IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 253 (LC)
Case No: RA/3/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – procedure – whether an expert witness was acting on a conditional fee arrangement – whether declarations made in an expert report were accurate - an expert witness's obligation to the Tribunal to act independently - whether success-related fees are compatible with that obligation – the procedure for dealing with possible breaches of an expert's obligations to the Tribunal or of a professional code of conduct

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE VALUATION TRIBUNAL FOR ENGLAND

BETWEEN:

GARDINER & THEOBALD LLP **Appellant**

and

MR DAVID JACKSON (VO) **Respondent**

Re: 227-233 Tottenham Court Road,
London. W1T 7QG

The Hon. Sir David Holgate, President, and Mr A J Trott FRICS

Royal Courts of Justice, Strand, London WC2A 2LL
on
26 June 2018

The Appellant was unrepresented
The Respondent was unrepresented
Mr Christopher Lewsley instructed by Colliers International Rating UK LLP for themselves and Mr Damien Clarke BSc, MRICS

The following cases are referred to in this Decision:

Aquilina v Havering LBC (1993) 66 P & CR 69
BPP Holdings Ltd v Revenue and Customs Commissioners [2017] 1 WLR 2945
Derby & Co. Ltd v Weldon The Times 9 November 1990
Faraday v Carmarthenshire County Council [2004] EWCA Civ 649 [2004] 2 EGLR 5 [2004] RVR 236
The "Ikarian Reefer" [1993] 2 Lloyd's Rep. 455
Re J [1990] FCR 193
Johnston v TAG Farnborough Airport Ltd [2014] UKUT 490 (LC); [2016] RVR 50; [2015] JPL 367
Keen v Worcestershire County Council (LCA/44/2001) 26 November 2001
The Kingsbridge Pension Fund Trust v Downs [2017] UKUT 237 (LC); [2017] L & TR 31
Polivitte Ltd v Commercial Union Assurance Co. plc [1987] 1 Lloyd's Rep. 379
R v (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No.8) [2003] QB 381
R (Hamid) v Secretary of State for the Home Department [2012] EWHC 3070 (Admin)
R (Sathivel) v Secretary of State for the Home Department [2018] 4 WLR 89
Whitehouse v. Jordan [1981] 1 WLR 246

DECISION

Introduction

1. This decision is concerned with important matters of principle affecting the conduct of experts, including surveyors, who undertake the vitally important role of providing expert reports and evidence in appeals or references before this Tribunal. Does the obligation to declare a success-related fee arrangement apply to remuneration not only for services as an expert witness, but also for services provided by that expert (or the practice for which he or she works) other than as an expert witness, whether before or during the currency of those proceedings? To what extent may success-related fees be compatible with an expert's obligation to the Tribunal to act independently?

Factual background

2. On 25 November 2009 Gardiner & Theobald LLP ("the appellant") instructed Colliers CRE as it then was[1] ("Colliers") "to provide a comprehensive rating service" in respect of a portfolio of properties, including an office at 227-233 Tottenham Court Road, London W1 ("the subject hereditament").

3. The subject hereditament was entered in the 2010 local non-domestic rating list at a rateable value of £2,300,000. Colliers made a proposal on behalf of the appellant against this assessment on 9 August 2010. The valuation officer ("VO") did not consider the proposal to be well founded and so it was referred to the Valuation Tribunal for England ("VTE") as an appeal. The VTE dismissed the appeal on 19 December 2016.

4. On 13 January 2017 the appellant sent a notice of appeal to the Tribunal. Colliers International was named as the appellant's representative, acting through Mr Damien Clarke BSc (Hons), MRICS, Head of London Rating. He signed a declaration accepting responsibility for the conduct of the appeal as the appellant's agent.

5. Mr Clarke submitted the appellant's statement of case on 13 March 2017. Paragraph 5 stated that the hereditament was held under a lease for a term of 20 years which commenced on 19 August 2009 at an initial rent of £2,527,382 per annum. The lease was dated 24 August 2009. The appellant contended that the VTE had been incorrect to conclude that the passing rent supported the VO's assessment in the list and that the valuation should instead be based upon an established "tone of the list". The appellant said that the correct rateable value was £1,710,000.

6. The VO's statement of case was dated 18 April 2017. Paragraph 11 disputed the appellant's case that the passing rent was not useful and that a tone of the list had been established. The VO

[1] Now known as Colliers International Rating UK LLP

also said that the passing rent had been agreed after the market crash of late 2008, and therefore after the antecedent valuation date ("AVD") of 1 April 2008, and thus undermined the case that the rateable value entered in the list was excessive.

7. On 18 April 2017 the Tribunal directed that the appellant should file and serve any reply to the VO's statement of case within one month and that both sides should file and serve reports by their respective experts within 2 months thereafter.

8. By emails sent on 12 May, 6 June and 12 July 2017 the VO requested details of rental evidence from Mr Clarke, including a copy of the lease of the subject hereditament and any agreement for that lease. Mr Clarke did not respond to these emails. He says that Colliers International did not have copies of any of the documents requested by the VO, but he did not pass on the requests for these documents to the appellant. Plainly these documents were relevant and Mr Clarke ought to have asked his client to provide them so that he could pass them on to the VO.

9. The VO provided the report of his expert (Mr Mark Paterson) dated 25 July 2017. Paragraph 42 of the report referred to the letting from 19 August 2009 and stated that according to the property press a pre-let had been agreed in September 2007. Mr Paterson stated that any such agreement would carry great weight in relation to rental evidence and that requests for the documentation to be disclosed had not been answered.

10. However, Mr Clarke did not provide his expert report at this stage. Part of his purported justification for an extension of time until 30 September 2017 for the service of his report (which he put before the Tribunal in an email dated 31 July 2017) was that the VO had requested him to provide the lease documentation on the hereditament and he had been "hoping to shortly provide a copy of the original documentation to [the VO]". He sought to explain why the Tribunal directions had not come to his attention and added: "I was mistakenly under the impression that the exchange of information between, and the request of further information from the VOA, was continuing in a genuine effort to resolve this case". The Registrar granted the extension of time sought.

11. The appellant filed Mr Clarke's expert report dated 28 September 2017. In section 4 of his report he explained why he took the view that the decline in global markets had become well established before the AVD. In section 5 he continued to take the view that the passing rent from 19 August 2009 was of no help in determining the rateable value for the hereditament in the 2010 list. He relied instead upon rating assessments on comparable properties and arrived at a valuation of £1,790,000, slightly higher than the figure which had been put forward in the appellant's statement of case. Notwithstanding the clear indication that Mr Clarke gave to the Tribunal in his email of 31 July 2017 that the lease documentation which had been requested by the VO would be provided, it was not in fact supplied with the report or discussed in the report. Mr Clarke simply fell back on the line which he had put forward in his statement of case dated 13 March 2017, which, of course, pre-dated those requests and his email to the Tribunal on 31 July 2017.

12. In para. 34 of his first witness statement (dated 22 February 2018) Mr Clarke states that after he had filed his report he contacted Mr Paterson to see whether the appeal could be settled by agreement but the VO "was not prepared to engage in any meaningful discussions". That is hardly surprising given that Mr Clarke himself had told the Tribunal in his email of 31 July 2017 (which had been copied to Mr Paterson) that the provision of the lease information requested by the VO would form part of a "genuine effort to resolve this case" and yet Mr Clarke had still failed to provide that information.

13. On 20 November 2017 the Tribunal wrote to the parties to make arrangements for the listing of the appeal. The letter raised the question whether the parties had completed disclosure. On 22 November 2017 the VO responded that while he considered the case to be ready for hearing he still would like to make an application requiring the appellant to disclose a copy of the lease of the hereditament, noting that three previous written requests had been made to Mr Clarke, but the documentation had not been supplied. This email was copied to Mr Clarke. It does not appear that he replied to the Tribunal.

14. On 22 January 2018 the hearing was listed to take place on 11 and 12 April 2018 before a judge and member of the Tribunal. The letter stated that "if a copy of the lease to the appellant referred to in the Valuation Officer's letter of 22 November 2017 has not yet been supplied by the appellant to the Valuation Officer, the Tribunal should be informed". On 25 January the VO responded to the Tribunal that the appellant had still not supplied a copy of the document, and had given no indication as to when it would be, or whether there was any issue with securing a copy. Mr Clarke accepts that he received this response, that he had not previously shown the appellant any of the various requests for the documentation or otherwise asked to be given copies and, even at this late stage, that he did not pass on this request to his client (see for instance para. 40 of his first witness statement). The only explanation for not immediately contacting the appellant about the disclosure issue was that he had arranged to meet the client on 29 January 2018. He had also arranged to meet Mr Paterson on 31 January to produce a statement of agreed facts, if a settlement could not be reached.

15. Paragraph 41 of Mr Clarke's first witness statement merely says "On 29 January 2018 I met with the Appellant to explain the progress of the case." Having read Mr Clarke's evidence as a whole (together with the witness statement of Mr James Morris – see below), it is apparent that the Appellant was not then told anything about the outstanding request for disclosure, or simply asked to supply the documentation which had been requested by the VOA over 8 months previously.

16. Mr Clarke says that he was expecting to negotiate a settlement of the appeal at the meeting on 31 January 2018 and that he was surprised to find Mr Paterson unwilling to discuss this (para. 42 of Mr Clarke's first witness statement). However, it will be plain from the earlier communications summarised above that that stance should not have come as any surprise at all. Mr Clarke also says Mr Paterson stated that he would need to make a formal request to have copies of the lease documentation (para. 43). It is difficult to see why that step should have been thought necessary by any one. Given that there was no proper basis for this longstanding request to be resisted, and indeed the Tribunal had been led to believe by Mr Clarke some 6 months

beforehand that the documentation would be provided to the VO (see email of 31 July 2017), he ought to have taken immediate steps to contact his client as a matter of urgency to ensure that the lease documentation was disclosed without any further delay.

17. On 5 February 2018 the Tribunal gave notice that a case management hearing would be held on 15 February 2018 before the Deputy President at which the appellant's explanation why a copy of the lease had not been supplied would be considered before deciding whether or not to strike out the appeal. Mr Clarke accepts that he received this notice. It was at this point that he requested his client for the first time to supply a copy of the lease, although it appears that the first attempt to do so on 6 February 2018 was unsuccessful and had to be repeated on 8 February. The appellant then promptly supplied a copy of the lease electronically at 4.18pm on 8 February, the very same day. Mr Clarke did not attempt to forward this material to the VO until 5.30pm on 9 February, but the delivery of that email failed (paras. 44 to 53 of Mr Clarke's first witness statement).

18. At 2.20pm on 8 February 2018 Mr Paterson had repeated his request for a copy of the agreement for the lease. This request was repeated again at 3.21pm on 14 February. At 5.38pm Mr Clarke sent an email to the appellant asking it for the first time to provide a copy of this document. Once again, the appellant responded promptly. They arranged for a courier to deliver a hard copy to Colliers' office before 5pm on 15 February (paras. 51 and 58 of Mr Clarke's first witness statement).

19. Mr Clarke did not attend the hearing on 15 February having mistakenly gone to the wrong building (paras. 59 to 61 of the first witness statement). The Deputy President made an unless order striking out the appeal unless by 22 February 2018 the appellant provided (1) to the VO copies of the agreement for lease in 2007 and its annotated plans and floor area calculations for the hereditament and (2) to the Tribunal and the VO a witness statement from Mr Clarke "explaining why the requests made by the [VO] for disclosure of the lease of the appeal premises and the agreement for lease pursuant to which it was granted were neither complied with nor met with a reasoned objection". The reasons given for the making of the order stated that it had been obvious since at least the VO's report dated 25 July 2017 that the terms of the agreement under which the hereditament had been let were an issue in the appeal and that:

> "In the absence of a proper explanation the only inference open to the Tribunal from the manner in which the appeal has been conducted is that Mr Clarke is seeking to obstruct the fair resolution of the appeal to the appellant's advantage."

In the event of the witness statement being lodged the order provided for a further case management hearing to be held if considered necessary.

20. The VO confirmed that he had received a copy of the lease on 14 February and a copy of the agreement for lease (together also with the appellant's floor area calculations) on 19 February (para. 66 of Mr Clarke's first witness statement). It transpired that the agreement for lease had been executed as far back as 17 August 2007.

21. Because the appellant was concerned about the making of the unless order, it instructed Mayer Brown International LLP to advise. On 22 February 2018 they gave notice of acting as Solicitors for the appellant in the appeal. Later that day they filed Mr Clarke's first witness statement together with a bundle of supporting documents. In para. 67 of his statement Mr Clarke stated:-

> "I have seen from the Tribunal's reasons for its order dated 15 February 2018 that the Tribunal is concerned that my failure to have provided the documents requested by the Respondent supports an inference that I have been seeking to conduct the proceedings unfairly and in favour of the Appellant and that my impartiality as an independent expert is impugned. Reviewing what I have written above, I can see painfully clearly that there have been many occasions when I have not taken, or taken in good time, the steps which ought to have been taken, in particular my handling of the Respondent's requests for documents. I am extremely sorry for the situation which has arisen as a result and I accept that my expectation of a settlement has led me to pay insufficient attention to the conduct of the litigation. In the most recent period, after 31 January 2018, there have been other complications including email errors and the timing of my holiday. But the mistakes I have made were not referable to any desire or attempt on my part to obstruct the fair disposal of the appeal. I assure the Tribunal that the thought of doing such a thing has never crossed my mind, and I apologise for the fact that my conduct of the litigation has created a different appearance."

22. On 7 March 2018 the appellant made an application to the Tribunal to change its expert because it had lost confidence in Mr Clarke. The application was supported by a witness statement from Mr James Morris, a solicitor at Mayer Brown. On 13 March 2018 the Deputy President approved a draft consent order allowing the appellant to call an alternative expert in place of Mr Clarke. However, that change made it necessary also to order that the substantive hearing fixed for April 2018 be vacated. On 22 March the Tribunal listed the substantive hearing to take place on 12 July 2018. A fresh expert report for the appellant was then filed supporting a rateable value of £1.9m. On 13 June 2018 the Tribunal approved a consent order settling the appeal by reducing the rateable value in the 2010 list from £2.3m to £2.08m and the trial date was vacated.

23. Paragraph 26 of Mr Morris's witness statement set out one of the reasons given by the appellant for its loss of confidence in Mr Clarke, and which gave rise to the hearing before us:

> "Thirdly, Mr Clarke has signed two declarations stating that he is not acting on a conditional fee arrangement, when in fact this is not the case. In the Appellant's statement of case dated 26 March 2013 to the Valuation Tribunal, Mr Clarke said: 'I confirm that I am not instructed under a conditional fee arrangement.' He made the same declaration in his expert report dated [28] September 2017 before the Upper Tribunal. Until the end of January 2018, Colliers' work for the Appellant was entirely based on a conditional fee arrangement. At the end of January 2018, the Appellant agreed with Mr Clarke that his work for the appeal itself should be charged on a time charge basis, but I understand that this was to be additional to the conditional fee which Mr Clarke expected to receive based on any savings which might be achieved for the Appellant through the appeal process. My

client and I do not know Mr Clarke's reason for signing the declaration, twice, in the form in which it appears."

24. Section 8 of Mr Clarke's report dated 28 September 2017 had contained a series of declarations which included the following:

> "I confirm that I understand and have complied with my duty to the Upper Tribunal (Lands Chamber) as an expert witness which overrides any duty to those instructing or paying me, that I have given my evidence impartially and objectively, and that I will continue to comply with that duty as required."
>
> "I confirm that I am not instructed under any conditional or other success-based fee arrangement."
>
> "I confirm that I am aware of and have complied with the requirements of the rules, protocols and directions of the Upper Tribunal (Lands Chamber)."
>
> "I confirm that my report complies with the requirements of RICS – Royal Institution of Chartered Surveyors, as set down in the RICS practice statement Surveyors acting as expert witnesses."

25. On 19 March 2018 the Registrar wrote to Mr Clarke at the direction of the Deputy President to invite his response to para. 26 of Mr Morris's witness statement. The Tribunal asked (inter alia) whether the matters stated therein were true and, if so, any explanation for them. Because of the potential seriousness of the issue the letter asked for any response to be received by 9 April and to be supported by a statement of truth. Mr Clarke was informed that the Tribunal might wish to arrange for a hearing to consider the matter.

26. Mr Clarke provided a second witness statement dated 6 April 2018 disputing the correctness of para. 26 of Mr Morris's statement. In para. 22 Mr Clarke stated:

> "It is clear to me …. that my expert witness work in respect of both the Valuation Tribunal and the Upper Tribunal hearings has not been undertaken by reference to any success-related fee, that my statements to the Tribunal are true and …..".

The documents evidencing the contractual arrangements between Colliers and the appellant were appended to the statement.

27. On 19 April 2018 the Registrar wrote to Mr Clarke again because of a potential concern that the documents produced by Mr Clarke appeared to provide that Colliers' "entitlement to a significant success fee for *all work done before the appeal to the Tribunal* (with the exception of work done in connection with the VTE proceedings) is made conditional on the outcome of the appeal itself" (emphasis added). If that were correct, then there remained concerns about the

accuracy of the declarations given by Mr Clarke and the Tribunal would wish to consider dealing with any incompatibility between such an arrangement and the duties of an expert witness giving evidence to the Tribunal in a published decision. However, before taking any further step the Tribunal gave Mr Clarke and Colliers the opportunity to make further representations. For that purpose, a hearing was listed on 26 June 2018 at which they could appear personally or through counsel or another legal representative. The letter stated:

> "The only matter to be considered at the hearing will be the declaration of compliance made in your expert report of [28] September 2017."

28. Colliers filed a third witness statement by Mr Clarke dated 12 June 2018 (to which a small correction was made by letter dated 25 June 2018) in which he sought to explain in more detail the fee arrangements between the appellant and Colliers.

29. At the hearing Mr Christopher Lewsley of counsel appeared for Colliers. We are grateful to him for his skeleton argument and assistance. Mr Clarke was also present. Colliers produced a hearing bundle containing (inter alia) copies of Mr Clarke's three witness statements and his expert report to the Tribunal; the witness statement of Mr Morris; Colliers' letters of instruction, standard terms of business, scope of instruction and fees (signed by the appellant); and copies of relevant emails and correspondence. The Tribunal gave Mr Lewsley the opportunity to deal with the factual background as well as the points of principle raised.

The basis of Colliers' instructions

30. On 2 July 2009 Mr Donald Baker, a director of Colliers CRE, wrote to Mr Andrew Pollard of Gardner & Theobald enclosing "terms of engagement to challenge the rating assessments on the attached property portfolio and to provide a comprehensive rating service to your company". The letter made it plain that the terms of engagement related to the lifetime of the 2010 rating list. The key provisions set out under the heading "Valuation and Appeal Service" were:

> "The following fee charge for the comprehensive rating valuation service covers the completion of 'Requests for Information' from the Valuation Office Agency, general rating advice during the life of the 2010 List, the re-measurement of the floor space, the service of compiled list and Material Change of Circumstance appeals (after consultation with you and analysis of the relevant rental evidence and other information), negotiation with Valuation Officer, recommendations on the conclusion to the appeals.
>
> On this basis our fee would be based upon [a percentage[2]] of total savings for the period of the 2010 List, exclusive of VAT, based on a no win, no fee basis.
>
> The fee basis is inclusive of all expenses, disbursements, fees and costs incurred, except where specifically agreed with you."

[2] Details of the actual fee amounts have been redacted for reasons of commercial confidentiality.

31. The letter enclosed Colliers' standard terms of business and a document headed "Appendix B: 2010 Rating revaluation - Scope of Instruction and Fees". Mr Baker asked Mr Pollard to sign and return one copy of Appendix B so that Colliers could commence their instruction. These documents were said to "outline in detail our agreed fee breakdown and duties to be carried out by Colliers CRE".

32. The letter further stated:

> "Our fees will become due after each case has been finalised, agreement forms signed, Tribunal Decision issued or assessment altered as a result of our representations.
>
> …
>
> The terms of the enclosed 'Standard Terms of Business' shall apply to our agreement, but Appendix B and the Scope of Instruction shall prevail where there is any inconsistency."

33. The standard terms of business, insofar as relevant to the present matter, state:

> "2.0 FEES
>
> 2.1 Our fees are as stated in the Instruction Letter
>
> …
>
> 2.4 Additional Work
>
> Where we are required to undertake additional work outside the agreed scope of the Services additional charges will be made by arrangement."

The "Instruction Letter" is defined in clause 1.4 as the letter of instruction, proposal or tender which was sent with the terms, i.e. the letter from Mr Baker dated 2 July 2009. Clause 1.4 continues:

> "In the event that there is any conflict between the terms set out in this document and the terms set out in the Instruction Letter the terms in the Instruction Letter shall take precedence."

"Services" are defined in clause 1.5 to mean "the specific services set out in the Instruction Letter and any other services which we agree in writing to provide."

34. Appendix B defines Colliers CRE's duties at clause 1. These are similar to those contained in the letter of instruction. Clause 5 deals with "Additional Services" and states:

> "The following matters are outside the parameters of these instructions but Colliers CRE can provide such additional services on request.
>
> - Attendance at and the presentation of a case to the Valuation Tribunal.

- The preparation of a case and the attendance of a Director or Senior Valuer as Expert Witness on behalf of the Client at the Lands Tribunal.

- …

The above will be subject to individual instructions and the prior agreement of additional fees."

35. Clause 7 of Appendix B deals with fees and states:

"The fee basis as calculated below is inclusive of all expenses, disbursements, fees and costs incurred, except where specifically agreed.

Compiled List Appeal:

Our fee is based upon [x%] on the first [£y] savings and [z%] of the remainder of the total savings for the period of the 2010 List, based on a no win, no fee basis.

…

The Client will be billed after each case has been finalized, agreement forms signed, Tribunal Decision issued or assessment confirmed… All fees and charges are exclusive of Value Added Tax…"

36. Attached to the scope of instructions was a copy of the then RICS, IRRV, RSA Rating Consultancy Code.

37. Mr Baker signed Appendix B on behalf of Colliers on 29 October 2009 and Mr Pollard signed on behalf of the appellant on 25 November 2009. Before the agreement was concluded Mr Pollard sent an email to Mr Baker on 21 October 2009 suggesting that the first day of attendance at the VTE should be included in the (conditional) fee rather than as an "extra" to it. Mr Baker replied on 24 October:

"The rule associated with appearing before a court as an expert witness prevents a fee to be based on an incentive basis so I am unable to agree with your suggestion."

Mr Pollard replied on 28 October that the appellant was happy to proceed on that basis.

38. Mr Clarke emailed Mr Pollard on 24 November 2016, the day before the VTE heard the appeal against the compiled list assessment of the subject hereditament, to say that it had not been possible to settle the appeal and that it was "my intention to appear tomorrow to present our case". He went on to say:

"I must confirm that I am not representing you under an incentive based fee. Accordingly to satisfy the tribunal procedures and to cover some of the cost of my time to prepare and appear at tribunal on your behalf I would suggest a nominal fee of £ …. plus VAT."

Mr Pollard accepted this proposal and Colliers subsequently presented an invoice for the agreed sum as their fees for preparing their submission to the VTE and appearing at the hearing.

39. Following the VTE's dismissal of the appeal and the submission of an appeal to the Tribunal, Mr Clarke met Mr Pollard and others on 25 January 2017 to discuss fees. At that meeting Mr Clarke proposed a fixed fee of £…. plus VAT for "my initial expert witness work" (para. 12 of Mr Clarke's third witness statement). Mr Clarke says in his second witness statement (para. 21) that this proposal was verbally agreed at a meeting on 29 January 2018 (i.e. a year later) with Imelda Moffat, the successor to Mr Pollard as the appellant's general counsel. Mr Clarke also states that between those dates he proceeded on the basis that his proposal would be accepted by the appellant.

40. But Mr Clarke also says that a further meeting was to be arranged after 31 January 2018 "to agree fees for my further work in this case, including attendance at the Upper Tribunal." In the event, that meeting did not take place. We also note that the appellant states that this work was to be paid on a time charge basis (see para. 23 above). For the purposes of this decision, it is unnecessary for us to resolve any differences between the appellant and Mr Clarke on whether his fees in this Tribunal were to be paid as a fixed sum or as timed charges, or a mixture of the two, and we do not do so.

41. We are told that the only fee in fact charged to the appellant by Colliers was the fixed fee agreed in respect of the VTE hearing (para. 21(b) of Mr Clarke's second witness statement).

42. On 16 February 2016 Mr Pollard signed a scope of instruction for Colliers to undertake a similar range of services in connection with the 2017 local non-domestic rating list. Although these arrangements are irrelevant to the issue raised at the present hearing in relation to Mr Clarke's declarations in the 2010 list appeal, we note that the list of services now includes:

> "Where necessary representation at Valuation Tribunal or Upper Tribunal (Lands Chamber) where recommended and agreed with the client prior to the hearing."

This and the other defined services are to be paid for on the same conditional fee basis as agreed previously (see para. 35 above). So far as expert witness work is concerned (as distinct from representation at a tribunal) the scope of instruction states:

> "In some instances where agreement cannot be reached by negotiation it may be necessary to pursue the appeal to Valuation Tribunal hearing. Under the provisions of the RICS professional guidance Surveyors Acting as Expert Witnesses (4th Edition), where attending the Tribunal in the capacity of an Expert Witness, any conditional fee arrangement is incompatible with the duty of impartiality and independence. As such in advance of any appearance at Tribunal an appropriately revised fee basis will be agreed with the client."

43. In the present case it would appear that the drafting of the terms of engagement in 2009, which applied to a substantial part of the rating work undertaken by Mr Clarke on the appeal hereditament, had been dealt with by Colliers International and by other colleagues. Mr Clarke

was responsible specifically for agreeing the separate fee of £1,000 plus VAT for the representations and appearance before the VTE and for negotiating the fixed fee of £10,000 plus VAT for his work in the proceedings in this Tribunal up to the preparation of his report as an expert witness. However, these fixed fee arrangements only dealt with remuneration for work carried out as an expert in the appeals to the VTE and this Tribunal. They did not purport to cover work which had been undertaken outside the scope of that role, for example surveying, valuation work and negotiations with the VO before any appeal process began. The terms of engagement contained no suggestion that if an appeal should be initiated, whether in the VTE or in this Tribunal, Colliers would no longer be entitled to their success-related fee as remuneration for their original services (as defined in the letter of instruction and Appendix B), or that they would not be entitled to any remuneration at all for that work, or that it would be remunerated in some other way (eg. by being rolled up in the subsequently agreed fixed fee).

44. In para. 19 of his second witness statement Mr Clarke explained his understanding of Colliers' terms: -

> (i) Fees for rating valuations based on success governed only professional services undertaken up to and including referral to the VTE;
>
> (ii) Attendance and presentation to the VTE and Lands Chamber fell outside any success-based fee and were to be the subject of individual instructions;
>
> (iii) Success-related fees were calculated for pre-Tribunal work as a percentage saving of the 2010 Rating List.

We note that his carefully expressed evidence did not exclude the possibility of both types of fee being recoverable, a fixed fee for a hearing before a tribunal in addition to a success-related fee for eg. work carried out before the appeal process began. That possibility was the direct focus of the question raised in the letter from the Tribunal dated 19 April 2018 (see para. 27 above).

45. Mr Clarke returned to this subject in his third witness statement. In para. 3 he referred to the letter of instruction dated 2 July 2009 in which Colliers had stated that their fees would become due after each case had "been finalised, agreement form signed, Tribunal decision issued, or assessment altered as a result of our representations". Mr Clarke said that this passage only defined the date when fees became payable and not the nature of the fees payable. He explained that a Tribunal decision might be issued *following a hearing* in which Colliers had offered no expert evidence, but had previously made representations to the VO. In para. 14(4) of his skeleton, Mr Lewsley made the same point.

46. Thus, according to Colliers' understanding of the fee arrangements, the initiation of an appeal to the VTE or to this Tribunal (leaving to one side for the moment the provision by Colliers of any services as an expert witness) would not bring to an end the firm's entitlement to a success-related fee for services covered by the letter of instruction and Appendix B.

47. Both Appendix B and Colliers' standard terms of business referred to the fees payable for work falling outside the services covered by the letter of instruction as "additional services". These additional services included work as an expert in an appeal before the VTE or Lands Chamber on a property to which the letter of instruction applied. Such fees were to be the subject of a further agreement and were described as "additional fees". There was no suggestion in the contractual documents that these additional fees would take the place of, or be substituted for, the conditional fee arrangement already in place in relation to the services defined in the letter of instruction and in section 1 of Appendix B.

48. Mr Clarke addressed "additional fees" for "additional services" in para. 7 of his third witness statement. He stated that: -

> "The use of the term "additional" to describe the fees for "additional services" cannot be taken to imply that they are "additional" to contingency fee"

The sole reason he gave for making that statement is that the conditional fee basis agreed with the client does not apply to the provision of expert evidence. But, as we have already noted, these two statements are not incompatible. Indeed, Mr Clarke goes on to contradict his initial assertion by giving two examples of situations in which "unconditional fees could be described as "additional" to conditional fees". The second occurs where Colliers reaches agreement with the VO that a rateable value on a property is excessive, but the parties cannot agree the exact amount of that excess. It is said that Colliers would be entitled to a conditional fee on the savings represented by the revised rateable value accepted by the VO in the Tribunal proceedings and an unconditional fee for expert evidence presented by Colliers in the Tribunal. Presumably, this example assumes that the VO's revised view has resulted from Colliers' "representations" (see letter of instruction).

49. Thus, it is plain that on Colliers' interpretation of its fee arrangements, the initiation of an appeal to the VTE or Lands Chamber would not bring to an end the client's liability to pay a conditional or success-related fee for services covered by the original instruction letter. That liability to pay a fixed fee for the services of an expert witness from Colliers co-exists with his ongoing responsibility to pay the conditional fee if the circumstances triggering that additional liability should occur.

50. Consistent with this reading of Colliers' terms and with para. 7 of Mr Clarke's third witness statement, Mr Lewsley accepted during his oral submissions that if, while an appeal is outstanding, Colliers should settle the matter by negotiating with the VO an agreed reduction in rateable value, the success-related fee would remain payable, in addition to any fee separately agreed for the work of Colliers' expert on the appeal.

51. We consider that on a proper interpretation of, in particular, the letter of instruction and Appendix B, there are circumstances in which both an unconditional fee for expert work in the appeal and a conditional fee for other work are both payable. The letter of instruction and Appendix B entitle Colliers to a success fee, namely a percentage of the total savings achieved

during the lifetime of the 2010 list, "once each case has been finalised, agreement form signed, Tribunal Decision issued or assessment altered as a result of our representations". This fee is "additional" to whatever fee is negotiated for the work in the appeal as an expert witness.

52. Although Mr Lewsley submitted that a conditional fee would not be payable where a rateable value is reduced by virtue of a tribunal decision on a contested appeal, it is difficult to see how that distinction can be justified given the broad ambit of the language used in Colliers' fee arrangements. The language used in the letter of instruction: -

> "Tribunal Decision issued….as a result of our representations"

is sufficiently broad to cover a situation where a tribunal decides to reduce a rateable value because it accepts "representations" made by Colliers in the appeal itself, and not simply a consent order made by a tribunal as the result of a settlement based upon representations by Collier in negotiations outside the appeal process.

53. However, even in the circumstances described by Mr Clarke and by Mr Lewsley, both a success-related fee and an unconditional fee would be payable. This potential entitlement to a success-related fee would continue whilst Mr Clarke was acting as an expert witness in this Tribunal by producing an expert report and disclosing relevant information. Furthermore, Mr Clarke has made it plain that while his client's appeal to this Tribunal was ongoing, he was seeking to negotiate and agree with the VO a reduction in rateable value in July 2017, September 2017 and January 2018. We conclude that if he had been successful in achieving a settlement during that period the agreed conditional fee would have been payable in addition to the fixed fee agreed for work in the appeal process.

54. It follows that Mr Clarke's declaration in his expert report dated 28 September 2017 that he was not then "instructed under any conditional or other success-based fee arrangement" was incorrect. True enough, no such arrangement applied to his work as an expert acting for his client in the appeal. However, it was incorrect to state then that he was not instructed under *any* such arrangement. Colliers' terms of engagement made it plain that if he had successfully negotiated a reduction in the rateable value, with a consequent saving during the lifetime of the 2010 list, then the conditional fee would have become payable.

55. Our conclusion is essentially concerned with the *objective* correctness of the declaration set out in section 8 of Mr Clarke's report. It is plain from his witness statements that Mr Clarke is well aware of the principle that he should not act as an expert in tribunal or court proceedings under an instruction providing for any conditional or success-based fee.

56. We should also record that in para. 13 of his third witness statement, Mr Clarke says that from the point when he was instructed to provide evidence to the VTE, he "had no *intention* of charging any conditional fee for any services already supplied or to be supplied to my client" (emphasis added). At the hearing before us on 26 June 2018 only Colliers and Mr Clarke were represented. No oral evidence was called and in any event no cross-examination would have

taken place. The hearing focused on the correct interpretation of Colliers' conditions of engagement, their compatibility with the declarations made to the Tribunal and the relevant Practice Statement of the RICS. For these reasons we make no findings about this part of the witness statement dealing with Mr Clarke's subjective intention.

57. Nevertheless, the response by Mr Clarke and by Colliers to the Tribunal's letter of 19 April 2018 (see para. 27 above) was unsatisfactory in a number of respects. First, the skeleton served on behalf of both of them contended that in that letter the Tribunal had misunderstood Collier's fee arrangements, relying on Mr Clarke's second and third witness statements. Yet that evidence gave at least one example of circumstances in which a conditional fee would have been payable, which we find rendered one of Mr Clarke's declarations incorrect (see paras. 48 and 54 above). So the Tribunal had not misunderstood the position. Second, it was accepted in oral submissions for Mr Clarke and Colliers in response to questions from the Tribunal that there was a second situation in which a conditional fee would have been payable, which, on our findings, also rendered that declaration incorrect (see paras. 50 and 54 above). Third, those oral submissions also sought to justify this particular fee arrangement on the basis that it would promote the settling of litigation and so would be in the public interest.[3] This attempt to advance positive support for the fee arrangement implied that Colliers should be allowed to continue with arrangements of this kind because they wish to do so. Otherwise, the submission would have been academic. Fourth, this arrangement ought to have been identified transparently by Mr Clarke and Colliers rather than revealed through questioning from the Tribunal, especially in view of the nature of the hearing which had been ordered. In these circumstances, we are left with the impression that the written responses to the Tribunal's letter of 19 April 2018 were not frank in all relevant respects. We find this troubling.

58. We note that in para. 3 of his skeleton argument Mr Lewsley submitted that it would be wrong to hold Mr Clarke individually or personally responsible for any deficiency in the drafting of Colliers' conditions of engagement. This aspect was not investigated during the hearing and so we make no finding about it. No doubt many surveyors and other experts, particularly those in larger practices, will operate on an assumption that standard form conditions will have been drafted by the practice so as to comply with the requirements of the tribunals before whom they appear and of the professional bodies to which they belong. In practice, an individual expert may not consider questioning the content of the standard conditions which are regularly used by the firm for which he or she works. But that cannot override or detract from the obligations which each individual expert personally owes, not only to the relevant tribunal or court, but also under any professional code of conduct. All these considerations only serve to emphasise the importance of a practice ensuring that its standard terms of engagement are drafted with care and clarity so that they do indeed comply with those obligations. Furthermore, individual experts must ensure that any specific terms agreed for individual cases, whether varying or supplementing the standard conditions of a practice, also meet the same requirements.

[3] We deal with this submission in para. 84 below.

The obligations and independence of expert witnesses

59. In view of the issues raised by the hearing it is necessary for the Tribunal to re-emphasise to all users the importance of the obligations owed by expert witnesses to the Tribunal, notably the duty of independence. We will also address the implications they have for success-related remuneration, access to justice and the regulation of compliance with those obligations.

60. The general rules governing procedure in this Tribunal are contained in Part 1 of the Tribunals, Courts and Enforcement Act 2007, the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (SI 2010 No.2600) and the Tribunal's Practice Directions dated 29 November 2010. In rating appeals these provisions are supplemented by the Local Government Finance Act 1988 and relevant delegated legislation, but they do not contain any explicit provisions dealing with an expert's independence and duties in proceedings before the Tribunal.

61. Rule 2(1) of the 2010 Rules sets out the "overriding objective" of the Rules, namely "to enable the Tribunal to deal with cases fairly and justly". Under rule 2(3) the Tribunal must seek to give effect to that objective when it (a) exercises any power under the Rules and (b) interprets any rule or practice direction. Under rule 2(4) the parties *must* (a) help the Tribunal to further the overriding objective and (b) co-operate with the Tribunal generally.

62. Rule 5(1) empowers the Tribunal to "regulate its own procedure".

63. By rule 16(1) the Tribunal may give directions as to (inter alia) whether the parties are *permitted* to provide expert evidence.

64. Rule 17 deals specifically with expert evidence. By rule 17(1): -

> "It is the duty of an expert to help the Tribunal on matters within the expert's expertise and this duty overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid"

65. Expert evidence is to be given in a written report unless the Tribunal directs otherwise (rule 17(4)). Such a report must: -

> "(a) contain a statement that the expert understands the duty in paragraph (1) and has complied with it,
>
> (b) contains the words "I believe that the facts stated in this report are true and that the opinions expressed are correct",

(c) comply with the requirements of any practice directions as regards its form and contents, and

(d) be signed by the expert."

66. Part 8 of the Tribunal's Practice Directions deals with expert evidence. Paragraph 8.2 deals with the form and content of an expert's report. Several of the provisions are based upon the requirement that an expert witness be independent and impartial.

67. In substance rule 17(1) of the 2010 Rules is identical to CPR 35.3 of the Civil Procedure Rules. CPR 35.10(2) is similar to Rule 17(5)(a) of the 2010 Rules. CPR 35.10(1) requires an expert's report to comply with Practice Direction 35. Paragraph 3.2 of PD 35 lays down requirements for the content of an expert's report which are similar to those contained in paragraph 8.2 of the Tribunal's Practice Directions.

68. The expert's duty to help the Tribunal, which overrides any obligation to the client (rule 17(1) of the 2010 Rules), connotes an obligation to act independently and without bias. The obligation is so similar to that in CPR 35.3 that it is helpful to refer to the related commentary in "Civil Procedure" (2018). Because this obligation is fundamental to the duty of an expert giving evidence in the Tribunal, it is appropriate to set out certain of the key principles summarised in The "Ikarian Reefer" [1993] 2 Lloyd's Rep 455: -

"1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (Whitehouse v. Jordan [1981] 1 WLR 246 at p. 256, per Lord Wilberforce).

2. An expert witness should provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within his expertise (see Polivitte Ltd. v. Commercial Union Assurance Co. plc [1987] 1 Lloyd's Rep. 379 at p. 386 per Garland J and Re J [1990] FCR 193 per Cazalet J). An expert witness in the High Court should never assume the role of an advocate.

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J *supra*).

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re J *supra*). In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole truth and nothing but

the truth without some qualification, that qualification should be stated in the report (Derby & Co. Ltd. v Weldon The Times 9 November 1990 per Staughton LJ).

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court."

69. Paragraph 35.3.4 of "Civil Procedure" (2018) summarises a number of decisions in which the implications of an expert's obligation to act independently have been examined. It is in this context that the courts have considered whether an arrangement for remunerating an expert witness by a success-related fee is compatible with that expert's obligations to the court in which he or she is acting, especially the obligation to act independently and impartially.

The decision in Factortame

70. In R v (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No.8) [2003] QB 381 the Court of Appeal discussed the duty of an expert witness in the civil courts to act independently (paras. 63 to 75). Having decided that the test for apparent bias should not be applied to experts the Court went on to say: -

"Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the Judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules."

On the subject of contingency fee arrangements, Lord Phillips MR (as he then was) stated (para. 73): -

"To give evidence on a contingency fee basis gives an expert, who would otherwise be independent, a significant financial interest in the outcome of the case. As a general proposition, such an interest is highly undesirable. In many cases the expert will be giving an authoritative opinion on issues that are critical to the outcome of the case. In such a situation the threat to his objectivity posed by a contingency fee agreement may carry greater dangers to the administration of justice than would the interest of an advocate or solicitor acting under a similar agreement. Accordingly, we consider that it will be in a very rare case indeed that the Court will be prepared to consent to an expert being instructed under a contingency fee agreement."

The courts have not subsequently departed from those views. They are also reflected in para. 88 of the Guidance for the Instruction of Experts to Give Evidence in Civil Claims 2014 (see PD 35 para. 1).

71. In BPP Holdings Ltd v Revenue and Customs Commissioners [2017] 1 WLR 2945 Lord Neuberger PSC (with whom the other members of the Supreme Court agreed) stated at para. 23:

> "while it would be both unrealistic and undesirable for the tribunals to develop their procedural jurisprudence on any topic without paying close regard to the approach of the courts to that topic, the tribunals have different rules from the courts and sometimes require a slightly different approach to a particular procedural issue."

Whether the same or a different approach should be taken to a particular issue as the courts have taken, is a matter primarily for this Tribunal and the Court of Appeal, in the light of the statutory framework and rules under which the Tribunal operates (paras. 24-26).

72. The extent to which the *approach* in Factortame should be applied in this Tribunal has not been argued in the present case. If and when this issue does arise for decision, the Tribunal may be asked to hold that that approach should be applied to conditional or other success-related fee arrangements entered into by expert witnesses or the practice for which they work, at least for cases dealt with under the Tribunal's standard or special procedures.[4] We can envisage that the Tribunal will be asked to address a number of important issues. As Lord Phillips MR indicated, the position of a barrister or solicitor should not be confused or elided with that of an expert witness. The Tribunal decides cases on the evidence before it. An advocate (or an instructing solicitor) does not give evidence, but an expert witness does. It is the role of the Tribunal to evaluate that evidence and in doing so bring its own specialist expertise to bear upon it. The use of that expertise entitles the Tribunal to take a different approach to that put forward by the parties where it considers it appropriate to do so, subject to allowing the parties an opportunity to deal with that point where fairness would so require (Aquilina v Havering LBC (1993) 66 P & CR 69; Faraday v Carmarthenshire County Council [2004] EWCA Civ 649; [2004] 2 EGLR 5; [2004] RVR 236).

73. In many, if not most, cases before the Tribunal, both the data assembled by an expert in his evidence and the opinion he gives will be crucial to the outcome of the dispute for the parties, even if there are also factual disputes to be resolved in the decision. This issue embraces not simply the opinions which the expert gives, but also the information (eg. on the property, comparables, surveys, structural and engineering matters, planning history and so on) which he supplies and on which his opinion is based, and to which the evidence of the opposing party will react. A party to a dispute before the Tribunal might wish to oppose an opponent's reliance upon an expert remunerated by success-related fees because of the risk that poses to the objectivity of that expert and the uncertainty to which it may give rise about whether the expert has disclosed all that he should. An expert is obliged to provide information or knowledge (and not simply

[4] See paras. 3.2 and 3.4 of the Tribunal's Practice Directions – 29 November 2010

documents) which may go substantially beyond the scope of the disclosure obligations owed by his client and any solicitor involved, such "disclosure" generally involving only documents which are or have been in the control of the client.

74. A further consideration which the Tribunal will likely be asked to address is that the requirement for an expert to act objectively and independently applies not just to the stage when he is giving live evidence at a hearing. It applies to all stages of his involvement in the proceedings. It affects the initial exchange of information by an expert with his opposite number, the discussions they have to identify matters of common ground and the issues upon which they should focus, the preparation of their respective expert reports and further exchanges thereafter leading up to the agreement of a joint statement for the Tribunal. In some cases, an opinion expressed by an expert and the adequacy of the information he discloses may affect the work of experts in other disciplines which depends wholly or in part upon that information and opinion. If there were to be a lack of objectivity in any of these various stages, then it may be said that the administration of justice will be put at risk if that remains undiscovered before the Tribunal's decision is given. Even if it is discovered, it may also be said that there is a risk of time, work and costs being wasted, additional work becoming necessary and the proceedings delayed.

75. Some might argue that such concerns may be reduced in cases where each party in a case seeks to rely upon an expert remunerated by a success-related fee. Others may respond that these concerns would not disappear and that the Tribunal's task of achieving a proper and just outcome may be rendered more difficult, and unjustifiably so.

76. There may also be concerns about the suggestion that a conditional fee arrangement may be acceptable where a surveyor, or other expert, acts in a dual capacity both as an advocate and as an expert witness in the same case. There may be a justification for allowing such arrangements in simplified procedure cases[5] where access to justice could not otherwise be achieved. But doubts are likely to be expressed about the notion that conditional fee agreements are acceptable simply because they may be seen as attaching to the role of the advocate.[6] Even in straightforward cases, some might say that the role of the expert in providing relevant information to the other party and the Tribunal and in giving opinion evidence is just as important, if not more important, than the role of the advocate. Perhaps one solution might be to allow this type of arrangement only in a relatively simple case where it is shown to the Tribunal to be necessary in order to provide access to justice, because alternative measures would not achieve that purpose.[7] If so, there might also be a requirement for dedicated training requirements. But the Tribunal may need to be cautious even in such cases. For example, there are sometimes concerns about the objectivity and independence of an expert (whether acting in a dual role or simply as a witness) who provides services on a "no win, no fee" basis as part of an exercise to gather up a substantial number of low value claims, where the expert has a clear financial interest, not only in the single or limited number of cases

[5] See para. 3.3 of the Tribunal's Practice Directions. The simplified procedure provides a "no costs" regime (subject to certain exceptions) for cases where no substantial issue of law or of valuation practice or conflict of fact is likely to arise. It is often suitable where the amount at stake is small.

[6] See para. 102 below and PS 10.2 of the RICS's Practice Statement and Guidance Note: Surveyors acting as expert witnesses

[7] See para. 88 below

taken to a hearing, but in the many settlements which are expected to flow from those initial decisions.

77. We were not referred to any decisions of the Tribunal which have considered the implications of an expert witness being entitled to success-related remuneration. But from our own researches we note that the Lands Tribunal had encountered such a situation even before Factortame was decided. In Keen v Worcestershire County Council (LCA/44/2001)[8] the claimants sought compensation under Part 1 of the Land Compensation Act 1973 for depreciation in the value of their home arising from the use of a new by-pass. Evidence was given on their behalf by a surveyor who was also acting for more than 50 other homeowners with similar claims. The claimants' case was advanced as a lead case. The surveyor acted on a no win, no fee basis, but he did not disclose that fact to the Tribunal in his report; it emerged at the hearing (paras. 10 and 17). The Tribunal decided that no weight should be given to the surveyor's opinion evidence, because of his financial interest in the outcome of the reference (para. 50). But it should be noted that in Keen the Tribunal was given no opportunity at an earlier stage to consider whether the expert should be allowed to act as an expert witness on a conditional fee basis. Given that oral evidence was heard from both experts, it is not surprising that in those circumstances the Tribunal decided to deal with the issue as a matter of weight, rather than admissibility.

78. Nonetheless it might be argued that a possible alternative to the Factortame approach would be for the Tribunal to take into account the factors identified by Lord Phillips (and other issues referred to above) as going to the *weight* to be attached to an expert's report, rather than to its *admissibility*. Some might say that this would allow a more nuanced approach to be taken to the issues raised and would avoid an overly inflexible approach. One implication of this "weight approach" is that the Tribunal's reaction to the remuneration of an expert by a success-related fee would occur after the hearing, during the course of its evaluation of the evidence in the decision. In other words, it would occur at the end of the process rather than at an earlier case management stage. Some might argue that this would be advantageous because it would enable the Tribunal to form a view on the effect of the conditional fee arrangement in the light of the expert's handling of the proceedings throughout the case and the evidence in fact given. Others might respond that it would be preferable for all parties to know from an early stage whether remuneration on a success-related basis in that particular case is acceptable or not. By contrast, a party who is told early on that he may employ an expert on a success-related basis may not be very happy to discover at the end of the day that he has been unsuccessful, or not entirely successful, because the Tribunal decides to attach no weight to his expert witness on that ground (as in the Keen case).

79. There are other questions which would need to be addressed about the "weight approach". How could the Tribunal fairly and properly assess the weight to be given to the fact that an expert's entitlement to remuneration is dependent upon his client's case succeeding? For example, how could the Tribunal reflect the risk that the expert may not have provided all the information which he ought to have done, particularly in a case where this is an unknown and there are no specific pointers to the expert having breached his duty of independence to the Tribunal? Is it right that the opposing party should have to take part in litigation facing this risk of

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non-disclosure? What are the merits and demerits of the Tribunal having to evaluate these factors in its decisions?

80. These issues would need to be the subject of well-considered submissions following detailed research. We also raise them for consideration by, and discussion amongst, the Tribunal's users and the various professional bodies involved. No doubt there will be other matters to consider which we have not identified.

81. However, one thing is certainly clear. Whatever approach this Tribunal decides to adopt on the issues raised by Factortame, it remains wholly unacceptable for an expert witness, or the practice for which he or she works, to enter into a conditional fee arrangement, without that fact being declared (and in sufficient detail) to the Tribunal and any other party to the proceedings from the very outset of their involvement in the case. The Tribunal will treat such a failure as a serious matter.

The conditional fee agreement in the present case

82. In the present case no conditional fee arrangement applied to the services provided by Colliers for the appellant through Mr Clarke acting as an expert witness in the VTE and in this Tribunal. Those services were the subject of arrangements for the payment of fixed fees. However, for the services covered by the letter of instruction in 2009, Colliers were entitled to a success-related fee in the event of (inter alia) them agreeing with the VO an alteration of the rateable value in the 2010 list which reduced the appellant's liability for rates during the currency of that list, even if such an agreement were to be made at a time when Mr Clarke was acting as an expert witness for the appellant in its appeals to the VTE or this Tribunal.

83. For a number of reasons, we consider that the concerns expressed in Factortame about the implications for the independence of an expert witness apply equally to a conditional fee agreement of that nature. First, the expert witness, or the practice for which he works, has a direct financial interest in the assessment of the rateable value, whether determined by agreement with the VO or by a Tribunal decision. Second, that financial interest impairs or undermines the independence and impartiality required of that expert in the Tribunal's proceedings. There is a clear risk that an expert may fail to comply with his obligations to the Tribunal, because to do so would adversely affect the prospect of successfully negotiating and agreeing with the VO a reduced rateable value and receiving the conditional fee. For the reasons we have already given, we are not in a position to make adverse findings against Colliers or Mr Clarke in this respect. But the circumstances of the present case illustrate why the concerns raised in Factortame apply to *any* agreement for the provision of *any* service by an expert or the practice for which he works, where that person is acting as an expert witness in an appeal to the Tribunal, and the entitlement to the fee for that service is related to the outcome of the appeal, whether by a decision of the Tribunal or by the parties agreeing to settle the subject-matter of the appeal. An expert may fail to disclose to the other party and to the Tribunal information which should be disclosed but is adverse to the appellant's case (and hence the expert's financial interest), because he continues to expect or hope

that the dispute will be settled.[9] These same considerations apply to an expert witness acting in other types of case before the Tribunal (eg. compensation disputes) where the outcome is likely to be affected by that person's performance throughout the proceedings as an expert witness.

84. Mr Lewsley submitted that it should be acceptable for an expert witness (or his practice) to benefit from a conditional fee for services he provides in addition to acting as an expert in the Tribunal because there is a countervailing public interest, namely the encouragement of parties to resolve disputes which are the subject of litigation. On the submissions we have heard, we do not accept this line of argument. Not all attempts at settling disputes are successful. There is usually a risk of the Tribunal having to adjudicate upon a dispute once it has reached the stage of litigation. The availability of an independent determination promotes reasonable conduct by both parties in the negotiations. But the resolution of, for example, valuation disputes in this Tribunal usually depends upon expert evidence and upon those experts having discharged their obligations to the Tribunal, including the duty to act independently. The public interest in promoting the amicable resolution of disputes does not override the public interest in the proper discharge of an expert's obligations to the Tribunal. We would add that in the context of disputes about rateable value there is a particular public interest in this Tribunal being able to arrive at decisions based on expert evidence which is entirely independent, because many of those decisions are likely to influence assessments for other properties and thus the liabilities of other ratepayers.

Access to justice

85. The extent to which conditional fee arrangements are compatible with the proper discharge of an expert witness's obligation to the Tribunal to act independently and impartially also needs to be considered in the context of access to justice and the "overriding objective" in rule 2(1) of the 2010 Rules.

86. Rule 2(2) provides that "dealing with a case fairly and justly" includes "(b) avoiding unnecessary formality and seeking flexibility in the proceedings" and "(d) using any special expertise of the Tribunal effectively". These provisions are not contained in the overriding objective for the Civil Procedure Rules in CPR 1.1. On the other hand, Rule 2(2)(a) of the 2010 Rules refers to "dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties", a provision which is very similar to CPR 1.1(2)(d).

87. In order to facilitate access to justice by parties with limited resources, there may be good arguments for the Tribunal to allow conditional fee and other success-related arrangements in, for example, cases allocated to the simplified procedure provided that this is made known to the Tribunal and other parties from the outset and provided, that the expert concerned fully understands and complies with the obligations that he owes to the Tribunal and any relevant professional code of conduct. In such cases, the client would also need to appreciate that the Tribunal could take into account the fact that the expert had entered into a fee arrangement of this

[9] We consider that the circumstances of the present case should be considered by the RICS – see para. 106 below.

type, and therefore had an interest in the outcome of the case, when assessing the weight to be given to his or her evidence.

88. However, some might contend that financial constraints on access to justice can be addressed by other means. Litigants can make use of the more informal, "no costs" regimes under the simplified and written representations procedures.[10] In other cases, it is possible to apply for costs-capping orders (Johnston v TAG Farnborough Airport Ltd [2014] UKUT 490 (LC); [2016] RVR 50; [2015] JPL 367). In some compensation cases the acquiring authority may make advance payments towards litigation costs reasonably incurred. Alternatively, there may be good arguments for the introduction of a "fixed costs" procedure which uses costs limits (with or without a differential between the costs of the claimant and the respondent). There are examples of this approach in CPR Part 45 (see eg. Aarhus Convention limits for environmental law judicial reviews in CPR 45.41 – 45.44). It might be argued that the availability of these procedures should lead the Tribunal to refuse to accept the provision of expert evidence on a conditional fee basis, or to allow this only where it is shown that access to justice would not otherwise be possible.

89. Access to justice and the extent to which it should affect the issues raised by Factortame are matters which need to be considered in this Tribunal in conjunction with users and professional bodies.

Regulating compliance with the obligations of expert witnesses to the Tribunal

90. The Keen case illustrates why it is so essential that an expert witness declares from the outset whether he, or the practice for which he works, may receive a conditional or other success-related fee. That information is privy to the expert and his client. Without it other parties to the litigation and the Tribunal are in the dark. No assessment can be made as to whether the evidence of the expert should be admitted or, where in an exceptional case it is, how much weight, if any, may properly be attached to it.

91. The duty of an expert under Rule 17(1) "to help the Tribunal" dovetails with the overriding objective in Rule 2. It is, or should be, well-known that the finite resources of courts and tribunals are under great pressure. Those resources must therefore be used carefully. It is necessary to deal with each case in a manner which is proportionate to (inter alia) its importance and the issues involved. An appropriate share of the Tribunal's resources will be allocated to a case whilst respecting the need to allocate resources to other cases. If an expert fails to declare a conditional fee arrangement from the outset of his involvement in proceedings before the Tribunal, there is a clear risk of the resources of other parties and of the Tribunal being wasted. It will not be possible to deal at an early stage with any objection that the expert should not be allowed to act as an expert witness because he lacks the requisite degree of independence for the purposes of Rule 17(1). If the true position becomes known later on, time may be taken up by the Tribunal in having to consider and hear live evidence about the report (along with responses from the opposing party), only for that material to be excluded, or treated as having no weight.

[10] See paras. 3.3 and 3.5 of the Tribunal's Practice Directions

92. Some relief against these adverse consequences can be provided to other parties in the same litigation by an appropriate award of costs, but that will not address the adverse effects of delay. More importantly, this remedy would not help conserve the Tribunal's resources in the interests of all litigants. However, as was pointed out in The Kingsbridge Pension Fund Trust v Downs [2017] UKUT 237 (LC); [2017] L & TR 31 at para. 107, where it is thought that a professional representative or expert may have abused the Tribunal's procedures, through a serious failure to comply with its Rules or a related breach of a professional code of conduct, then the Tribunal may consider whether any further action should be taken. That may involve requiring a written explanation to be given by the professional concerned, holding a hearing to examine the issues involved, and referring the matter to the relevant professional body for further consideration, whether in relation to an individual case or more generally. Regrettably it has been necessary to introduce such hearings in the High Court (see eg. R (Hamid) v Secretary of State for the Home Department [2012] EWHC 3070 (Admin)).

93. More recently, the High Court has emphasised the importance of a solicitor complying with the duty of candour which he or she owes to the court (R (Sathivel) v Secretary of State for the Home Department [2018] 4 WLR 89). Experts owe a similar duty to courts and tribunals. The Hamid procedure, as recently refined in Sathivel, usually involves a requirement that the person responsible for the case explains why an issue should not be referred to a professional body, initially through a witness statement accompanied by a signed statement of truth, providing a "full, candid and frank response" to the issues raised (para. 97). The court may even refer a matter to a professional body without having previously held a hearing. However, it is not always necessary for a referral to take place. The Hamid procedure provides an opportunity for the person or practice concerned to put forward an explanation for what occurred, to identify what lessons have been learned and what action has been taken, and to give assurances about steps that will be taken in the future to prevent similar issues arising again. A statement of that nature may satisfy the court in some cases. A similar approach will be applied in this Tribunal.

94. This Tribunal relies heavily on the independence, diligence, expertise and skill of the wide range of experts who appear before it. The great majority of these experts discharge their obligations to the Tribunal impeccably. Accordingly, use of a Hamid type procedure should only exceptionally be necessary. However, the availability of this option, does reinforce the importance of all professional representatives and experts complying fully with their obligations to the Tribunal. Any notion that, by way of example, the inclusion and signing of an expert's declarations in his or her report is a mere formality, or something which may be dealt with perfunctorily, needs to be completely dispelled.

Codes of Conduct and the Practice Statement of the RICS

95. In section 8 of his report Mr Clarke made a further declaration in the following terms: -

> "I confirm that my report complies with the requirements of RICS – Royal Institution of Chartered Surveyors, as set down in the RICS Practice Statement Surveyors acting as expert witnesses."

96. Experts generally include in their reports a declaration that they have complied with the relevant provisions of their own professional code of conduct. The Tribunal considers this to be essential, and that the declaration must, of course, be correct. An expert must be able to demonstrate if necessary that he has complied with the relevant code of practice. The Tribunal also expects an expert to continue to comply with that code in so far as it may affect the proceedings before it.

97. If an expert considers there to be a good reason for departing, or for having departed, from the requirements of a code, and that may have a bearing upon the proceedings, the Tribunal would expect the expert to send that justification in writing to the Tribunal and other parties, so as to allow for any consequential case management decisions to be taken.

98. The fourth edition of the RICS's "Practice Statement and Guidance Note: Surveyors acting as expert witnesses" was published on 2 April 2014 and came into effect on 2 July 2014. It was the relevant code applicable to Mr Clarke's instruction as an expert witness in the appeals to the VTE and to this Tribunal.

99. Page 4 explains that a Practice Statement "provides members with mandatory requirements under Rule 4 of the Rules of Conduct for members". Paragraph 1.2 states that the Practice Statement with which we are concerned does not apply when a surveyor is acting in any capacity other than as an expert witness (see also para. 1.4). There is a separate Practice Statement entitled "Surveyors acting as advocates."

100. Paragraph 1.5 states that where a surveyor acting as an expert witness considers that there are special circumstances making it inappropriate or impractical for the instruction to be undertaken wholly in accordance with the Practice Statement, the fact of and reasons for the departure must, as soon as reasonably practical, be given in writing to the client, and must also be included in any expert witness report (unless the surveyor declines instructions or withdraws from the case). Before accepting any instruction to act as an expert witness, a surveyor must (inter alia) inform the client in writing "that this practice statement and the rules of the relevant tribunal will apply" and offer to provide the "client guide" version of the Practice Statement (PS 3.4).

101. PS 5.4(o) and (p) require a surveyor acting as an expert witness to include a signed statement of truth in his or her report and the declarations set out in the Practice Statement. The declarations contained in section 8 of Mr Clarke's report, certain of which we have set out in para. 24 above, were in the form specified by the Practice Statement.

102. PS 10 deals with "conditional fees" in the following terms: -

> "10.1 You should not undertake expert witness appointment on any form of conditional or other success-based arrangement including where those instructing you are engaged on such a basis.

10.2 It is inappropriate to be remunerated by way of a conditional fee arrangement when acting as an expert witness but it may be an appropriate fee basis when acting as an advocate. When acting in a dual role as an expert witness and advocate, where permitted in lower tribunals, a conditional fee arrangement may be acceptable because it will be seen as attached to the role of advocate. Such a dual role improves access to justice by reducing costs and therefore a conditional fee payment can be supported in these limited and strict circumstances.

10.3 When acting in a dual role and where a conditional fee arrangement has been agreed, this must be declared to the tribunal.

10.4 It is unlikely that a dual role will be permitted in higher tribunal formats and consequently previously agreed conditional fees when the surveyor has appeared in a lower tribunal will, at the point of transferring to the superior or higher tribunal, need to be commuted and replaced by an hourly rate or fixed fee arrangement."

103. Generally, the interpretation of the Practice Statement is a matter for the RICS. We did not seek any submissions from the Institution on that issue for the purposes of the hearing. Nonetheless, it is helpful to consider how the Factortame approach sits with the current Practice Statement. Mr Lewsley made submissions on the effect of PS 10.1 and 10.2.

104. We agree with Mr Lewsley that PS 10.1 plainly prohibits the remuneration of services as an expert witness by any form of conditional or other success-based fee. However, we do not agree with him that the first sentence of PS 10.2 goes no further than that. The language of PS 10.2 is broader and has the effect that when a surveyor is acting as an expert witness, he may not be remunerated by way of a conditional fee arrangement (i.e. a fee related to the outcome of the proceedings in which he is so acting), whether that fee is for his services as an expert witness or for other services. That interpretation is consistent with para. 1.2 of the Practice Statement and the ambit of the document. It accords with the rationale for the prohibition of conditional fee arrangements in the RICS's GN 19.1.

105. This interpretation of PS 10.2 also accords with the approach taken in PS 10.4. This states that even if in a lower tribunal a surveyor had been allowed to act in the dual roles of advocate and expert witness on a conditional fee basis, it is unlikely that he would be allowed to do so in a higher tribunal. Consequently, when proceedings begin in a higher tribunal, the conditional fees previously agreed for the appearance in the lower tribunal, will "need to be *commuted* and *replaced* by an hourly rate or fixed-fee arrangement" (emphasis added). Plainly the principle underlying PS10.4 is that it is impermissible for a surveyor to act as an expert witness in a higher tribunal, such as the Lands Chamber, on the basis that he may still be remunerated for other work by reference to the outcome of the case before that tribunal.

Conclusions

106. We have come to the clear conclusion that the Tribunal should send a copy of this decision to the President of the RICS so that the Institution may consider whether the decision has any implications for its Practice Statement, or more generally, and whether any further steps should be taken in relation to the circumstances of this case. These are entirely matters for the RICS.

107. If an expert's report contains declarations relating to the expert or to the report or its preparation which are materially incorrect, or appears to be in breach of any rule or code of conduct, the Tribunal is likely to refer the matter to that expert's professional body. The Tribunal may also consider taking that matter into account when making decisions on orders for costs.

Dated 3 August 2018

The Honourable Mr Justice Holgate
Chamber President

A J Trott FRICS
Member