Neutral Citation Number: [2021] EWHC 3383 (QB)

Case No: QA-2021-000059

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 December 2021

Before:

SIR ANDREW NICOL

- -

Between:

JAMES MURRAY	**Defendant/ Respondent**
- and -	
RICHARD SLADE AND CO LTD	**Claimant/ Appellant**

- -
- -

Benjamin Williams QC (instructed Richard Slade and Co Ltd) for the **Appellant**
Robin Dunne (instructed by **checkmylegal fees.com**) for the **Respondent**

Hearing date: 26th November 2021

- -

APPROVED JUDGMENT

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

....

SIR ANDREW NICOL

Sir Andrew Nicol :

1. This is the hearing of the appeal against the decision of Costs Judge Haworth brought with the permission of Stewart J.

2. For the appeal, I had the assistance of Costs Judge Simon Brown. However, as I explained to the parties, the appeal would be determined by me alone. Consequently, if there are errors in this judgment, the responsibility is mine alone.

3. Judge Haworth had to consider an application by the 1st Claimant (now Respondent. In the court below there was a second Claimant, Storm Loans Ltd, but Mr Murray is the effective party, and it is only him who is the effective Respondent to the appeal. I shall refer to him as ‘the Respondent’.) for the assessment of three bills rendered by the Defendant. I shall refer to Richard Slade and Co Ltd as ‘the Appellant’. The right to seek such an assessment is conferred by Solicitors’ Act 1974 s.70.

4. The bills were:

    i) Invoice 803534 dated 20th May 2018 for £20,000.03. (‘counsel’s fees bill’);

    ii) Invoice 803734 dated 25th January 2019 for 16,200.00 (‘Hodders’ fees bill’);

    iii) Invoice 803735 dated 25th January 2019 for £6,000 (‘costs of assessment’).

5. Before Judge Haworth it was agreed that the assessment of the third bill should be adjourned until the Judge gave his decision on the other two matters. It is therefore only the first and second invoices which were assessed by the Judge and which form the subject-matter of this appeal.

6. The first matter concerned litigation brought by the Claimant's parents seeking declarations that the parents were entitled to a share of the beneficial ownership of certain properties in the Claimant's name. This became known as the 'Murray claims' or the 'Shirley litigation'. I shall refer to these proceedings as 'the parental litigation claim'.

7. The second invoice related to the Hodder litigation and hence was usually referred to as 'Hodders' claim'. Occasionally, they were referred to as 'Alf', but I shall refer to them as the 'Hodders' claim'.

8. The Judge heard oral evidence from:

   i) Mrs Jan Preen, the Respondent's accountant and business partner,

   ii) The Respondent's costs lawyer,

   iii) The Respondent (the Judge made special arrangements for the Respondent when he gave evidence because the Respondent suffers from extreme dyslexia (see the Judge's decision [8] and [33]).

   iv) Richard Slade of the Appellant.

9. Oral evidence was given on 24th November 2020. Submissions were completed on 25th November 2020. The Judge reserved his decision which was handed down on 29th January 2021.

10. The Claimant succeeded in persuading the Judge that he should not have to bear the cost of counsel's fees in relation to the parental litigation. The Judge also accepted that it was the solicitors who had terminated the retainer and therefore he did not have to bear the costs of the Hodders' claim.

11. The solicitors are dissatisfied with the Judge's decision and it is they who are appealing.

12. It is convenient to take each of the assessed bills separately, though, as I shall show, the Respondent's position was that, in relation to Hodders, the two matters became linked in the correspondence between the parties.

Parental claims litigation/counsel's fees

The factual background

13. The parental litigation had been continuing for some time. The parents' claim was valued by them at some £700,000. This was a substantial multi-track case that was subsequently listed for trial in Central London County Court.

14. The Appellant agreed to act for the Appellant in relation to that matter on 22nd February 2016.

15. The Respondent complained to the Appellant of poor service and overcharging. As a result of these complaints (which concerned the Hodders' matter – see below) Mr Slade substantially reduced his firm's bill by some £7,000.

16. On 21st December the Respondent and Mr Slade met for lunch in a London restaurant where there was further discussion as to the parental litigation. The Judge recorded that Mr Slade proposed that all further work on the parental

litigation should be undertaken by his firm for a fixed fee of £77,000 (inclusive of VAT) Judge's decision [33].

17. Oral agreement was then reached as to the future terms on which the Appellant would act for the Respondent.

18. The outcome was an oral agreement as to the future charges which the Appellant would make for the parental litigation. The Judge found that the terms of that agreement were that (see [36] of the Judge's decision),

> "from 1st December 2017 to the end of the case the Appellant would charge the Respondent a fixed fee of £50,000."

This fee would be inclusive of counsel's fees and VAT (that the fee was to be inclusive of VAT accords with the bill which the Appellant rendered to the Respondent on 21st December 2017 and is in line with what the Judge said at [33] of his decision. At [36] the Judge said that the agreement was £50,000 *plus VAT.* This was not a discrepancy which featured in the appeal. To the extent that it matters, I shall assume that the agreed fee was inclusive of VAT). The fee was to cover the Appellant's services from 1st December 2017 to the end of the case. This was subject to an exception namely, 'that if [the Respondent] wanted a more senior barrister he would have to pay extra.' (see - [36] of the Judge's decision). The Judge also noted that it was important to the Respondent that 'the agreement reached in December 2017 was an all-in fee. This was based on the history of his dealings with the Appellant, his previous complaints and the need to achieve a bargain.' - see Judge's decision paragraph 36.

19. At that stage, it was envisaged that counsel would be a barrister who I shall refer to as 'counsel 1' (I have not named him since there were criticisms of his performance at one stage of the proceedings, but counsel 1, who was not a party to the proceedings, did not have an opportunity to respond. Mr Williams for the appellant also urged me to anonymise him. It was anticipated that his fees would be a total of £16,000 (£10,000 for the brief and four refreshers of £1,500 each. These are the figures given at paragraph 11 of Mr Slade's witness statement, quoted by the Judge at [12]. Later the Judge refers to the refreshers due to counsel 1 as being £2,000. But, if, as seems to be common ground, the total for counsel 1's fees was to be £16,000 the refreshers would have had to have been £1,500).

20. The parental litigation was cost budgeted. For the trial phase the approved costs budget was £25,740.

21. On 10th May 2018 there was a pre-trial review in the parental litigation. The Respondent was represented by counsel 1. The Respondent was unhappy with the way that counsel 1 had performed. An adverse costs order had been made against the Respondent as a result of that hearing. The Respondent considered that counsel 1 had been 'weak'

22. The Respondent spoke to Mr Slade on 10th May 2018. The Judge found that he made his unhappiness with counsel 1 clear and said to Mr Slade (see Judge's decision [37]),

> "You had better get this sorted out. You had better get this sorted."

23. The trial of the parental litigation was then imminent. On 10th May 2018 (this is the date in [38] of the Judge's decision, although at [26] the Judge quotes paragraph 26 of Mr Slade's witness statement which gives the date of the negotiation with the clerk to Mr Frances Moraes as 16th May 2018). Mr Slade telephoned the clerk to Mr Moraes and instructed Mr Moraes to represent the Respondent at the forthcoming trial of the parental litigation.

24. In relation to the parental litigation, the Judge defined the preliminary issue which he had to decide in [33] as, 'whether Mr Moraes was instructed by [the Respondent] or on [the Appellant's] own initiative.'

25. The fee negotiated by Mr Slade for Mr Moraes' services was £25,000 plus VAT. This was an inclusive fee (i.e. there were no additional refreshers due if the trial went into a second or subsequent day or days).

26. In [38] the Judge answered the question which he had posed for himself in [33] as follows,

> "The evidence points to Mr Slade instructing Mr Moraes on 10th May of his own volition without authority from the client which he did not seek until 7 days later, shortly before the trial." (Judge's decision [38]).

27. On 16th May 2018 Mr Slade emailed the Respondent to say that he had lined up a new barrister for the parental litigation.

28. There was a conflict of evidence as to whether the Respondent and Mr Slade spoke to each other on the telephone on 17th May 2018. The Judge found that they did speak on that day (see Judge's decision [39]). However, there was no attendance note or confirmatory email or letter regarding that call and the Judge

rejected the evidence of Mr Slade that Mr Slade had specifically discussed the instruction of Mr Moraes, his fees and the impact of this on the amount that the Respondent would have to pay (an additional £15,000). The Judge did not accept that the Respondent had specifically agreed to the instruction of Mr Moraes.

29. The Respondent replied on 18th May 2018 and said that he gave permission for Mr Slade to negotiate with their barrister up to £30,000 (although he thought that would not be accepted). He added,

> "I would like to know what the new barrister thinks of the whole case."

30. The parental litigation settled before trial on 18th May for £30,000. There was no trial.

31. The Respondent refused to pay the additional cost of instructing Mr Moraes which led to his claim for the parental litigation fees to be assessed.

32. In the course of the assessment, the Judge was referred to CPR r.46.9 which says,

> "(1) 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 Services 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.
>
> (2) Section 74(3) of the Solicitors Act 1974 applies unless the solicitor and client have entered into a written agreement which expressly agrees to

payment to the solicitor of an amount of costs greater than that which could have recovered from another party to the proceedings.

(3) Subject to paragraph (2), costs are to be assessed on the indemnity principle 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.

(4) ….”

33. The Practice Direction to Part 46 of the CPR at paragraph 6.2 says

‘The presumptions in r.46.(3) are rebuttable.’

34. At [40] of his judgment the Judge found that the fee which had been negotiated with the clerk to Mr Moraes was unusual in that it was a fee which included refreshers. The fees for the trial had been cost budgeted at £16,000. The Judge

also found that it would have been obvious to Mr Slade that, if the Respondent were to succeed in the parental litigation, the additional costs of instructing Mr Moraes would be irrecoverable. The Judge considered that Mr Slade had been the author of his own misfortune because he had not recorded his attendance on the Respondent on 17th May 2018 and by failing to confirm his instructions in a letter or email to the Respondent.

35. At [43] of his judgment, the Judge referred to *McDougal v Boote Edgar Esterkin* [2001] Costs LR which had been a decision on RSC O.62 r.15.2 but which the Judge said was now reflected in CPR r.46.9(3). Holland J. (who had given the judgment in *McDougal)* had stressed the need for any approval by the client to be ‘informed’.

36. The Judge concluded this aspect of the assessment by saying at [44],

> “Consequently, Mr Slade has not complied with CPR r.46.9(3) and in that respect the additional counsel’s fee is irrecoverable from [the Respondent]. Consequently, any additional costs incurred in relation to the instruction of counsel over and above to the fixed fee agreement between [the Respondent] and [the Appellant] on 21st December 2017 are disallowed.”

The Appellant’s grounds of appeal in relation to the parental litigation decision

37. It is convenient to quote Mr Williams QC’s grounds in full:

> “1. The Judge was wrong to find the fees for counsel were ‘unusual’ in nature or amount. In particular (but without limitation):

(a) the *inter partes* budget is not determinative of costs which are usual or unusual as between solicitor and client.

(b) the *inter partes* costs budget does not in any event set an allowance for counsel's fees: the court's approval of the budget relates to the overall total for phase. The amount estimated for counsel's fees did not constrain the amount which might have been recoverable in respect of counsel's actual fees *inter partes* 'unusual'.

(c) The Judge failed to have regard to his own factual findings which were to the effect that there had been a change to more senior counsel very shortly before trial as [the Respondent] had been dissatisfied with the performance of previous counsel at the pre-trial review. In those circumstances and where more senior counsel had to read-in and prepare for trial at short notice, it was inevitable (rather than 'unusual') that the fee for counsel would exceed the sum in the *inter partes* budget.

(d) a fee of £25,000 plus VAT for Chancery counsel called in 1985 to read-in and prepare for a 5-day trial at short notice was not an unusual fee.

2. Even if the Judge was right to find that the fees of counsel were 'unusual' in nature or amount, he was wrong to apply the presumption of unreasonableness provided for in r.46.9(3)(c). In particular (but without limitation):

(a) The presumption can only apply in circumstances where there is a recovery of costs *inter partes* on which there is a shortfall due to the 'unusual' nature or amount of the relevant fees. Here there was no recovery of *inter partes* fees, so the presumption in r.46.9(3)(c), so the presumption in r.46.9(3)(c) was irrelevant.

(b) Even if counsel's fees were 'unusual' because they exceeded the amount in the estimated budget, it did not follow that those fees ought not to have to be recovered between the parties so as to engage the principle of unreasonableness. The amount estimated in the costs budget does not limit the amount recoverable *inter partes*; that is only a function of the phase total. The phase total for trial, £25,740 was sufficient to cover counsel's actual fees.

3. Even if the Judge was right that the presumption of unreasonableness in CPR r.46.9(3)(c) was *prima facie* applicable to counsel's fees, he was wrong nonetheless to apply it. As a matter of law, the presumption is rebuttable. The Judge should have held that the presumption was rebutted on the facts of the case *inter alia* where the change to more senior counsel resulted from [the Respondent's] instructions and that change led an increase in fees for the trial.

4. Even if the Judge was right to reduce counsel's fees for trial in [the parental litigation], he was wrong to limit it to the estimated brief fee of £10,000 plus VAT which had formed the basis of part of the workings for the *inter partes* budget. The relevant index point was the phase total, not any individual sub-component of the phase total and the phase total was £25,740 plus VAT."

38. As can be seen from paragraph 3 of the grounds and as Mr Williams explained in his skeleton argument, the Appellant considered that the Judge had (implicitly) found that the Respondent had instructed the Appellant to instruct more senior counsel. Mr Williams argued that must have been the case, otherwise the Judge's discussion of the presumption would have been otiose, as would his reference (in [43]) to the need for any approval by the client to 'informed'. However, Mr Williams' skeleton for the appeal anticipated that that assumption might be controversial. The skeleton said that, if necessary, the Appellant would apply to amend the grounds of appeal to add the following, I assume as ground 6,

> "The costs judge failed to resolve a conflict of evidence as to whether (i) [the Respondent] had specifically instructed a change of counsel and (ii) to someone more senior. The Cost Judge should have found that [the Respondent] instructed both these things. Having made that finding, the Costs Judge should have found that the additional costs of more senior counsel were reasonably incurred."

39. The skeleton was dated 8th March 2021 and the Respondent has had notice of the intention of the Appellant to apply to amend since then or shortly after then, although it was only at the hearing of the appeal that Mr Williams actually made the application to amend the grounds of appeal.

40. That application was opposed by Mr Dunne for the Respondent. He submitted that it was far too late at the hearing of the appeal to apply to amend the grounds of appeal.

41. The application to amend is undoubtedly made late. However, it was trailed in Mr Williams' skeleton argument which the Respondent has had since, or shortly after, 8th March 2021. Mr Dunne very properly did not argue that he was prejudiced by the late application to amend (save that it was very late). In my judgment, late though it is, the application to amend the grounds of appeal should be granted.

The Appellant's submissions in relation to the parental litigation

42. The assumption behind paragraph 3 of the grounds of appeal was justified. If there had been no instructions from the Respondent with respect to the instruction of more senior counsel, the discussion of the presumption and the discussion of whether there had been *informed* consent would have been otiose. In addition, when the Appellant told the Respondent that new counsel had been lined up, the Respondent did not protest but said that he would like to know new counsel's view of the whole case.

43. It was plain from the Respondent's comment that he considered that counsel 1's performance had been 'weak' and his reiterated urging of the Appellant to sort his representation at trial that he was discontented with counsel 1 and wanted a more senior counsel instructed instead.

44. Alternatively, as per the new ground 6 the Costs Judge had no alternative but to conclude that the Respondent wanted the Appellant to instruct new and more senior counsel than counsel 1.

45. In any event, the presumption in CPR r.46.9(3)(c) had no application. This was because:

i) the presumption only applied, on its true interpretation, if there had been an *inter partes* assessment and certain costs had been disallowed because the costs had been unusual in nature or amount. In the present case, there had been no *inter partes* assessment. Although the rule was expressed in general terms, the second requirement for the presumption to operate (that the costs might be irrecoverable *inter partes*) only made sense if there was the prospect of an *inter partes* costs order. Further, a wider interpretation than that contended for by the Appellant would make no sense in a context where there was no power to make an *inter partes* costs order. If this is right, the client will only have an interest in contesting his or her own solicitor's costs if they have not been allowed on an *inter partes* assessment. Clients are always protected against unreasonable charges by their solicitor since, even on the indemnity basis of assessment (which is applicable to a solicitor/own client assessment) only reasonable costs can be recovered – see CPR r.44.3(1).

ii) In any case, Mr Moraes' fees were not unusual nor likely to be irrecoverable if there were an *inter partes* assessment. The costs judge had said that counsel's fees were unusual in two respects: (a) it was an all-in fee, rather than a brief fee plus refreshers if the trial went into a second or subsequent day, but the costs judge should instead have asked himself whether £25,000 was unusual for a 5-day trial where the counsel had been instructed at short notice. (b) the amount of the fees exceeded what was said to be the costs budget for the trial. But this approach was misconceived. What is approved by the costs budget is the total fees payable for each phase of the case. Here the total for trial was £25,740.

Furthermore, the costs budget is an estimate of what would be reasonable on a standard basis of assessment. Critically, that has to include a judgment as to the proportionality of the fees. But because solicitor/own client assessments are conducted on the indemnity basis, proportionality has no part to play.

46. In any case, Mr Moraes' fees could not be said to be unusual in circumstances where he had been briefed at the last moment on the client's request for a more senior counsel.

47. In any case as the rule and Practice Direction make clear, the presumption is rebuttable. The Costs Judge did not acknowledge this, but found that, because the presumption applied, therefore the fees for counsel should be disallowed. Had the Costs Judge correctly considered the issue, he would have been bound to conclude that the presumption had been rebutted.

Parental litigation: the Respondent's submissions

48. Mr Dunne began by recalling that it would only be in rare circumstances that an appellate court would depart from findings of fact made by a first instance judge. There was no basis for interfering her with Judge Haworth's findings of fact.

49. The Respondent's dissatisfaction with what had happened at the PTR was only partly due to the performance of counsel 1. The Respondent had expected Mr Slade to be present at the hearing. The Respondent believed that, if Mr Slade been present, the outcome might have been different. The Respondent had been

asked about his use of the phrase 'get it sorted'. He denied that he was wanting Mr Slade to instruct a new barrister.

50. The premise to paragraph 3 of the grounds of appeal was unjustified. The Costs Judge found that when Mr Moraes was instructed, the Appellant was acting on his own volition and without the client's instructions. When Mr Slade emailed the Respondent on 16th May, he did not say that, further to the Respondent's instructions, a new barrister had been lined up. At no stage did the Appellant explain that this would involve very considerable extra expense.

51. Mr Dunne argued that the presumption was not rebuttable.

52. If that was wrong and, in principle the presumption can be rebutted, there was nothing in the present circumstances to justify a rebuttal.

53. Mr Dunne had also submitted a Respondent's Notice which argued that there was an alternative basis on which the Costs Judge could, and should, have found that the counsel's fees should be disallowed. Mr Dunne relied on Solicitors Act 1974 s.67 which says,

> "A solicitor's bill of costs may include costs payable in discharge of a liability properly incurred by him on behalf of the party to be charged with the bill (including counsel's fees) notwithstanding that those costs have not been paid before delivery of the bill to that party; but those costs
>
> (a) shall be described in the bill as not then paid; and
>
> (b) if the bill is assessed shall not be allowed by the costs officer unless they are paid before the assessment is completed."

54. In the present case, Mr Dunne accepted that the costs that the bills described the fees of Mr Moraes as unpaid (and so s.67(a) was satisfied), but the costs were not paid before the assessment is completed. Thus, by virtue of s.67(b) the costs officer could not have allowed those fees.

Parental litigation fees: discussion

55. I start with the premise of ground 3.

56. I do not accept that the Judge implicitly accepted that the Respondent had authorised Mr Slade to instruct new and more senior counsel. As the Judge said at [36] of his decision the agreement for an all-in fee was important to the Respondent because, in part, of his previous complaint concerning the Appellant's fees on Hodders. There was an exception, namely if *the Respondent* wanted a more senior barrister, then he would have to pay the additional cost (my emphasis). But, on the Judge's resolution of what he saw as the preliminary issue in relation to the parental litigation, the Appellant had instructed Mr Moraes on his own initiative without his client's instructions. In those circumstances, it seems to me unreal to say that it was implicit in the Judge's decision that the Respondent had instructed the Appellant to instruct different and/or more senior counsel.

57. I do not consider that I am impelled to a different conclusion because the Judge referred to the presumption and to the need for *informed* consent. It may well be that exploration of these matters was unnecessary if, as I conclude was the case, that the Judge had determined that the instruction of Mr Moraes by the Appellant was totally without the Respondent's authority, but it is a common

device for a Judge to reinforce a conclusion to which he has come by reference to other matters which point in the same direction.

58. This was a careful decision by the Judge which dealt fully and sufficiently with all the issues he had to decide. In my view the suggested findings in ground 6(i) and (ii) were incompatible with his express findings and these were ones to which it was open to the Judge to come.

59. Before turning to the other grounds of appeal I note that at more than point of the grounds Mr Williams used the phrase ‘without limitation’. I have doubts as to whether this is, with respect to him, a proper formulation of grounds of appeal. It gives the impression that other matters, not included in the grounds might be relied upon. But that would be to subvert CPR r.52.21(5) that only matters contained in the appeal notice can be relied upon unless the Court grants permission to amend the grounds. Mr Williams recognised this when he applied to amend his grounds to add what I have called ground 6 In any event, with the exception of ground 6 (for which I gave permission) Mr Williams did not seek to rely on any other matters. It is not, therefore, necessary to resolve this issue, which, as Mr Williams said when this judgment was circulated in draft, I had not raised at the hearing.

60. I turn to ground 1. This overlooks the fact that the Judge’s decision that the fees for Mr Moraes’ services was ‘unusual’ did not rest the solely on the fact that the fees agreed with Mr Moraes’ clerk exceeded the budget for the trial phase. The Judge also found that the fee was unusual because it was an all-in fee for the trial as a whole. It was not divided (as is customary) between a fee for the brief and other fees for refreshers in the event that the trial went into a second or

subsequent day. While that would mean that the client was protected if the trial lasted longer than the projected number of days, it also meant that the whole fee would be payable if the case settled early (which was in fact what happened). In my judgment, a finding that the fee was 'unusual' was well within the permissible range of decisions to which this experienced Judge could come.

61. I turn to ground 2. I do not accept that rule 46.9 can only apply in the circumstances specified in this ground 2(a). Rule 46.9(1) begins,

> "This rule applies to every assessment of a solicitor's bill [with immaterial exceptions]"

62. Thus, the rule is general and, I agree with Mr Dunne that the rule is not limited in the way that the Appellant suggests. As for the point made in ground 2(b), this Judge would have been well aware that budgeted costs concern the particular phase of the trial, and he would have seen that the budgeted costs in this case for the trial phase was £25,740. But that figure had been arrived at taking account of counsel 1's fees. Again, it was open to the Judge to find that the payment of a further sum to different counsel was 'unusual'.

63. I turn to ground 3. I have already addressed the premise of ground 3, but I recognise that this ground also makes the point that the presumption was rebuttable. I agree with Mr Williams thus far and I reject Mr Dunne's submission that the presumption was in truth irrebuttable. That would be to convert the rule into a statement of law and would be contrary to the language of 4.46.9(3). The Practice Direction says in terms that the presumption may be rebutted and I consider that to be an accurate statement of the position.

64. However, while I go this far with Mr Williams, since, for the reasons I have given, I do not accept that the Judge considered that the Respondent had authorised Mr Slade to instruct another and more senior barrister, this does not take the Appellant far enough. In short, while the presumption was rebuttable, there was no basis for finding that the presumption had been rebutted. Alternatively, it was open to the Judge to find that it had not been rebutted, as I find that the Judge implicitly did.

65. I turn to ground 4. I have already commented that the Judge would have been well aware that budgeted costs cover the particular phase of the case and that here the costs for the phase of trial was £25,740 plus VAT. Ground 4 argues that the Costs Judge was wrong nonetheless to make use of counsel 1's brief fee to limit the allowable recovery to £10,000 plus VAT, but in my judgment this part of the calculation was also well within the discretion or judgment which the Judge enjoyed.

66. I am not persuaded by the argument in the Respondent's Notice. As Mr Williams submitted, there would have been an opportunity in the interval between the Judge distributing his judgment in draft and the sealing of the Judge's order for the Appellant, if the decision on counsel's fees had been in their favour, to pay those fees and thus comply with Solicitors Act 1974 s.67(b).

Conclusion as to the parental litigation

67. Although I have not accepted the argument in the Respondent's Notice, it follows that I dismiss the appeal so far as it concerns the parental litigation.

Hodders' litigation the factual background

68. Hodders Law Ltd had previously been the Respondent's solicitors. The Respondent intended to bring a claim against them for professional negligence. He instructed the Appellant to act for him in this regard and, on 23rd August 2016 entered into a conditional fee agreement in relation to this matter.

69. The Respondent considered that the Appellant had made only slow progress with regard to this matter, and he complained about this to the Appellant in his letter of 14th June 2017 and again in December 2017. It was this which led the Appellant to reduce its fees by £7,000 (see above).

70. On 3rd July 2018 the Respondent and Mr Preen, his accountant and business partner met with Mr Slade. The Judge found that Mr Slade was solely focussed on the outstanding fees for counsel in the parental litigation matter rather than addressing the Respondent's concerns in relation to Hodders.

71. The following day (4th July 2018), the Respondent wrote to Mr Slade as follows,

> "Thank you for meeting with Mr C. Preen and me yesterday at your offices in London.
>
> Our concerns regarding the poor progress and lacklustre enthusiasm shown to date in the 'Alf' case [the Respondent referred to the Hodders' litigation as the 'Alf' case], plus conflicting explanations of the merits of the case and whether there is any case at all plus the demands for disbursements of £15,000 for the barrister and a previous payment of £10,000 for the expert's financial report relating to the Shirley Murray case [viz the parental litigation matter] were discussed.
>
> We have listened to your explanations regarding the following:

1. Disbursement charges re Murray of £15,000 and £10,000 respectively.

2. Release of files relating to the 'Alf' case and your assurances regarding future progress should we choose another solicitors' firm to take up the case.

and I have chosen the following course of actions.

Under the SRA regulations and your own professional regulations we have been requesting a complaint to be registered and resolved regarding the above matters and hereby give you notice that we intend to make a formal complaint to the SRA and ombudsman based on your written agreement (copy attached) with me, that a payment of £50,000 would be paid to cover all professional matters, disbursements and expenses regarding the Mrs Murray case. Based on this contract I should never have been charged the two invoices mentioned above. Further, full knowing that that I have specific disabilities, requiring me to have a third party present (noted throughout all matters by my word, email and in person) and previously accepted by you instructed by me (namely Mr Jann C. Preen) you failed to observe this accepted and agreed process, placing me in a very difficult position and thus taking advantage of my disability and by that obtaining an extra £10,000 payment followed by a demand for a further £15,000.

Your explanation was that in *your* opinion that an agreed 3rd party should *not* when discussing the extra charge was and is not acceptable based on your lack of knowledge and medical expertise regarding my life-long condition.

> Under the SRA regulations you have a duty of care to observe special needs and disabilities and in my opinion your actions have breached the laws regarding disability discrimination.
>
> I wholly and completely dispute the disbursements mentioned above and in order to avoid this matter being made formal; you release the 'Alf' file without caveat and remove the two disbursement charges and confirm that in writing within 5 working days of the date of this letter.
>
> I would also like to remind you that the 'Alf' case began in 2016 and has hardly progressed. [Respondent's emphasis]".

72. The Judge found that the retainer (I assume that the Judge was speaking of the retainer in the Hodders' matter) was not terminated by this email. Rather it was a complaint whereby the Respondent offered to have the files released on the basis that the Appellant dropped the claim for outstanding disbursements in the parental litigation matter.

73. So far as Hodders was concerned, the Judge defined the preliminary issue which he had to decide as whether the retainer had been terminated by the Respondent's email of 4th July 2018. In the Judge's view (see [46] of his decision) that email did not terminate the retainer. The email linked ('conflated' was the Judge's expression) the parental litigation and Hodders. It was a proposal that the files in Hodders should be released in return for the outstanding claims in the parental litigation being dropped.

74. The Appellant's reply to the Respondent's email of 4th July 2018 came in an email of 8th August 2018.

75. The Judge observed (at [47] of his decision) that the Appellant's reply did not state that the retainer had been terminated or advise the Respondent as to the potential consequences of termination of the retainer. The Judge said that the Appellant's response presumed that the retainer in Hodders continued to exist and referred to how it might be ended, not that it had already come to an end ([49] of the Judge's decision).

76. The Judge noted that the correspondence had continued in October 2018. The Respondent's costs lawyer had written on 3rd October 2018. They stressed that their instruction did not amount to a termination of the Appellant's retainer.

77. The Appellant responded on 11th October 2018 by saying that in relation to Hodders, the Respondent had terminated the retainer by demanding the return of his files.

78. The Respondent's costs lawyer wrote again on 16th October 2018 to which the Appellant replied on the same day. In the course of this reply, the Appellant said,

> "In relation to the Hodders matter we take it that our retainer has indeed been terminated. Please confirm."

79. On 25th October 2018, the Respondent's costs lawyer replied denying that the retainer in Hodders had been terminated.

80. On 26th October 2018 in a letter written by the Appellant without prejudice but which the Judge noted had been included in the papers for the assessment, the Appellant had commented that,

> "James either pays the draft bill in the Hodders matter and I transfer the files to a firm of his choosing or (if he wishes) continues to instruct my firm on the terms of the CFA. If the latter (which I do not encourage but will go along with if that is what he wants) some agreement will have to be made with Jan Preen who has to date sought to disrupt the course of my work for James to James' disadvantage."

81. Mr Williams objected to the inclusion of this 'without prejudice' document in the Judge's decision. He submitted that on an assessment, the solicitor was obliged to produce all his papers. However, as the Judge said, the document had been included in the papers which had been put before him. Mr Williams submitted that no inference of waiver of privilege which could be drawn from this since a solicitor facing a claim for assessment of his bill was anyway obliged to produce all of his papers. Whatever the merit of this argument, it seems to me that no objection was taken in the grounds of appeal to the Judge's use of this document. In any event, even setting aside the reference to this particular document, the Judge was entitled to say that the October correspondence was inconsistent with the view that the retainer in Hodders had been terminated.

82. As the Judge said, clause 14 of the CFA dealt with termination and made provision for payment in the event of termination. The Judge said at [57], that the Appellant was conflating two issues,

> "First the alleged disbursements in [the parental litigation] which had been raised as interim statute bills and secondly the complaints in Hodders. In my judgment there was no basis whatsoever for [the Appellant] to terminate the CFA on any ground of failure to pay costs. Any sums owed could only

> relate to [the parental litigation] and could not relate to Hodders. [The Appellant] had not given [the Respondent] any notice of any breach of his responsibilities under the provisions of the CFA in any event."

83. The Judge added at [58]

> "I accept [the Respondent's] evidence that [he] and the [Appellant] were negotiating a complaint which was caused by the [the Appellant's] poor service. At no time did [the Appellant] advise the [Respondent] that the request he had made in his email of 6th July 2018 [this would appear to be a typo for the Appellant's email of 4th July 2018] would cause the retainer to be terminated or advise him of any consequences thereof. Furthermore, the [Appellant] accepted in the 2018 correspondence that the retainer continued. They then terminated the retainer at an unknown date for an alleged repudiatory breach without setting out the terms of that breach or providing [the Respondent] with notice."

84. In relation to the Hodders' matter the Appellant's grounds of appeal were as follows,

> "The Judge was wrong to find that the Appellant wrongly terminated the retainer in *Murray v Hodders*. In particular (but without limitation),
>
> (a) The Judge was wrong to find that the Appellant's retainer had not previously been terminated by [the Respondent]. On 4th July 2018 [the Respondent] wrote making (spurious) complaints

about its conduct of the claim in *Murray v Hodders* intimating a complaint to the SRA and demanding the release of its files relating to the case. As a matter of law, this email constituted a termination of the Appellant's retainer, entitling it to bill [the Respondent] for work done to date.

(b) Alternatively, the Judge should have found that that [the Respondent's] conduct on and after 4th July 2018:

(i) Entitled the Appellant to terminate its own retainer for cause, whereupon it legitimately billed [the Respondent] for work done prior to termination; or

(ii) Constituted a repudiatory breach of contract by [the Respondent] which the Appellant accepted whereupon it legitimately billed [the Respondent] for work done prior to the breach.

(iii) Signified an irretrievable breakdown in the necessary relation of trust and confidence between the Appellant and [the Respondent], entitling the Appellant to cease acting for and bill [the Respondent] for work done to date."

85. Mr Williams elaborated on his grounds of appeal in line with his skeleton argument. He also submitted that the Judge had misunderstood some of the correspondence which he had erroneously considered was discussing the Hodders matter when it had actually been taking about the parental litigation.

86. Mr Dunne expanded on his skeleton argument. He emphasised the importance of the issue as to whether a CFA had been terminated and the need to be quite clear about this in any correspondence. The Judge was entitled to conclude that there had been no termination here by the Respondent, nor had there been any repudiatory breach by him. There had been complaints by the Respondent both in relation to the parental litigation and in relation to Hodders. Indeed, the Appellant had also linked the resolution of the two issues. The Judge had been right to say that the Respondent had linked the two issues, but his offer of a means to resolve both had not been accepted by the Appellant.

Hodders: discussion

87. In my judgment, there was no material misunderstanding of the evidence by the Judge. He was right to say that both the Appellant and the Respondent linked the issues regarding the parental litigation and Hodders.

88. In my view the Judge was also entitled to reach the factual conclusions that he did. Mr Williams argued that his grounds of appeal involved matters of law which an appellate court would (and should, if wrong) overturn with less circumspection than findings of fact. Put baldly, that is right. But, as is so often the case, conclusions as to the law, can (and in this case do) rest on factual conclusions. In my view the Judge's conclusion as to what the Respondent did is an example of such a finding.

89. Put another way, in my view the Judge was entitled to find that the Respondent had neither terminated the Conditional Fee Agreement nor done what amounted to a repudiatory breach of that agreement. Nor do I agree with the Appellant that the correspondence showed an irretrievable breakdown in the necessary relationship of trust and confidence. In modern times, solicitors have to accept that complaints (whether of poor service or as to fees) go with the territory of professional practice.

90. I consider that the Judge's findings in this regard were reinforced by the correspondence in October 2018, even if, the 'without prejudice' email is disregarded.

Conclusion as to Hodders

91. The appeal in relation to the Hodders' matter is dismissed.

Overall conclusion

92. It follows that this appeal is dismissed.