



Neutral Citation Number: [2021] EWHC 1608 (QB)

Appeal No: QB/2020/012  
County Court Claim No: E90SE026

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**LEEDS DISTRICT REGISTRY**  
**ON APPEAL FROM**  
**SHEFFIELD DISTRICT REGISTRY**

Hull Combined Court Centre  
Lowgate  
Hull HU1 3EZ  
(Remote hearing on Cloud Video Platform)

Date: 11 June 2021

**Before:**

**MR JUSTICE LAVENDER**

**Between:**

**SGI LEGAL LLP**

**Defendant/  
Appellant**

**- and -**

**Mrs MARTA KARATYSZ**

**Claimant/  
Respondent**

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**Robert Marven QC (instructed by the Appellant) for the Appellant**  
**PJ Kirby QC and Robin Dunne (instructed by Clear Legal Ltd t/a checkmylegalfees.com)**  
**for the Respondent**

Hearing date: 17 November 2020

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**JUDGMENT**

**Mr Justice Lavender:****(1) Introduction**

1. This is one of a series of cases in which individuals who have brought successful claims for damages arising out of road traffic accidents have sought an assessment of their solicitors' bill of costs. The Claimant's solicitors and counsel act for a number of claimants in such cases. I decided an appeal in one such case, *Belsner v Cam Legal Services Ltd* [2020] EWHC 2755 (QB), last year. I have stayed a number of similar appeals pending the outcome of this appeal. I also understand that a number of similar cases are pending before District Judge Bellamy in the Sheffield District Registry of the High Court.
2. The Defendant firm of solicitors, SGI Legal LLP, acted for the Claimant, Mrs Marta Karatysz, in respect of her claim for damages against Mrs Siobhan Muddiman arising out of a road traffic accident on 27 May 2016.
3. This is an appeal by the Defendant against the decision of District Judge Bellamy on 7 January 2020:
  - (1) that the Defendant's base costs were limited to the base costs recovered from Mrs Muddiman's insurers, Aviva; and
  - (2) that the Defendant must pay the Claimant's costs of the assessment of the Defendant's bill, on the basis that the amount of the bill had been reduced by more than one fifth.
4. In addition, shortly before the hearing the Claimant applied for an extension of the time limited for filing a respondent's notice. I refused that application, for the reasons which I will give in this judgment.

**(2) Background****(2)(a) *The Collision***

5. As I have said, the accident occurred on 27 May 2016. Mrs Muddiman's vehicle collided with the rear of the Claimant's vehicle while the Claimant was stationary at a junction. The Claimant sustained whiplash injuries, including pain to her collar bone and shoulder. She did not attend hospital or seek any medical attention and she did not have to take any time off work.

**(2)(b) *The Defendant's Retainer***

6. The Claimant instructed the Defendant on 26 October 2016. The damage to her vehicle had been, or was being, dealt with by her insurer. She wished to pursue a claim for damages for personal injury. She had not required any medical attention in the 5 months since the accident.
7. On 26 October 2016 the Defendant sent to the Claimant a Client Care Letter which stated, inter alia, as follows:

“... Enclosed is a Conditional Fee Agreement (CFA) which, together with this Client Care Letter, will form the agreement between us. We also enclose a copy of the Personal Injury Booklet that explains how the CFA works and also contains our Terms of Business, which you are advised to read carefully, particularly the sections on Client Satisfaction, Client Money and Limitation of Liability.”

#### **“Outline of the Work**

A broad outline of the work we will undertake on your behalf is as follows:

- Submit your claim to the relevant party
- Liaise with all parties and gather evidence to establish evidence in respect of liability
- Arrange your medical appointment and medical report to substantiate your injuries
- Ensure all items of expense incurred as a result of this accident are claimed from the other side where recoverable in English law
- Advise you throughout on the above with a view to valuing your claim
- Negotiate settlement on your behalf in accordance with your instructions
- Proceed your case to Court when negotiations break down and your case has greater than 50% prospects of success
- Where appropriate prepare your claim for trial if amicable settlement cannot be achieved”

#### **“Costs and Timescales**

For an explanation of how the Conditional Fee Agreement (CFA) works, please refer to the Personal Injury Client Care Booklet provided. If you require a further copy, please contact us and we will arrange for a further copy to be sent.

The booklet also contains detailed information on the costs of and funding options for pursuing your personal injury claim. Please read through this information carefully and contact us should you have any queries or require any further information.

...

As matters currently stand the Court rules allow you to recover costs from your opponent (the person who caused your accident) unless the claim is a Small Claim (which is where the personal injury damages are £1,000 or less). However, there is a chance that at some point in the future this may change.

You will see from the Personal Injury Booklet that we aim to achieve an outcome whereby no more than 25% of your damages are deducted in respect of costs. This is achievable because the Court rules currently allow you to recover costs from your opponent and so this enables us to claim your costs from your opponent rather than entirely from your damages. If the rules were to change to prevent you from recovering costs from your opponent, then by entering into the CFA with us, you hereby agree that we would be entitled to deduct a higher proportion than 25% of your damages in respect of costs.

It is difficult at this point to predict with any certainty whether that will be necessary, but if it does become necessary we will discuss that with you. The changes (if they apply to your case) may be such that we may have to enter a

revised CFA with you and this may include an agreement to retrospectively cover the work we are now agreeing to undertake for you.

### **Recommendation Agreement**

We have entered into a Recommendation Agreement with Glenfield Marketing. This agreement remunerates Glenfield Marketing for advising you of our services and recommending you to contact us with regards to your claim for personal injury. We have agreed to pay Glenfield Marketing the sum of £625 for recommending that you contact us directly with your instructions to pursue a claim for personal injury.”

### **“After-the-Event Insurance**

...

We have recommended that you take out an ATE policy with Allianz Legal Protection, a division of Allianz Insurance plc.

...

The premium for the Allianz policy would be payable only on the successful conclusion of your claim and would at that stage be deducted from your damages. If your claim fails the premium will be written off, even though you might need to make a claim against the policy for disbursements.

As discussed by telephone, on the basis of the detail you have provided on your injuries we confirm that the cost of the Allianz premium will be £142.35. Should your injuries prove more serious the cost of the premium may increase. We will inform you if this becomes the case.

SGI Legal LLP does not receive commission from Allianz Legal Protection and has no interest in Allianz Legal Protection. However, the Partners at SGI Legal do have an interest (though a separate business, Exchange Holdings Limited) in a reinsurance company, which has a contract with Allianz Legal Protection. This contract allows the reinsurance company to share any underwriting profit made during the year in which the ATE policy is issued.

It is very difficult to define the level of financial interest that the Partners have as this depends on the success of the business. However, we estimate the interest to be in the region of 30-40% of recovered insurance premiums.”

8. Although the Client Care Letter referred to a Personal Injury Booklet or Personal Injury Client Care Booklet, no such booklet was in evidence before the District Judge or me.
9. The Conditional Fee Agreement (“the CFA”) enclosed with the Client Care Letter provided, inter alia, as follows:

“This agreement is a binding legal contract between you and your solicitor/s and confirms the agreement entered into by telephone between us on 26/10/2016 17:34:28. Please read everything carefully. This agreement must be read in conjunction with the document: “CFA: What You Need to Know”, which is attached to, and forms part of this agreement.”

**“3. Paying us**

- 3.1 If you win your claim, you pay our basic charges, our disbursements and a success fee.
  - 3.2 You are entitled to seek recovery from your opponent of part or all of our basic charges and our disbursements.
  - 3.3 You will also pay the ATE insurance premium (if applicable) as set out in the document: “CFA: What You Need to Know”.
- ...

**4. The Success Fee**

- 4.1 The success fee is set at 100% of our basic charges but will be capped at 25% of the damages you recover relating to:
  - a) General damages for pain, suffering, and loss of amenity; and
  - b) Damages for pecuniary loss, other than future pecuniary loss
 Net of any sums recoverable by the Compensation Recovery Unit of the Department of Work and Pensions, inclusive of VAT.”

- 10. The attached document, headed “CFA: What You Need To Know”, stated, inter alia, as follows:

**“2. Procedure**

- 2.1 If your claim is successful, you will be paid damages by your opponent. The damages are the amount of money you will receive.
- 2.2 **After** your damages have been awarded, we will seek to recover our fees, which will comprise our basic costs, disbursements made on your behalf and a success fee.

**3. Basic Charges**

- 3.1 These are our charges for the legal work we do, based on the rate we charge which is set out in the enclosed Client Care Booklet.
- 3.2 You agree to these hourly rates, expressly understanding the following; it may be that your case is one to which the court fixed fees apply. This means that the amount of costs which your opponent will have to pay if your (*sic*) win is limited to a fixed sum. The costs which are chargeable under this agreement will almost certainly exceed those fixed costs and so you will be required to pay the shortfall from your damages. This is because the Solicitors’ basic charges are comprised of hourly rates which when multiplied by the likely number of hours worked will exceed the fixed fees payable by the opponent. Even if your case is not a fixed fee case, the hourly rates are higher than the rates which the court is likely to order your opponent to pay to (*sic*). We believe these rates are justified to reflect the skill and specialised knowledge in the handling of your claim. However, we are required to provide a warning to you that the hourly rates might not be recovered from your opponent and that you nevertheless approve the rates which we are charging. This warning having been given, you permit payment to us of an amount of costs

greater than that which you can recover from another party to the proceedings.

- 3.3 Further to the above warning as to recoverable costs, s 74(3) of the Solicitors Act 1974 shall not apply and having been warned that hourly rates may not be recovered in full you accept that the rates are chargeable in full.””

**“8. What happens if you win**

- 8.1 You are then liable to pay all our basic charges, disbursements, success fee and the insurance premium for any After-the-Event insurance taken out.
- 8.2 You may be able to recover part or all of our basic charges and disbursements from your opponent. If for whatever reason you cannot recover all of our costs and disbursements from your opponent then you remain liable to pay them to us.
- 8.3 You will not be able to recover the Success Fee or your insurance premium (if applicable) from your opponent. You must pay both costs yourself.
- 8.4 If you and your opponent cannot agree the amount, the Court will decide how much you can recover. If the amount agreed or allowed by the Court does not cover all our basic charges and disbursements, we will seek to recover the balance from you.”

**“Our responsibilities – we must:**

- 16.1 Always act in your best interests, subject to our duty to the court;
- 16.2 Explain to you the risks and benefits of taking legal action;
- ...
- 16.4 Give you the best information possible about the likely costs of your claim for damages.”

11. Again, although this document referred to a Client Care Booklet, no such booklet was in evidence before the district judge or me. Moreover, although paragraphs 3.1 and 3.2 of this document referred to the Defendant’s hourly rates and said that they were set out in the Client Care Booklet and that the Claimant agreed and approved them, I was not shown any contractual document which set out the Defendant’s hourly rates.

**(2)(c) *The Claim against Aviva***

12. The Defendant pursued the claim against Aviva in accordance with the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (“the Protocol”). I summarised the relevant provisions of the Protocol and of CPR 45 in paragraphs 52 to 63 of my judgment in *Belsner v Cam Legal Services Ltd* and I need not repeat that summary. The Defendant obtained ATE insurance at a cost of £143 and a medical report at a cost of £216 (i.e. £180 plus VAT of £36).

13. Liability was admitted and on 15 December 2016 Aviva paid the Stage 1 fixed costs as required by paragraph 6.18 of the Protocol in the amount provided for in CPR 45.18 (i.e. £200 plus VAT of £40), together with the fee for the medical report.
14. The Defendant sent a Stage 2 Settlement Pack to Aviva, who offered to pay £1,250 in damages. This offer was accepted and Aviva paid the damages of £1,250. Aviva also paid the Stage 2 fixed costs (i.e. £300 plus VAT of £60) on 21 March 2017 and a further £300 on 7 July 2017. This last payment appears to have been made in error. £300 was equivalent to the amount of "Type A fixed costs" (i.e. £250 plus VAT of £50) which would have been payable if the claim had proceeded to Stage 3, i.e. if the Claimant had issued a Part 8 claim form, but no claim form was issued.
15. The total amount paid by Aviva in respect of fixed costs and disbursements was therefore £1,116 including VAT.

***(2)(d) Costs and the Defendant's Bill***

16. The Defendant paid £794.50 to the Claimant, which was the amount of the damages, less £455.50, made up of the success fee in the amount of 25% of the damages (£312.50) and the ATE insurance premium (£143). However, the Defendant did not give the Claimant a bill of costs.
17. The Claimant instructed checkmylegalfees.com Limited (who later merged with Clear Legal Limited) and they sought a bill of costs, which the Defendant delivered on 15 January 2018. The first part of the bill set out the Defendant's professional charges. These consisted of 4 items:
  - (1) Basic charges of £1,717 plus VAT of £343.40.
  - (2) A success fee of 100% of the basic charges, capped at 25% of the relevant recovered damages, i.e. £260.42 plus VAT of £52.08.
  - (3) The medical report fee of £180 plus VAT of £36.
  - (4) The ATE insurance premium of £143.
18. The following totals were given in a row beginning "Total":
  - (1) £1,977.42 in respect of costs.
  - (2) £323 in respect of disbursements.
  - (3) £431.48 in respect of VAT.
19. The total of these three figures is £2,731.90, but that figure was not stated on the bill.
20. The next row on the bill stated:
 

"Less monies received on account from Aviva      £1,116.00"
21. The final row on the bill stated:

“Balance payable by client, limited to 25% of £455.50 damages plus ATE premium paid.”

22. The total of these two figures is £1,571.50, but that figure was not stated on the bill.

***(2)(e) The Claim for an Assessment of the Defendant’s Bill***

23. On 15 February 2018 the Claimant issued a Part 8 claim form in the Sheffield District Registry of the High Court seeking an assessment of the Defendant’s bill, restricted to the profit costs, including the success fee. No challenge was made to the amount of the disbursements. The claim form stated as follows:

“The Claimant seeks an order that –

1. There be an Order in standard form pursuant to s.70(1) Solicitors Act 1974 for assessment of the final bill delivered to the Claimant as follows (a copy of which is attached to this claim form)
  - a. Bill Number: SB73269.1  
and delivered on 15<sup>th</sup> January 2018 in the total sum of £2731.90.
2. Such assessment be restricted by virtue of s.70(6) Solicitors Act 1974 to the profit costs element in the sum of £1,977.42.”

24. On 6 March 2018 the Defendant filed an acknowledgment of service, stating that it did not intend to contest the claim and that:

“We agree to an Assessment in accordance with Paragraphs 1 & 2 only of the Claimants (*sic*) Particulars of Claim.”

25. On 28 March 2018 District Judge Bellamy made an order for an assessment and gave directions. Paragraph 1 of the order was in the following terms:

“There be an assessment pursuant to s.70 Solicitors Act 1974 of the Defendant’s invoice/invoices as follows –

- a. Invoice Number SB 73269.1 Dated 15/01/2018 Amount of £2731.90

[such assessment to be limited pursuant to s.70(6) Solicitors Act 1974 to [those parts of the invoices that are actually in dispute, namely the success fee in the sum of £1977.42 inc VAT]]”

26. On 18 April 2018 the Defendant applied for an order varying aspects of the order of 28 March 2018. The Defendant did not seek the variation of that part of paragraph 1 of the order which stated, “Amount of £2731.90.” Ms Houghton of the Defendant made a witness statement in which she submitted that there should be an assessment not merely of the success fee but also of the Defendant’s basic charges “in the sum stated in the statute bill i.e. £1,717.00 plus VAT ...” The order was amended on 8 May 2018, but the amendments are not material for present purposes.

27. The Defendant provided a breakdown of its bill. This stated that the matter was dealt with by Grade D fee earners at a rate of £161 per hour. The total costs set out in the breakdown were higher than the total amount stated in the bill before application of the



25% cap. The total of the costs set out in the breakdown was £2,854.66, i.e. £2,402.72 plus VAT of £451.94.

28. Deducting from this total the medical report fee, the ATE insurance premium and the success fee, the base costs claimed in the breakdown amounted to £1,819.30 plus VAT. At the hourly rate of £161, this amounted to 11 hours and 18 minutes' work, whereas the equivalent figure in the bill, £1,717 plus VAT, amounted to 10 hours and 40 minutes' work at £161 an hour.

***(2)(f) The "On Paper" Assessment of the Defendant's Bill***

29. The Claimant served points of dispute and the Defendant served a reply. On 3 July 2019 District Judge Bellamy assessed the Defendant's bill on paper.

***(2)(f)(i) The "On Paper" Assessment: The General Point***

30. There were five points of dispute. By the first, labelled "General", the Claimant contended as follows:

"The bill comprises –

...

The bill therefore totals £2,731.90.

The sum of £1,116 received from the third party is then credited, leaving a balance payable by the client of £1,615.90, which is then limited to £455.50.

The reality therefore is that the Defendant has charged legal fees of £1,571.50 (£1,116 of which was paid by the third party, and £455.50 by the Claimant).

As a consequence the bill must as a starting point be reduced to a maximum of £1,571.50, otherwise the Claimant would owe a further £1,160.40 (as demonstrated in the attached draft Cash Account)."

31. The Defendant replied as follows:

"The bill is limited to £1,571.50 in that this is the amount of the payment which it requires.

The form of the bill is entirely a matter for the defendant and the defendant is perfectly entitled to set out in its bill the component elements which are payable by the claimant under the terms of her retainer; and then to set out that the amount payable above *inter partes* recovery is limited to 25% of damages (in accordance with the indications given in the retainer documentation) plus the ATE premium."

32. The district judge held that the amount of the bill was £2,731.90, saying:

"I agree with C.

See notes in White Book p. 2370.

It is the full amount of the bill which is taken into account when determining the "1/6"."

*(2)(f)(ii) The “On Paper” Assessment: Point 1*

33. The next point of dispute, labelled “Point 1”, concerned the effect of a letter written by the Defendant to the Claimant on 24 March 2017. The district judge agreed with the Defendant that this letter did not have the effect of limiting the amount of the Defendant’s claim to base costs. I need say no more about that issue, which did not feature on this appeal.

*(2)(f)(iii) The “On Paper” Assessment: Point 2*

34. The next point of dispute, labelled “Point 2”, was whether subsection 74(3) of the Solicitors Act 1974 limited the costs recoverable by the Defendant. The Claimant’s contention was that:

- (1) subsection 74(3) of the Solicitors Act 1974 applied because a claim under the Protocol constituted “proceedings in the county court”;
- (2) that subsection was not disapplied pursuant to CPR 46.9(2) because the Defendant had not obtained the Claimant’s informed consent to the agreement between them insofar as it permitted payment to the Defendant of an amount of base costs greater than that which the Claimant could have recovered from Aviva; and
- (3) consequently, the Defendant could not recover from the Claimant more by way of base costs than it had received from Aviva. (It is arguable that, if subsection 74(3) had applied, it would have limited the Defendant’s base costs to the £600 (including VAT) “which could have been allowed ... as between party and party”, rather than the £900 actually paid by Aviva to the Defendant, but the Claimant did not object to the Defendant retaining the £300 paid by Aviva by mistake.)

35. The Defendant contended that subsection 74(3) did not apply, because no claim form was issued and therefore no proceedings were commenced. I will refer to this as “the construction issue”. The Defendant also contended that informed consent was not required for the purposes of CPR 46.9(2), but that, in any event, the Claimant had given her informed consent.

36. The district judge held that subsection 74(3) applied and appears to have accepted that the Defendant could not invoke CPR 46.9(2). He said as follows:

“74(3) applies: County Court proceedings were contemplated by the mere fact of adopting the Low Value procedure in CPR. However, the fixed cost will operate as a cap (limit) on recovery unless there is a written agreement in clear terms: CPR 46.9(2).”

*(2)(f)(iv) The “On Paper” Assessment: Point 3*

37. The next point of dispute, labelled “Point 3”, concerned the case advanced by the Claimant in the alternative to Point 2 in relation to base costs. The Claimant contended that the base costs claimed were unreasonable. Point 3 consisted of a number of points of detail as to the time spent and the hourly rates claimed by the Defendant. The

Claimant offered 5 hours at £111 per hour. In its reply, the Defendant conceded 4 of the items in its breakdown, which between them accounted for less than 1 hour's work, but otherwise maintained its position that the costs claimed were reasonable.

38. The district judge said that:

“Having considered the Bill & further comments 9 hrs x £120 would seem reasonable.”

*(2)(f)(v) The “On Paper” Assessment: Point 4*

39. The final point of dispute, labelled “Point 4”, concerned the level of the success fee. The Claimant contended that it should have been 15%, rather than 100%, as in *Herbert v HH Law Ltd* [2018] EWHC 580 (QB). The district judge agreed. That decision has not been challenged on this appeal.

*(2)(g) The Review of the “On Paper” Assessment of the Defendant’s Bill*

40. On 24 July 2019 the Defendant applied for the review at an oral hearing of the “on paper” assessment of its bill. The Defendant sought to challenge the district judge’s decisions on the General Point, Point 2, Point 3, but only in relation to the hourly rate, and not the time allowed, and Point 4.

41. The Claimant’s position was set out in its skeleton argument dated 20 September 2019:

- (1) The Claimant supported the district judge’s decision on the General Point.
- (2) The Claimant did not challenge the district judge’s decision on Point 1.
- (3) The Claimant supported the district judge’s decision on Point 2, but added the following alternative argument in paragraphs 35 and 36 of her skeleton argument:

“35. If the Judge were to find on review that s.74(3) does not strictly apply, that is not the end of the matter.

36. The Judge would be able to reach the same result, either by the application of CPR 46.9(3)(c), or by applying the “fairness” test under the Non Contentious Business Remuneration Order.”

- (4) The Claimant supported the district judge’s decision on Point 3. The Claimant did not submit that the district judge should have assessed the time allowed at anything other than 9 hours and did not argue for a lower rate than £120 per hour.
- (5) The Claimant supported the district judge’s decision on Point 4.

*(2)(g)(i) The Amount at Issue*

42. In financial terms, what was in dispute before the district judge was a modest amount:

- (1) The Defendant had received £1,116 from Aviva and had deducted £455.50 from the Claimant's damages. The Defendant was not seeking to be paid anything more in respect of its costs.
- (2) The Claimant accepted that the Defendant could retain the £1,116 received from Aviva, which included:
  - (a) £216 (i.e. £180 plus VAT of £36) in respect of the medical report fee; and
  - (b) £900 (i.e. £750 plus VAT of £150) in respect of the Defendant's base costs.
- (3) The Claimant also accepted that the Defendant had been entitled to deduct a total of £278 from the Claimant's damages, made up of:
  - (a) £143 in respect of the ATE insurance premium; and
  - (b) £135 (i.e. £112.50 plus VAT of £22.50) in respect of the success fee, calculated as 15% of £900.
- (4) So the dispute was over £177.50 (i.e. £455.50 less £278). As to this:
  - (a) The Claimant said that this amount was not payable because the Defendant's base costs were limited to the £900 received from Aviva.
  - (b) The Defendant contended that it was entitled to more than £900 in respect of its base costs and/or to a success fee of more than 15% of its base costs.
- (5) Although the following figures were not cited before the district judge, it can be seen that the £177.50 difference between the parties was equivalent to:
  - (a) a further £154.35 (i.e. £128.63 plus VAT of £25.72) in respect of the Defendant's base costs, making its base costs £1,054.34 (i.e. £878.62 plus VAT of £175.72) rather than £900; and
  - (b) the consequential increase in the 15% success fee by £23.15, to £158.15, rather than £135.

(2)(g)(ii) *The General Point*

43. The hearing took place on 7 January 2020. Mr Marven made submissions on the General Point, after which the District Judge gave the following brief judgment on that point:

“I am going to deal with the general point, Mr Marven, because I am not persuaded to change my mind for the reasons I gave. I do not think that this piece of paper, as it is drafted, helps your argument, with respect. It is a fairly confusing piece of paper, and I think it cannot be said with any clarity precisely what the bill constitutes. It says there is a balance payable, but you have to do the maths. The claim form seeks an assessment of the final bill and adds it up

at £2,731.90. Although the assessment is limited to profit costs, I think anybody looking at that bill would struggle to say precisely what it was, but I think, on the basis of my previous decision and the reasons I gave, I cannot see any need to change what I said. I stand by it.”

(2)(g)(iii) Point 2

44. I need not set out all of the parties’ submissions on Point 2 at the hearing, but it is relevant to note that Mr Marven said as follows about the Claimant’s alternative argument:

“But of course it is important not to lose sight of what one does under sub-rule (3). It is a question of, firstly, what the presumption is. Even if you say that I am the wrong side of the presumption – this (*sic*) it is presumed to be unreasonable – I would suggest that, once you have gone through this bill, you have assessed the hourly rates at whatever you think is right and you have reduced the time, that is not unreasonable any more.”

45. The district judge gave a short judgment in which he held that subsection 74(3) did not apply to a claim brought under the Protocol unless the Claimant issued a claim form under the Stage 3 procedure. In other words, he had changed his mind since the “on paper” assessment and he decided the construction issue in favour of the Defendant.
46. There was some uncertainty at the hearing whether a claim form had been issued, but, pursuant to directions given by the district judge, the Defendant subsequently filed a witness statement confirming that no claim form had been issued.
47. However, the district judge went on to deal in his judgment with:
- (1) the Defendant’s submission that its costs were presumed to be reasonable pursuant to CPR 46.9(3)(a) & (b); and
  - (2) the submission made in paragraph 36 of the Claimant’s skeleton argument that the district judge could, by the application of CPR 46.9(3)(c), reach the same result as he would have reached if he had found that subsection 74(3) applied.
48. The district judge said as follows in his judgment:

“5. So where does that take me in relation to this review and the thorny problem of informed consent? It remains my view, because it is supported by the judicial authority in *MacDougall* and *Herbert*, that it is not possible to rely solely upon a piece of paper exchanged between solicitor and client as express consent when matters, for example, in relation to hourly rates, time spent and success fees are being discussed.

6. It is very difficult to imagine a scenario where a lay client who is not well versed in the litigation process can be said to have sufficient information to approve, whether expressly or impliedly, without seeing an explanation. Simply to say “My hourly rate is X” is in my view not sufficient. There are no guidelines available for the lay client in relation to fixed recoverable costs, for example, and there is no real explanation for informed consent to be given. “A full and fair exposition” are the

words used by Holland J, and I do not think I can improve upon those. This is a case where there is no explanation of the fixed recoverable charges. A client cannot do his own assessment of what his likely contribution is to be, particularly when the agreement is capable of interpretation, entitling the solicitor to recover all of their basic charges.

7. I, for those reasons, am of the view that the question of informed consent does require to be addressed before it can be said that any agreement can be enforced. I think I would come to exactly the same conclusion even if section 74(3) is not engaged, and, if we go, effectively, to the suggestion that under 46.9 the presumptions are there, I think it is easy to recognise that, as I indicated, for example, an hourly rate of £165 (*sic*) for a Grade D fee earner might be deemed to be unusual in amount when most, if not all, low-value RTA cases are dealt with by Grade D fee earners and the courts are well aware of seeing rates between £111 and £125.
8. Similarly, again with regard to the lack of information on fixed recoverable fees, that similarly impacts on any agreement that might be relied upon on (*sic*) 46.9(3). So, in short, save only that I might have changed my mind if I see sufficient evidence that there have been no issued proceedings on what I first said, I think the issue of informed consent is now relevant when that is being considered, 46.9 as well as 74(3).”

49. There was then a brief discussion as to the effect of the district judge’s judgment, as follows:

“MR MARVEN QC: Sorry, can I ask what may be a slow question? Obviously, if there are issued proceedings, I entirely follow that I have lost on that.

JUDGE BELLAMY: Yes.

MR MARVEN QC: If there were not issued proceedings, am I to understand your judgment ----

JUDGE BELLAMY: Then 74(3) does not apply.

MR MARVEN QC: Quite.

JUDGE BELLAMY: I am still saying that there should be implied within 46.9(3) the informed consent.

MR MARVEN QC: Tell me if I am being gloomy here, but in fact I have lost and lost to exactly the same extent, whatever the answer to that question?

JUDGE BELLAMY: You have.

MR MARVEN QC: I just want to be clear about that.

JUDGE BELLAMY: The only reason is that you have won in so far as I would be persuaded on the evidence before me today that 74(3) does not apply.

MR CARLISLE: Can I just be absolutely clear because I think I am being equally as obtuse ...

JUDGE BELLAMY: And I keep my hourly rates as they are, by the way.

MR CARLISLE: So if section 74(3) applies, the base costs are limited to the base costs recovered.

JUDGE BELLAMY: Yes.

MR CARLISLE: But if section 74(3) does not apply, they are limited to that amount in any event.

JUDGE BELLAMY: In any event, because I say there is no ----

MR SHENTON: Because that is a reasonable amount.

JUDGE BELLAMY: That is a reasonable amount and there is no informed consent. And, for the avoidance of doubt, you can tag this on to any existing appeal to get clarity between ... I do not think the clarity on section 74(3) and the informed consent is too much of a difficulty: it is where it then impacts on 46.9, is it not?"

*(2)(g)(iv) Points 3 and 4*

50. Mr Marven made brief submissions on Point 3 that a higher hourly rate than £120 should have been chosen and on Point 4 that a higher percentage than 15% should have been chosen for the success fee.
51. On Point 4, the district judge stated at an early stage in the hearing that he was not going to change the success fee. It will be noted that, in the passage just cited, the district judge said that he kept his hourly rates as they were. That was his decision on Point 3.

*(2)(g)(v) Costs*

52. In the light of the district judge's decisions, Mr Marven accepted that the Defendant had to pay the costs of the review.

*(2)(g)(vi) The District Judge's Order*

53. Paragraphs 1 to 5 of the district judge's order were in the following terms:
  - "1. The Court's 'on paper' decisions are affirmed, save that in respect of the decision on point of dispute 2, in the event that court proceedings were not issued the Solicitors Act 1974 section 74(3) does not apply, but the court's decision remains that the Defendant's base costs are limited to base costs recovered inter partes by the Claimant, on the basis of the presumptions in CPR r 46.9(3).
  2. The Defendant do by 28<sup>th</sup> January 2020 file and serve a witness statement confirming whether or not proceedings were in fact issued on the claim that is the subject matter of the Defendant's bill.
  3. The Defendant's bill be assessed in the sum of £1,394.00, being base costs of £750 and a success fee of 15% on such base costs, together with VAT and the disbursements as claimed.

4. The Court having undertaken the Cash Account exercise the Defendant do by 21<sup>st</sup> January 2020 pay to the Claimant the balance of £177.50.
  5. The Defendant's bill having been reduced by 49% the Defendant do by 21<sup>st</sup> January 2020 pay the Claimant's costs of the application, summarily assessed in the sum of £8,500 inclusive of VAT."
54. The bill was therefore assessed in the amount of £1,394, made up of:
- (1) £750 base costs, plus VAT of £150;
  - (2) £112.50 success fee (i.e. 15% of £750), plus VAT of £22.50;
  - (3) £180 medical report fee, plus VAT of £36; and
  - (4) £143 ATE insurance premium.
55. The net effect of the assessment was that the Defendant, instead of retaining £455.50 from the Claimant's damages, was only entitled to retain £278 (i.e. the total of the success fee and the ATE insurance premium) and was obliged to pay the difference of £177.50 to the Claimant.
56. The district judge gave the Defendant permission to appeal against his decision that the Defendant's base costs were limited to the base costs recovered inter partes by the Claimant. I will call this "the limitation decision".
- (2)(h) The Instigation of this Appeal***
57. The appellant's notice was filed by the Defendant on 13 February 2020. There were three grounds of appeal.
58. Ground 1 challenged the limitation decision. As I have said, the Defendant had permission to appeal on that ground.
59. Ground 2 was in the following terms:
- "If and in so far as it is necessary to address the issue, the district judge was wrong to conclude that, if court proceedings had been issued, (which they had not), SA 1974 s 74(3) would have been engaged to limit basic charges to inter partes recovery. The district judge was wrong not to conclude that the CFA had the effect that SA 1974 s 74(3) was disapplied under CPR r. 46.9(2)."
60. The Defendant needed the permission of this court to advance ground 2, but, in the event, at the hearing before me Mr Marven conceded that it was not necessary to address the issue identified in ground 2.
61. Ground 3 sought to challenge the district judge's decision that the amount of the bill was £2,731.90 rather than £1,571.50. Since the Defendant accepted that it was liable for the costs of the review of the "on paper" assessment, ground 3 only arises if the appeal is allowed on ground 1. Again, the Defendant needed the permission of this court to advance ground 3. On 1 May 2020 Lambert J ordered that the application for



permission to appeal on ground 3 and, if permission were granted, the substantive appeal be listed together with the appeal on ground 1.

**(2)(i) The Respondent's Notice**

62. The time for filing a respondent's notice expired on 27 February 2020, pursuant to CPR 52.13(4)(a) & (5)(a)(i). The Claimant did not file a respondent's notice, despite the fact that, pursuant to CPR 52.13(2)(b), the Claimant was obliged to file a respondent's notice if she wished to ask the court to uphold the district judge's decision (i.e. the limitation decision) for reasons different from or additional to those given by the district judge.
63. As to that, one potential basis for asking the court to uphold the limitation decision for reasons different from or additional to those given by the district judge was that:
  - (1) subsection 74(3) of the Solicitors Act 1974 applied; but
  - (2) the Defendant could not rely on CPR 46.9(2) as disapplying subsection 74(3) because:
    - (a) CPR 46.9(2) could only be invoked by a solicitor if his client had given informed consent to the relevant written agreement; and
    - (b) the Claimant had not given informed consent to that written agreement.
64. That had, after all, been the Claimant's primary case for contending that the base costs which the Defendant was allowed to charge the Claimant were limited to the amount recovered inter partes.
65. It is relevant to note that, when this appeal was commenced, the Claimant's solicitors and counsel were involved in at least one other appeal which raised some similar issues, namely *Belsner v Cam Legal Services Ltd*, which was an appeal against an order made by the same district judge on 14 August 2019. *Belsner v Cam Legal Services Ltd* was an appeal in which:
  - (1) The construction issue did not arise, because it was not disputed by the parties to that appeal that subsection 74(3) of the Solicitors Act 1974 applied, even though that was, like the present case, a case in which a claim had been made under the Protocol and had been settled before a claim form was issued.
  - (2) There was a dispute whether a solicitor who wished to rely on a written agreement pursuant to CPR 49(2) had to obtain his client's informed consent to that agreement. I decided that informed consent was necessary.
  - (3) There was also a dispute whether, on the facts of that case, the client had given informed consent to her written agreement with her solicitor. I decided that, on the facts of that case, the client had not given informed consent.
66. At the Claimant's request, I made an order on 5 June 2020 extending the time for filing the Claimant's skeleton argument to 14 days after judgment was handed down in *Belsner v Cam Legal Services Ltd*. That judgment was handed down on 16 October 2020.

67. In a letter to the court dated 22 October 2020, the Claimant’s solicitors stated, inter alia, as follows:

“In light of the judgment in *Belsner* and on consideration of the matter by leading counsel the claimant would wish to serve a respondent’s notice which would seek to contend that the District Judge should also have found that s74(3) Solicitors Act 1974 applied. (It would appear – although it is not entirely clear – that the District Judge found that there were not proceedings in the County Court and that therefore s74(3) of the Act did not apply.)”

68. Thus, for the first time, the Claimant indicated her desire to raise the construction issue on this appeal. The Claimant’s solicitors went on to express concern that the Defendant would not have sufficient time in which to consider the proposed respondent’s notice in advance of the date fixed for the hearing of the appeal, 17 November 2020.

69. The Claimant filed and served her skeleton argument on 27 October 2020 and also purported to file and serve a respondent’s notice. In section 6 of that notice the Claimant stated that she wished the court to uphold the district judge’s order on different or additional grounds because:

“the judge was wrong to find that s. 74(3) Solicitors Act 1974 did not apply to this claim. Proceedings should be construed to include claims that settle within the MoJ Portal.”

70. On 30 October 2020 the Claimant issued an application notice seeking an order extending the time for filing the respondent’s notice. The evidence relied on in the application notice was the following statement by Mark Carlisle, a consultant with the Claimant’s solicitors:

- “1. The Respondent waited until the High Court determined the issue of whether informed consent was required to displace the presumptions as (*sic*) s. 74(3) and r. 46.9(2) in *Belsner v CAM Legal* [2020] EWHC 2755 (QB). The High Court found that informed consent was required. Had it found to the contrary, the issues raised in the Respondent’s Notice filed on (*sic*) would not be relevant. The question whether s. 74(3) and r. 46.9(2) apply to cases that settle within the MOJ portal was fully argued at first instance. The Appellant is fully aware of the issue and will suffer no prejudice by having to address this point at the appeal.
2. Those representing the Respondent alerted the Court, and the Appellant, to the proposed Respondent’s Notice on 22<sup>nd</sup> October, by way of a letter to the Court, which was copied by email to the Appellant’s representatives.”

71. On 2 November 2020 I directed that I would hear the Claimant’s application at the hearing of the Defendant’s appeal.

### **(3) The Claimant’s Application**

72. The legal background to some of the issues which the Claimant sought to raise by her respondent’s notice is set out in paragraphs 32 to 63 of my judgment in *Belsner v Cam*

*Legal Services Ltd.* I do not propose to repeat what I set out in those paragraphs. However, my judgment did not deal with the construction issue because, as I have explained, that was not an issue in *Belsner v Cam Legal Services Ltd.*

73. On behalf of the Claimant, Mr Kirby submitted that the Claimant's application was in substance an application for relief from sanctions and that, applying the well-known three-stage test:
- (1) While the delay from 27 February to 27 October 2020 was significant, the breach of the CPR was neither serious nor significant, since:
    - (a) the issue which the Claimant sought to raise by the respondent's notice had been fully argued before the district judge; and
    - (b) ground 2 in the grounds of appeal addressed at least part of the issues which the Claimant sought to raise by the respondent's notice.
  - (2) The reason for the default was that the Claimant had been unable until judgment was handed down in *Belsner v Cam Legal Services Ltd* to give proper consideration to the need for a respondent's notice because, if I had decided against Ms Belsner on the issue as to the need for informed consent under CPR 46.9(2), the question as to the application of subsection 74(3) of the Solicitors Act 1974 would have become otiose. Mr Kirby quite properly accepted that there had been a deliberate choice not to file a respondent's notice in time.
  - (3) Having regard to all the circumstances of the case, I ought to grant the relief sought, particularly because:
    - (a) The respondent's notice did not raise a new point which would ambush or surprise the Defendant. It had been fully argued before the district judge. The construction issue could be dealt with at the hearing of the Defendant's appeal. The question whether the Claimant gave informed consent for the purposes of CPR 46.9(2) had been raised by the Defendant itself in ground 2 of the grounds of appeal.
    - (b) There was likely to be no real prejudice to the Defendant.
    - (c) The point was an important one to the profession and needed to be dealt with at High Court level.
74. There was no evidence before me as to whether the construction issue had or had not been raised in other similar appeals. Mr Marven's recollection was that it had and Mr Kirby's was that it had not.
75. For the Defendant, Mr Marven submitted, in particular, that:
- (1) The breach of the CPR was both serious and significant.
  - (2) There was no good reason for it.
  - (3) He was not ready to deal with the construction issue at the hearing. Although it had been argued below, the Claimant had advanced on appeal arguments which

had not been advanced before the district judge, namely the arguments set out in paragraphs 47 to 57 of the Claimant's skeleton argument, which advocated, by reference to two authorities, an "updating construction" of subsection 74(3) of the Solicitors Act 1974.

76. In my judgment, the Claimant's breach of the CPR was both serious and significant. It is a serious and significant matter that points which could have been taken in February 2020 were not raised until 8 months later, shortly before the hearing of the appeal, at a time when the Claimant's own representatives were concerned that the Defendant would not have adequate time in which to respond.
77. Moreover, there was no good reason for the Claimant's failure to file a respondent's notice. An obvious question for the Claimant and her lawyers to consider was whether to assert on this appeal that, if her alternative case on Point 2 (on which she had succeeded before the district judge) was not upheld on appeal, her primary case on Point 2 should be upheld instead. It appears that that question was considered and a deliberate decision was taken not to file a respondent's notice.
78. The appeal in *Belsner v Cam Legal Services Ltd* was not a good reason for delaying the filing of a respondent's notice. The purpose of a respondent's notice is to identify the issues in the appeal. That is important for the proper management of the appeal, whether or not those issues are subsequently narrowed as a result of a decision in another case. Moreover:
- (1) The construction issue did not arise in *Belsner v Cam Legal Services Ltd*.
  - (2) *Belsner v Cam Legal Services Ltd* was, as I said in my judgment, a test case. All parties will have appreciated the likelihood that, whatever decision I reached on the appeal, my judgment would itself be the subject of at least an application for permission to appeal to the Court of Appeal, with the result that my judgment would not necessarily be the final word on the issues raised in that appeal.
79. Against that background, I considered all of the circumstances of the case and concluded that it would not be appropriate to grant the relief sought. Those circumstances include the need to enforce compliance with the rules, the seriousness of the Claimant's breach of the rules and the fact that a deliberate decision was taken not to file a respondent's notice. In my judgment, those factors outweighed the factors relied on by the Claimant, as to which I make the following observations:
- (1) As to the scope of the issues proposed to be raised by the respondent's notice:
    - (a) The principal issue to be argued before me would be the construction issue, since my judgment in *Belsner v Cam Legal Services Ltd* both:
      - (i) decided that, if subsection 74(3) of the Solicitors Act 1974 applied in the present case, the Defendant needed to establish informed consent in order to rely on CPR 46.9(2) as disapplying subsection 74(3); and
      - (ii) provided assistance on the question whether the Claimant had given informed consent for the purposes of CPR 46.9(2).

- (b) The construction issue did not form part of ground 2 in the grounds of appeal and, in any event, it was accepted that ground 2 did not arise and would not be argued.
  - (c) Mr Kirby was right to point out that the construction issue was argued before the district judge, but Mr Marven was right to point out that the “updating construction” argument was not advanced before the district judge. A refinement of legal submissions is not unusual on appeal, but this additional argument served to increase the scope of what the Defendant would have to deal with if the Claimant were permitted to file the respondent’s notice.
  - (d) Understandably, Mr Marven had not come to the hearing of the appeal prepared to argue an issue which the Claimant did not have permission to raise.
- (2) There would be prejudice to the Defendant if the application were allowed, not least because the appeal would either have to be adjourned or heard in two parts.
  - (3) There are, as I have mentioned, a series of similar appeals. I can readily see that there is potential for the construction issue to arise in many of these cases, since many claims brought under the Protocol settle without a claim form being issued. However:
    - (a) Curiously, Mr Kirby’s recollection was that the issue has not arisen in any other appeal. If he is right, then this may be because the defendants in such cases have taken the same position as the defendant in *Belsner v Cam Legal Services Ltd*. I do not know, because there was no evidence before me on this point. However, if Mr Kirby was right, then that tends to cast doubt on his assertion that the construction issue is an important issue which needs to be resolved urgently.
    - (b) Nevertheless, if there is a need to resolve the construction issue, then it will arise in another appeal or appeals and can be dealt with then.

#### **(4) The Terms of the Contract**

- 80. Mr Marven made two submissions about the terms of the contract between the Claimant and the Defendant.
- 81. First, he submitted that it was a term of the contract that the amount which the Claimant could recover from the Defendant in respect of costs was limited to 25% of the damages received by the Claimant. I do not accept this:
  - (1) The success fee was capped at 25% of the relevant damages by clause 4.1 of the CFA, but there was no such agreement in relation to the Defendant’s base costs.
  - (2) On the contrary, paragraph 8.1 of the document entitled “CFA: What You Need To Know” expressly provided that, if the Claimant won her case, she would then be liable to pay all the Defendant’s basic charges. This is consistent with paragraphs 2.2, 3.2, 3.3, 8.2 and 8.4 of that document and clause 3.1 of the CFA.

(3) The Client Care Letter stated that the Defendant aimed to achieve an outcome whereby no more than 25% of the Claimant's damages were deducted in respect of costs. That, however, was an aspiration rather than a commitment.

(4) Mr Marven relied on the next two sentences in the Client Care Letter, which read:

“This is achievable because the Court rules currently allow you to recover costs from your opponent and so this enables us to claim your costs from your opponent rather than entirely from your damages. If the rules were to change to prevent you from recovering costs from your opponent, then by entering into the CFA with us, you hereby agree that we would be entitled to deduct a higher proportion than 25% of your damages in respect of costs.”

(5) He submitted that it was implicit in the second of these sentences that, unless the rules of court were changed, the Defendant could not deduct more than 25% of the Claimant's damages in respect of costs. However, in my judgment it is not possible to imply such a term in the face of an express term to the contrary, namely paragraph 8.1 of the document entitled “CFA: What You Need To Know”.

82. Secondly, he submitted that, by agreeing to the contract, the Claimant agreed to the Defendant's hourly rate of £161 per hour for a Grade D fee earner. I do not accept this either. As I have already pointed out, although paragraphs 3.1 and 3.2 of the document headed “CFA: What You Need To Know” referred to the Defendant's hourly rates and said that they were set out in the Client Care Booklet and that the Claimant agreed and approved them, I was not shown any contractual document which set out the Defendant's hourly rates. In particular, I have not seen any contractual document which refers to a rate of £161 per hour. In those circumstances, I do not see how it can be alleged that the Claimant agreed that she would pay for the time of the Defendant's Grade D fee earners at the rate of £161 per hour.

**(5) Ground 1: The Limitation Decision**

83. By ground 1, the Defendant challenges the limitation decision. This ground of appeal will involve a consideration of sub-paragraphs (a), (b) and (c) of CPR 46.9(3), but it is appropriate to begin by considering the terms of CPR 44(1)-(3) and 46.9(1) & (3).

84. Mr Kirby referred in his submissions to the Solicitors (Non-Contentious Business) Remuneration Order 2009, but the district judge did not base his decision on that order and even the late respondent's notice did not include an allegation that the district judge's decision should be upheld on the basis of that order.

**(5)(a) Ground 1: CPR 44(1)-(3) and 46.9(1) & (3)**

85. CPR 46.9(1) provides as follows:

“This rule applies to every assessment of a solicitor's bill to a client except a bill which is to be paid out of the Community Legal Service Fund under the Legal Aid Act 1988 or the Access to Justice Act 1999 or by the Lord Chancellor

under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.”

86. It followed that CPR 46.9(3) applied to the assessment of the Defendant’s costs. CPR46.9(3) provides as follows:

“Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –

- (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
- (b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;
- (c) to have been unreasonably incurred if –
  - (i) they are of an unusual nature or amount; and
  - (ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.”

87. Thus, CPR 46.9(3) required that the Defendant’s costs be assessed on the indemnity basis. What that means is set out in CPR 44.3(1)-(3), which provide as follows:

“(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –

- (a) on the standard basis; or
- (b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

- (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
- (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.”

88. It is important to remember that these provisions form the context for the operation of sub-paragraphs (a), (b) and (c) of CPR 46.9(3). The Defendant’s costs were to be assessed on the indemnity basis, which meant that:

- (1) the court would not allow costs which had been unreasonably incurred or were unreasonable in amount; but

(2) the court would resolve any doubt which it may have about whether costs were reasonably incurred or were reasonable in amount in favour of the Defendant.

89. It is possible for the court to assess costs on the indemnity basis, and to decide for that purpose whether costs claimed were unreasonably incurred or were unreasonable in amount, without recourse to any of the presumptions provided for in sub-paragraphs (a), (b) and (c) of CPR 46.9(3). Indeed, that is what the district judge appears to have done in his decision on Point 3 in the “on paper” assessment. The district judge said that, “9 hrs x £120 would seem reasonable.” He was, in effect, saying that:

(1) any costs relating to more than 9 hours’ work were unreasonable; and

(2) any costs claimed at a rate of more than £120 were unreasonable in amount.

**(5)(b) Ground 1: CPR 46.9(3)(a) & (b)**

90. Mr Marven submitted that the district judge should have found that the presumptions provided for in sub-paragraphs (a) and (b) of CPR 46.9 applied in the present case. He did so, primarily, by submitting that the Claimant had agreed that at most 25% of her damages could be paid to the Defendant. However, I have already held that there was no contractual agreement to this effect.

91. In any event, I doubt whether an agreement to a cap on the amount of costs recoverable by the Defendant from the Claimant would fall within the scope of either sub-paragraph (a) or (b):

(1) Such an agreement would not constitute the approval, express or implied, of any particular item of work being done by the Defendant. Nor would it, for example, constitute approval to the Defendant taking 11 hours over work which the district judge considered could be done in 9 hours.

(2) Nor would an agreement to such a cap constitute the approval of the amount of the Defendant’s costs or, for instance, of the Defendant’s hourly rate. A client who agrees that she will not pay more than 25% of her damages is not agreeing that she will pay 25% of her damages, come what may.

92. I note that the section of the Client Care Letter headed “Outline of the Work” could perhaps be relied on for the purposes of sub-paragraph (a), but Mr Marven did not place any reliance on that section in his submissions. Mr Marven did rely, for the purposes of sub-paragraph (b), on his submission that the Claimant had approved the Defendant’s hourly rate, but I have already explained why I do not accept that submission.

93. It was accepted that a solicitor can only invoke the presumptions in sub-paragraphs (a) and (b) if he has obtained the client’s informed consent. The district judge found in paragraphs 5 and 6 of his judgment that the Claimant had not given her informed consent to the agreement about the Defendant’s costs.

94. Mr Marven submitted that the district judge was wrong to make this finding, but the principal basis for that submission was, again, his submission that the parties had agreed to a cap on the amount of costs recoverable by the Claimant. Where such a cap is



agreed, that may be a significant factor in relation to the issue of informed consent. That is a matter for consideration in another case. But in this case there was no cap.

95. Before considering whether a client has given informed consent, it is appropriate to identify what it is that the client is alleged to have given informed consent to. The difficulty for the Defendant is that, as has already been seen, the Claimant did not agree to the Defendant doing 11 hours' work and the Claimant did not agree to the Defendant being paid for that work at the rate of £161 per hour. Since the Claimant did not consent to the hours worked or the hourly rate, the question whether she gave informed consent to them simply does not arise.
96. It can be said that the Claimant agreed that the Defendant would do the work identified in the "Outline of the Work" section of the Client Care Letter and agreed that the Defendant would be paid for that work on the basis of the hours worked multiplied by an hourly rate. That much does not greatly assist the Defendant in relation to subparagraphs (a) and (b). However, insofar as the Claimant agreed anything with the Defendant in relation to the nature or amount of the costs to be incurred, I consider that the district judge was right to hold in paragraph 5 and 6 of his judgment that the Claimant did not give her informed consent to the agreement between the parties as to costs.
97. It is illustrative to consider the potential effects of that agreement:
  - (1) In dealing with Point 3, the District Judge decided that 9 hours at £120 per hour was reasonable for the Defendant's base costs. That is £1,296 (i.e. £1,080 plus VAT of £216). Had Aviva not paid the Defendant by mistake the extra £300, the Claimant would have had to pay £696 (i.e. £1,296 less £600) to the Defendant, together with the ATE insurance premium of £143 and a success fee equivalent to 15% of £1,296, i.e. £194.40. That would have made a total of £1,033.40 to be deducted from the damages of £1,250, leaving the Claimant with £216.60, or 17%, of her damages.
  - (2) The position is even more striking if one uses the figures in the Defendant's bill, in which the Defendant contended that its base costs were £2,060.40 (i.e. £1,717 plus VAT of £343.40) and its success fee was £312.50. Adding the ATE insurance premium of £143 to these amounts gives a total of £2,515.90. If the Defendant had claimed that amount from the Claimant, then, even allowing for the extra £300 which Aviva paid to the Defendant, the Defendant's costs would have exceeded the amount of the Claimant's damages by £365.90 (i.e. £2,515.90 less the sum of £1,250 and £900). On that basis, bringing the claim for damages would have left the Claimant with no damages and £365.90 out of pocket.
  - (3) The Defendant had paid £625 to Glenfield Marketing. In order for the Defendant not to be out of pocket, it needed to charge at least that amount to the Claimant by way of base costs and success fee. Yet if, as happened, the claim settled at Stage 2 for £1,250, then, in order to limit its recovery to 25% of the Claimant's damages, the Defendant would have to claim no more than £760.42 (i.e. £500 base costs plus £260.42 success fee) plus VAT from the Claimant. That is only £135.42 more than the Defendant had paid to Glenfield Marketing.

98. These figures are for illustration only. However, as the Defendant acknowledged in paragraph 16.4 of the document headed “CFA: What You Need To Know”, the Defendant was obliged to give the Claimant the best information possible about the likely costs of her claim for damages.

99. Despite that obligation:

- (1) The Defendant did not (unlike the solicitors in *Belsner v Cam Legal Services Ltd*) give the Claimant an estimate of its likely costs. Indeed, the Defendant did not even tell the Claimant what hourly rate it would charge.
- (2) Nor did the Defendant inform the Claimant that, for example, if her claim settled at Stage 2 for less than £10,000, then the amount which her opponent would be liable to pay in respect of the Defendant’s base costs might be £500 plus VAT.

100. I have set out what the Defendant did say about its likely costs:

- (1) On the one hand, the Defendant said, in paragraph 3.2 of the document headed “CFA: What You Need To Know” that the costs which were chargeable under the agreement would almost certainly exceed the fixed costs which Aviva would have to pay and so the Claimant would be required to pay the shortfall from her damages. Moreover, the Defendant stated in paragraph 8.3 of that document that the Claimant would have to pay the success fee and the ATE insurance premium herself.
- (2) On the other hand, the Defendant stated in the Client Care Letter that it aimed to achieve an outcome whereby no more than 25% of the Claimant’s damages were deducted in costs and that this outcome was “achievable”. It could be said that this was an ambitious statement in the context of a claim for damages for a whiplash injury for which the Claimant had received no medical attention. The amount of the claim was likely to be modest, as the Defendant must have appreciated. While the Defendant could not predict the precise amount for which the claim would settle, the Defendant must have appreciated that it was likely to be at the lower end of claims covered by the Protocol. No evidence was adduced before me to suggest that the Defendant ever believed that the Claimant’s claim might settle for an amount significantly greater than the amount for which it did settle.
- (3) Clause 3.2 of the CFA and paragraph 8.2 of the document headed, “CFA: What You Need to Know” each referred to the possibility of the Claimant recovering “part or all” of the Defendant’s basic charges and disbursements from Aviva. This said nothing about how large a part of her costs the Claimant was likely to recover from Aviva if she did not recover all of them.

**(5)(c) Ground 1: CPR 46.9(3)(c)(i)**

101. The district judge found, in effect, in paragraph 7 of his judgment that the Defendant’s costs were “of an unusual ... amount”, since £161 per hour was an unusual hourly rate for a Grade D fee earner conducting a low value road traffic accident claim. Mr Marven challenged this finding, but in my judgment it is an assessment which the district judge was entitled to make. He explained that the usual rates in such cases were between

£111 and £125 per hour and there was no evidence before me that £161 per hour was a usual rate in such cases. It follows that the requirement of CPR 46.9(3)(c)(i) was satisfied.

102. Although it is not necessary for the determination of this appeal, I should state that I do not accept the Claimant's submission that any costs in excess of the fixed costs allowed inter partes were unusual for the purposes of CPR 46.9(3)(c)(i) on an assessment of costs between solicitor and client on the indemnity basis. It is not necessary for me to decide this point, because the district judge did not base his decision on it, but it may be worth stating that in my judgment the question of what is usual or unusual as between solicitor and client is a very different question from the question of what is recoverable inter partes.
103. The question whether a solicitor's costs should be limited to those recoverable inter partes is dealt with by subsection 74(3) of the Solicitors Act 1974 and CPR 46.9(2). Assuming that a solicitor's costs are not so limited by virtue of those provisions, it is not the purpose of CPR 46.9(3)(c) to reintroduce the same limit by a different route.

**(5)(d) Ground 1: CPR 46.9(3)(c)(ii)**

104. As for CPR 46.9(3)(c)(ii), the Defendant told the Claimant, by paragraphs 3.2, 8.2 and 8.4 of the document headed, "CFA: What You Need To Know" that the Defendant's costs might not be recovered from Aviva. Moreover, paragraph 3.2 stated that this was because the hourly rates when multiplied by the number of hours charged would exceed the fixed fees payable by Aviva. Mr Marven submitted that this was sufficient to mean that CPR 46.9(3)(c)(ii) was not satisfied.
105. The district judge took the view that informed consent was relevant for the purposes of CPR 46.9(3)(c)(ii), in the sense that a solicitor who argued that he had told his client that, as a result of their unusual nature or amount, the relevant costs might not be recovered from the other party had to show not merely that he had told his client that, but that he had obtained his client's informed consent to it.
106. I note, however, that there is no authority to this effect:
- (1) *MacDougall v Boote Edgar Esterkin* [2001] 1 Costs LR 118 concerned the need for informed consent when a solicitor sought to rely on the predecessor of CPR 46.9(3)(b).
  - (2) *Herbert v HH Law Ltd* [2019] 1 WLR 4253 concerned the need for informed consent when a solicitor sought to rely on CPR 46.9(3)(a) & (b).
  - (3) My decision in *Belsner v Cam Legal Services Ltd* concerned the need for informed consent when a solicitor sought to rely on CPR 46.9(2)
107. Indeed, the parties to *Herbert v HH Law Ltd* appear to have proceeded on the basis that informed consent was not relevant to CPR 46.9(3)(c). In paragraph 35 of his judgment, Sir Terence Etherton MR said as follows:

"There is no longer any dispute between the parties in relation to CPR r 46.9(3)(c). The judge recorded (at para 27) that Mr Andrew Hogan, counsel for

HH before him and junior counsel for HH before us, accepted that an irrecoverable success fee could be regarded as a cost of an “unusual nature or amount” but had submitted that, as the retainer made it clear that the success fee could not be recovered from the other party, the condition in CPR r 46.9(3)(c)(ii) was not satisfied, and so there was no presumption under CPR r 46.9(3)(c) that it was unreasonably incurred. The judge agreed with that submission: para 47. There is no respondent's notice challenging that decision.”

108. Mr Marven submitted that informed consent is irrelevant to CPR 46.9(c)(ii). In my judgment, that is right. The issue under CPR 46.9(c)(ii) is whether or not the solicitor told his client what is there set out. That issue concerns what the solicitor said, not whether the client agreed with or approved what the solicitor told him. That issue is materially different from the issue under CPR 46.9(2) or 46.9(3)(a) & (b), which is whether the client agreed or approved something proposed by the solicitor. The focus there is on what the client did, which is why it is relevant to consider whether the client gave informed consent to what was proposed.
109. Accordingly, I conclude that the district judge was wrong to decide that the presumption under CPR 46.9(3)(c) arose in the present case.

***(5)(e) Ground 1: CPR 46.9(3)(c) and the Limitation Decision***

110. In any event, even if the district judge was right in his construction of CPR 46.9(3)(c)(ii), and supposing that it was to be presumed under CPR 46.9(3)(c) that the Defendant's rate of £161 per hour was unreasonable, it does not follow that it was appropriate to limit the Defendant's base costs to the amount recovered from Aviva in respect of fixed costs. The effect of CPR 46.9(3)(c), where it applies, is to create, for the purposes of an assessment of costs on the indemnity basis, a presumption that certain costs were unreasonably incurred. Where a solicitor claims costs at an unreasonable rate, the appropriate course on assessment on the indemnity basis is usually to allow costs at a reasonable rate. Assuming that it was reasonable for the work to be done (and there was no challenge to the district judge's decision that it was reasonable for 9 hours' work to be done), it is not unreasonable for the solicitor to be paid for that work at a reasonable rate.
111. Moreover, in this case, the district judge had already, in deciding Point 3, decided that £161 per hour was an unreasonable rate and had instead identified £120 per hour as a reasonable rate. In the light of that decision:
- (1) There was no need for the presumption in CPR 46.9(3)(c), since the district judge had already decided that £161 per hour was in fact an unreasonable rate.
  - (2) Moreover, the district judge had already decided the extent to which that rate was unreasonable: it was unreasonable insofar as it exceeded £120 per hour, but no further.
112. These considerations suggest that the district judge, if he had found that the presumption applied, should have reduced the Defendant's base costs to £1,296 (i.e. 9 hours at £120 plus VAT per hour).

113. The district judge did not explain in his judgment why he did not do that and why instead he considered that the application of the presumption provided for in CPR 46.9(3)(c) led to the limitation decision. I have quoted the exchange in which Mr Marven asked the district judge to clarify what he had decided. The district judge agreed that the effect of his decision was the same whether:
- (1) a claim form had been issued, in which case subsection 74(3) of the Solicitors Act 1974 applied; or
  - (2) a claim form had not been issued, in which case subsection 74(3) of the Solicitors Act 1974 did not apply, but he applied the presumption in CPR 46.9(3)(c).
114. Immediately after providing that clarification, however, the district judge added:
- “And I keep my hourly rates as they are, by the way.”
115. That was a determination by the district judge that £120 per hour was a reasonable rate.
116. Mr Shenton, on behalf of the Claimant, then prompted the district judge to say that the amount recovered from Aviva in respect of base costs was reasonable, but that was inconsistent with what the district judge had just decided about hourly rates. The amount recovered from Aviva, £900, was equivalent to £750 plus VAT, which, as payment for 9 hours’ work, was equivalent to a rate of £83.33 per hour. Yet the district judge had just decided that £120 per hour was a reasonable rate (and, indeed, the Claimant had not argued for a lower rate).
117. Mr Kirby submitted that, in contending that the application of the presumption in CPR 49.9(3)(c) ought to have led the district judge to allow 9 hours’ work at £120 per hour, Mr Marven was raising a point on appeal which had not been raised before the district judge. However, I have quoted earlier in this judgment the passage from his submissions in which Mr Marven raised this very point.
118. Mr Kirby also submitted that the district judge was entitled, when applying the presumption, to decide that £900 (including VAT) was the appropriate amount to allow for the Defendant’s base costs, on the basis that it was, as the district judge said, a reasonable amount. However, the district judge’s statement, after giving judgment, and prompted by Mr Shenton, that £900 was a reasonable amount was inconsistent with his considered decision on Point 3 in the “on paper” assessment that it was reasonable to allow 9 hours at £120, a decision which was not even challenged by the Claimant and which, after hearing argument on the hourly rate, the district judge decided to uphold.
119. While I accept that the district judge could, for good reason, have departed from the “hours times hourly rate” method of assessing the Defendant’s base costs and could, for good reason, have alighted on £900 as the reasonable amount for the Defendant’s base costs (in the sense that any greater amount would have been unreasonable), I am not persuaded that that is what the district judge did.
120. In those circumstances, I consider that the limitation decision was wrong and that the district judge should have assessed the Claimant’s base costs (before the limitation of the Claimant’s costs at £1,571.50) at £1,296 (including VAT). On that basis, the district

judge should have found that nothing was owing from the Defendant to the Claimant, since the Defendant was entitled to charge the Claimant the £455.50 which it had retained from the Claimant's damages.

**(6) Ground 3: The Amount of the Bill**

121. Ground 3 concerns an issue which arises by virtue of subsection 70(9) of the Solicitors Act 1974, which provides as follows:

“Unless—

(a) the order for assessment was made on the application of the solicitor and the party chargeable does not attend the assessment, or

(b) the order for assessment or an order under subsection (10) otherwise provides,

the costs of an assessment shall be paid according to the event of the assessment, that is to say, if the amount of the bill is reduced by one fifth, the solicitor shall pay the costs, but otherwise the party chargeable shall pay the costs.”

122. The district judge decided that “the amount of the bill” was £2,731.90, as contended for by the Claimant. On that basis, he awarded the Claimant the costs of the assessment. The Defendant contends that he was wrong and that the amount of the bill was £1,571.50. It is arguable that the district judge was wrong and I grant permission to appeal.

**(6)(a) Ground 3: Post-Hearing Submissions**

123. Mr Kirby referred in his oral submissions to the district judge's order of 28 March 2018. It appeared to me at the hearing that he was arguing that the issue of the amount of the bill was res judicata and I was concerned that that the law on res judicata had not been fully argued in the skeleton arguments prepared for the hearing. Consequently, I gave the parties the opportunity to make further written submissions on this issue after the hearing.
124. In the event, although Mr Marven made submissions as to the potential application of the doctrine of res judicata, Mr Kirby made clear in submissions dated 8 December 2020 that he was not relying on the doctrine of res judicata. Rather, he was asserting that the Defendant had accepted that the amount of the bill was £2,731.90:
- (1) in the acknowledgment of service;
  - (2) by not objecting to the order of 28 March 2018 (paragraph 1 of which included the words, “Amount of £2,731.90”);
  - (3) by applying for the variation other parts of that order, but not paragraph 1; and
  - (4) by asserting that, for the purposes of the assessment of the success fee, the court needed to assess the total amount claimed for the Defendant's base costs.
125. These are all matters which I have taken into account in considering what was the amount of the bill.

**(6)(b) Ground 3: Authorities on Subsection 70(9) and its Predecessors**

126. In his “on paper” assessment, the District Judge referred to p. 2370 of the White Book. This appears to have been a reference to what is now paragraph 7C-123 of Volume 2 of the White Book 2021, which states, inter alia, that the amount of the bill:

“... includes the full amount of the bill, and disregards the added expression “say X” (*Re Carthew* (1884) 27 Ch D 485; *Re Mackenzie* (1894) 69 L.T. 751) or the fact that a lesser figure is alone claimed (*Re Paull* (1884) Ch D 485).”

127. As I will explain, it appears to me that this note is something of an oversimplification. *Re Paull and re Carthew* (1884) 27 Ch D 485 concerned two bills of costs. Carthew’s bill was for £83 3s 4d, but concluded with the words, “say £78”. £78 was paid. Paul’s bill was for £361 19s 2d, but the solicitor stated separately that he claimed only £320 16s 6d and that sum was paid. In each case, the taxation resulted in a figure which was less than 5/6ths of the higher sum stated in the bill, and less than the lower sum demanded by the solicitor and paid to him, but more than 5/6ths of that lower sum.
128. Section 37 of the Act for Consolidating and Amending Several of the Laws relating to Attorneys and Solicitors Practising in England and Wales 1843 (“the 1843 Act”) was the section then in force. It provided as follows:

“... the costs of such reference shall, except as herein-after provided for, be paid according to the event of such taxation; that is to say, if such bill when taxed be less by a sixth part than the bill delivered ... then such attorney or solicitor ... shall pay such costs; and if such bill when taxed shall not be less by a sixth part than the bill delivered ... then the party chargeable with such bill ... shall pay such costs ; ...”

129. In relation to Carthew’s bill, Baggallay LJ, with whom Cotton LJ agreed, said as follows

“The bill delivered was a detailed bill consisting of items amounting to £83 3s. 4d. At the foot of it was written “say £78,” and the signature followed these words. There was no letter accompanying the bill, so we can only infer the intention with which those words were written. It is not necessary to come to a very positive conclusion on the point; but I should say that the words in substance mean this, “Here is my bill for £83 3s. 4d. If you will pay £78 without taxation I will accept it in full discharge. If you do not I will take what taxation gives me.””

130. Lindley LJ put it this way:

“The first point is, was it a bill for £78? It is impossible, in my opinion, to say that it was. It was a bill containing items making up £83 3s. 4d., with an offer to take a less sum, and it is impossible to say that the bill delivered within the meaning of the Act was a bill for £78.”

131. In relation to Paull’s bill, Baggallay LJ said as follows:

“In *In re Paull* an order was obtained under sect. 41 for taxation after payment. The bills as delivered amounted to £361 19s. 2d., but the solicitor stated that he claimed only £320 16s. 6d., which was £41 2s. 8d. less than the amount of the bills. He had previously delivered a cash account in which he had treated the bills as being of the lesser amount. An order for taxation after payment having been obtained, full bills were carried in and the Taxing Master disallowed £81 3s. 8d., reducing their amount to £280 15s. 6d., which is more than five-sixths of the £320 16s. 6d. but less than five-sixths of the £361 19s. 2d. If the matter stood there, I should say, as in *Carthew’s Case*, that the bill must be taken as at the larger amount, and that it must be considered that more than a sixth has been taxed off, and that the solicitor must pay the costs of the taxation.”

132. Baggallay LJ then went on to consider that part of section 37 of the 1843 Act which was the predecessor of subsection 70(10) of the Solicitors Act 1974. No issue arises as to that subsection on this appeal.
133. *Re Mackenzie* (1894) 69 L.T. 751 is referred to in paragraph 7C-123 of Volume 2 of the White Book 2021 and was the subject of written submissions before the district judge, but neither party relied on it before me.
134. I drew the parties’ attention to *Re Hellard & Bewes* [1896] 2 Ch 229, which was not cited to the district judge (but which was cited in the appeal in *Belsner v Cam Legal Services Ltd*). In connection with the grant of a lease, the lessor’s solicitors wrote on 24 December to the lessee’s solicitors to say that their charges in relation to the lease amounted to £7 11s. On 1 January the lessee’s solicitors wrote asking for particulars of the charges. On 2 January the lessor’s solicitors replied by sending a bill with detailed items, amounting to £10 10s 8d, adding at the foot, “Say £7 11s.” The lessee obtained an order to tax the bill, and on the taxation the whole of the £7 11s. was allowed. North J held that the bill was delivered on 24 December, that the bill sent on 1 January was merely explanatory and that, the bill not having been reduced on taxation, the solicitors were entitled to the costs of the taxation. In relation to the words, “Say £7 11s”, North J said:

“I understand that note when expanded to mean, “Our charge if made by items would amount to 10l. 10s. 8d., and that is more than the 7l. 11s. which we have already stated to be our whole claim in respect of the business comprised in this bill.” I think, therefore, that the taxing master was justified in saying that the 7l. 11s. was the bill actually claimed; and, although the mistake of treating the other document as the bill is perfectly intelligible now, yet it was a mistake, because the letter of December 24 was the bill. That being so, *Re Tilleard* and *Re Russell, Son & Scott* exactly apply, and I think the taxing master was right in following those cases.”

135. It is unnecessary to say anything about the facts of *Bentine v Bentine* [2016] Ch. 489. Sales LJ said as follows in paragraph 5 of his judgment:

“Section 70(9) provides for a basic and simple default rule that the costs of the assessment should follow the event (ie be paid by the losing to the winning party), where the “event” (ie the criterion of who has won and who has lost) is defined by reference to whether a reduction in the amount of the bill of one fifth has been achieved by the client in the assessment (I refer to this as “the one-



fifth rule”). However, subsection (10) allows the court to modify this position where the costs officer certifies that there are “special circumstances relating to a bill or to the assessment of a bill.””

136. Then in paragraph 7 he said as follows:

“Disputes between solicitors and clients regarding the amount of solicitors' bills can be substantial, and the costs of resolving them can likewise be substantial. ... Both client and solicitor benefit from knowing in advance what the basic default rule is governing the costs of an assessment, and what ordinarily counts as winning and losing, so that they can make a rational calculation of the risks involved in proceeding with a disputed assessment before a costs judge.”

137. Arden LJ said as follows in paragraph 111 of her judgment:

“In my judgment, the policy behind section 70(9) is that the remedy under section 70 should be efficacious and that potential claimants should not be disincentivised from bringing claims under section 70 by the usual costs-shifting rule. The result of the usual cost-shifting rule would be that, if the solicitors were successful in obtaining judgment for their bill they would in the absence of other factors obtain an order for costs. Without section 70(9), this would be so even if it was reduced by 20% or more. Section 70(9) displaces that result.”

138. In *Bentine v Bentine* the three judges expressed differing views on the effect of the fact that the Solicitors Act 1974 was a consolidation Act: see paragraphs 42 to 57 (per Sales LJ), 73 to 80 (per Sir Bernard Rix) and 100 and 102 to 108 (per Arden LJ, who, as Lady Arden, referred in paragraph 89 of her judgment in *R. (on the application of Derry) v Revenue and Customs Commissioners* [2019] 1 WLR 2754 to the issue discussed in *Bentine v Bentine* as one which was yet to be resolved). Arden LJ identified the issue as follows:

“*Farrell v Alexander* [1977] AC 59 establishes, that where the meaning of a consolidation statute is clear, the court should not generally investigate its “antecedents”: see per Lord Wilberforce, at p 73, Lord Simon of Glaisdale, at p 83, and Lord Edmund-Davies, at p 97. It should interpret the statute afresh according to its ordinary meaning. Those antecedents include earlier judicial authorities as well as earlier legislative provisions. But it does not follow that the interpretation of a consolidation statute in this way authorises the court to ignore some earlier authority on an earlier legislative provision which has been consolidated *where that authority is binding on it under the doctrine of precedent.*”

139. In the present case, subsection 70(9) of the Solicitors Act 1974 Act and section 37 of the 1843 Act were not identically worded, in particular because section 37 did not contain the phrase “the amount of the bill”, but there is scope for debate as to whether the current subsection is materially different from its predecessor, such that a case decided on section 37 of the 1843 Act remains binding when considering subsection 70(9) of the Solicitors Act 1974.

140. I was also taken to the unreported decision of Master Rowley given on 26 July 2017 in *Breyer Group Plc v Prospect Law Limited*. The solicitors in that case had received payments on account totalling £73,720 plus VAT. When asked to produce a statute bill, i.e. a bill which complied with the requirements of section 70 of the Solicitors Act 1974, they produced a bill with an attached breakdown. The breakdown contained items totalling £99,804.91 plus VAT. The bill gave that figure, but then contained the words “Limited to the amount previously billed” and gave the figure of £73,320 plus VAT. Master Rowley decided that “the amount of the bill” for the purposes of section 70(9) was £73,320 plus VAT.

**(6)(c) Ground 3: Decision**

141. In my judgment, the key to the issue which arises under subsection 70(9) is the construction of subsection 70(9) and, in particular, the phrase, “the amount of the bill”. Since a bill of costs is a demand for payment, it is in my judgment plain that the amount of a bill is the amount demanded by the bill.

142. That conclusion is not inconsistent with any of the authorities. In particular, *Breyer Group Plc v Prospect Law Limited* was an example of a case in which a bill contained a demand for one amount, but also identified a larger amount which the solicitor contended that he could have charged. The decision of Master Rowley in *Breyer Group Plc v Prospect Law Limited* was that the amount of the bill in that case was the lesser amount demanded, rather than the greater amount which might have been demanded. It is, moreover, a decision on subsection 70(9) of the 1974 Act.

143. The older cases to which I have referred were decisions on section 37 of the 1843 Act, which was differently worded. I doubt whether *Re Paull and re Carthew* can be regarded as binding authority on the construction of a phrase which is not to be found in the legislation under which it was decided. However, unless it is a binding authority, *Farrell v Alexander* [1977] AC 59 is authority that, if the meaning of subsection 70(9) is clear (which I consider that it is), *Re Paull and re Carthew* should be disregarded. Indeed, *Bentine v Bentine* has left open the question whether, even if the decision in *Re Paull and re Carthew* would otherwise be binding, it should be disregarded.

144. In any event, I do not consider that my reading of subsection 70(9) of the Solicitors Act 1974 Act is in any way inconsistent with the relevant parts of the decision in *Re Paull and re Carthew*. In particular:

(1) The decision in *Re Carthew* turned on the construction of the particular bill at issue in that case. The Court of Appeal did not purport to lay down any general rule that a bill which said, in effect, “I could demand x, but I demand the lesser sum of y”, was a bill for x rather than y. On the contrary, it is implicit in the reasoning of Baggallay LJ that, if he had interpreted the bill in that case as saying “I could demand £83 3s 4d, but I only demand £78”, then he would have treated it as a bill for £78. He treated it instead as a bill which contained both a demand for £83 3s 4d and an offer (which was unaccepted and therefore of no effect) to compromise that demand if the client paid £78.

(2) Contrary to what is said in paragraph 7C-123 of Volume 2 of the White Book, I do not read *Re Carthew* as laying down a general rule that the words, “Say X” in a bill must always be disregarded. On the contrary, *Re Hellard & Bewes*

[1896] 2 Ch 229 is an example of a case in which the words, “Say X” were interpreted as meaning that the amount demanded was X (although the principal ratio of North J’s decision was that the document which contained the words, “Say £7 11s” was not the bill in that case).

(3) As for *Re Paull*, it appears that the only figure mentioned in the bill in that case was the figure of £361 19s 2d. The offer to accept less was separate from the bill, and so the bill remained a demand for £361 19s 2d.

145. It is clear from his judgment that the district judge was affected by what he understandably perceived to be a lack of clarity in the Defendant’s bill. It is a curious feature of this case that, while the Claimant contended that amount of the bill was £2,731.90 and the Defendant contended that it was £1,571.50, neither of those figures is stated in the bill.

146. Nevertheless, if one asks the question, “How much was being demanded by this bill?” the answer is clear. The Defendant was merely seeking by this bill to justify its retention of the £1,116 received from Aviva and the £455.50 deducted from the Claimant’s damages. The Defendant was not by this bill demanding payment of any more, and certainly not a further £1,160.40, from the Claimant.

147. Moreover, the Claimant was well aware of this fact. That is why she said in her points of dispute:

“The reality therefore is that the Defendant has charged legal fees of £1,571.50 (£1,116 of which was paid by the third party, and £455.50 by the Claimant).”

148. On that basis, I conclude that the amount of the bill was £1,571.50 and that the district judge was wrong to decide otherwise.

### **(7) Conclusion**

149. For the reasons set out in this judgment, I allow this appeal on grounds 1 and 3. I invite the parties to agree the terms of an order to give effect to my decision.

150. I offer my apologies for the time taken to complete this judgment, which is attributable to the exceptional demands on my time as a Presiding Judge during the period of the pandemic since the hearing of the appeal.

151. Finally, I express my gratitude to the solicitors and counsel on both sides for the care taken over the preparation and presentation of this appeal, which has been of considerable assistance to me.