final sentence, the court implies that an adverse inference might have been drawn against GEHC for not waiving privilege in correspondence with Bird & Bird. Recognising it goes beyond identifying a possible typographical error, but in circumstances where no such inference was contended for by the defendant, the court is respectfully reminded that such is the fundamental nature of legal professional privilege that it is forbidden to draw any adverse inference from a party maintaining privilege in its dealings with its legal advisers: Wentworth v Lloyd (1864) 10 HLC 589.*

325. However, much more relevant are facts including that RS were (mistakenly) being asked to fund disbursements going forward, including disbursements incurred by Bird & Bird without any prior reference to RS, and the fact that RS were in effect being asked to follow Bird & Bird's instructions. Had RS terminated the retainer because of those issues it would in my view have been reasonable.
326. However, I refer to the "forthright correspondence" at the time the relationship broke down, as cited above by GEHC, at [I1/1-32]. That correspondence is – almost – entirely directed to the issue of the August Agreement, and Eversheds Sutherlands' demands on behalf of GEHC for the return of the Gray money. I agree with GEHC's characterisation of the inclusion of Bird & Bird as an afterthought; it is in my view clear that the real reason for RS to cease to act, was indeed the dispute over the Gray money which (as they have belatedly accepted) RS were not legally entitled to retain.
327. Whilst I am grateful to RS for the erudite submissions which I understand to be directed to whether, by entering into CFA3, RS contracted out of the right to exercise its rights in the case of a repudiatory breach, in my view those submissions are beside the point. Firstly, I do not find that RS did accept a repudiatory breach by GEHC, they chose to walk away over financial issues. Secondly, it would have been open to RS to invoke the relevant provisions of CFA3 to cease to act and still claim their base costs. Had they successfully argued repudiatory breach by GEHC, they would maintain their right to recover their success fee. Instead, based upon the sequence of events laid out in the documents and in the parties' oral evidence, it was question of the Gray moneys and not the involvement of Bird & Bird (or of Mr de Clare's approach to disclosure), that poisoned the well.
328. Had RS wished to stay these proceedings pending resolution of the Part 7 or otherwise to regularise what I agree is a very unsatisfactory situation with Part 7 and Part 8 claims running in tandem, they could presumably have made attempts to do so. I am not involved in the Part 7 proceedings, I have not seen those Particulars of Claim and whilst I have tried to word this Judgment carefully, as I see it, I am tasked with deciding this case (which, as I understand it, was first in time) upon the facts and evidence before me and which I have done as set out above⁴.

⁴ In its proposed corrigenda to this Judgment, GEHC stated the following which I append as a footnote, without comment: *Please see note to paras 26-31 above. The Part 7 proceedings are simply protective because of the defendant's (rejected) stance on scope. There are no POC in the Part 7 proceedings, because GEHC applied to stay*

Conclusion

329. For the reasons above referred-to I find that CFAs 1, 2 and 3 entered into between GEHC and RS were in breach of Section 58 of the Courts and Legal Services Act and are thereby unenforceable. I find that, based upon the evidence that GEHC were advised that CFA2 had come to an end, as such if CFA2 was terminated, it was terminated wrongfully and/or CFA3 was entered into as a result of that misrepresentation that CFA2 had ended, and is therefore tainted. As to whether CFA3 was wrongfully terminated I find that RS would have been entitled to terminate the retainer by invoking the terms of CFA3, thereby restricting RS to base costs under CFA3. However, in choosing instead to invoke a repudiatory breach that did not (based upon the evidence) constitute its reason for ceasing to act, RS did indeed wrongfully terminate the retainer.

Dated 20 August 2020

them pending these proceedings. In the result, that application was not brought on, both parties acquiesced in the SCCO proceedings continuing while the Ch D provisions were left fallow.