Neutral Citation Number: [2024] EWHC 2157 (Ch)

Case No: CH-2024-000052

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

CHANCERY APPEALS (ChD)

ON APPEAL FROM THE ORDER OF COSTS JUDGE NAGALINGAM DATED 6 FEBRUARY 2024 (REF. SC-2022-APP-001089)

7 Rolls Building
Fetter Lane
London EC4A 1NL

Judgment date: 19th August 2024

STEPHEN JOHN FINNAN

Appellant

and

CANDEY LIMITED

Respondent

Before :

His Honour Judge Cadwallader

The Appellant in person

David Juckes (instructed by **Candey Limited**) for the **Respondent**

Hearing date: 3 July 2024

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JUDGMENT

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Approved Judgment

This judgment was handed down remotely at 10;00am on 19 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ Cadwallader :

1. This is my reserved judgment on the appeal from the decision of Costs Judge Nagalingam made on 7 February 2024, by which the Appellant was ordered to pay the Respondent, which is his former solicitors, the sum of £120,000 (inclusive of VAT) by 4pm on 19 March 2024, plus interest and costs.
2. By the Appellant's notice dated 26 February 2024 permission was sought to appeal the entire order, seeking an order that the conditional fee agreement between the parties is unenforceable and that the Respondent pay the costs of the claim; alternatively, if the agreement is enforceable, that the Respondent should not be entitled to interest for the period prior to the handing down of the judgment on 20 November 2023 alternatively prior to the decision made at the date of the consequentials hearing on 6 February 2024; or that the Respondent pay the Appellant's costs of the whole claim, or at least up until the Appellant declined the Respondent's offer of 26 June 2023, or up until judgment was handed down; or that there be no order as to costs.

Permission to appeal

3. By his order made on 1 May 2024 Richards J granted permission to appeal on 4 grounds out of the 22 raised.

   Ground 1-the Judge erred in construing the Conditional Fee Agreement ("**CFA**") in that, contrary to the Judge's conclusion at [132] and [133] of the Judgment, Clause 3 did not apply only where there was an order for the losing party to pay the Appellant's costs or if the underlying petition was settled on a "damages plus costs" basis. Accordingly, the CFA could operate to make the Appellant liable for fees calculated by reference to hourly rates other than in the circumstances specified in [132] of the Judgment (that is, where an order for the losing party to pay the Defendant's costs

arose, or the underlying petition was settled on a damages plus costs basis) with the £60,000 figure specified in Clause 4 being a payment on account of fees to be charged at hourly rates.

Ground 2 - the Judge erred in concluding that the CFA was a "contentious business agreement" that could be enforced under s. 61of the Solicitors Act 1974. The CFA provided for remuneration by reference to hourly rates which were not expressed with the precision required of a "contentious business agreement" -see *Chamberlain v Boodle and King* [1982] 3 All ER 188.

Ground 3 - the Judge erred by (i) declining to order an enquiry into the matters set out in s. 61(4B) of the Solicitors Act 1974 in relation to the Respondent's fees calculated by reference to hourly rates and/or (ii) declining to order an assessment of the Respondent's fees on the footing that the CFA was not a "contentious business agreement".

Ground 4 - the Judge erred in concluding that the CFA satisfied the conditions set out in s58(4) of the Courts and Legal Services Act 1990 in that: the CFA does not state any "percentage" of the kind specified in s58(4)(b); and/or, since the Appellant could be required to pay fees by reference to hourly rates (see Ground 1), s58(4)(b) does not require a simple comparison between £60,000 and the maximum £100,000 fee that could be charged. The £60,000 was a payment on account of fees to be charged at hourly rates. Therefore, the maximum limit set out in s58(4)(c) could be exceeded depending on the level of fees incurred by reference to hourly rates at the point any success fee became payable.

Renewed application for permission to appeal

4. The order provided, among other things, that if the Appellant sought permission to appeal on grounds additional to those for which permission was granted, he must

within seven days of receipt of the Order apply for a hearing to renew his application for permission to appeal. A hearing would then be listed before Richards J (if available) at the Rolls Building on a date to be fixed, with a time allowed of 1 hour.

5. The Appellant wrote to the Court on 7 May in relation to his ground 14 (for which permission had been refused on paper) inviting the Court to reconsider his application for permission to appeal on that ground at the start of this hearing. Under Practice Direction 52A, however, only a High Court Judge can give permission to appeal. Accordingly, I could not determine it, although I can determine the appeal on the grounds for which permission has been given, which was listed before me for a full day's hearing. The application for permission to raise the additional ground, and the appeal if permission is granted, do not need to be heard with the appeal on the other grounds. The Respondents need not be present or heard (and if they were, would not be likely to have their costs) on the renewed application for permission to appeal. At that hearing, therefore, I indicated that I thought I should proceed to hear the appeal only on the grounds for which permission had been given and adjourn the remaining application for permission to appeal to a High Court Judge. The parties agreed to this course.

The facts

6. The Appellant instructed the Respondent, a firm of solicitors, to act on his behalf in two sets of proceedings under s.994 Companies Act 2006 against his brother Sean. The Appellant and the Respondent entered into a written agreement dated 6 March 2018 which regulated their relationship and the fees payable. In particular, it provided

> "3. CANDEY will record time at rates between £150 (paralegals) and £700 (partners) per hour plus VAT. If the Proceedings are successful, in that a costs order is made in Stephen's favour and/or Stephen obtains any of the relief sought by the petitions, CANDEY will seek to recover their total hourly

rate costs as part of any judgment order or settlement. Stephen agrees that any settlement will be on a 'plus costs' basis.
4. Stephen will pay CANDEY £60,000 plus VAT on account of costs. If the Proceedings are successful, in that a costs order is made in Stephen's favour and/or Stephen obtains any of the relief sought by the petitions, Stephen will pay a further £40,000 plus VAT to CANDEY i.e. a total of £100,000 plus VAT. Stephen shall pay the appropriate amount no later than 12 months from the date judgment is handed down in the Proceedings together with interest at the rate of 8% per annum — except that interest shall not be payable if Stephen pays within 6 months of the date of judgment."

7. A settlement was achieved on the third day of the trial of the consolidated proceedings on terms contained in a Settlement Deed and Release dated 14 March 2018 which, in the event, did not include an *inter partes* order to pay costs. The Appellant was to transfer his legal and beneficial interest in shares in one company to Sean Finnan; Sean Finnan was to transfer his legal and beneficial interest in shares in another to the Appellant, and was to credit the bank account of that company so that the balance should not be less than £133,946.67; and Sean Finnan and two companies were to pay the Appellant the sum of £4m by instalments and provide security for that payment. The proceedings were stayed on those terms with no order as to costs.

8. The Respondent then invoiced the Appellant on 19 December 2019 seeking payment of £100,000 plus VAT ('**the first invoice'**). Mr Andrew Dunn was the lead solicitor of the Respondent in the underlying claim. He stated the invoice was an interim invoice and that a further invoice would follow. He sent the Appellant an email on 25 August 2021 which attached a final invoice ('**the second invoice'**) for £59,245 plus VAT. The second invoice was said to be

> "…payable in addition to £100,000 invoiced on 19 December 2019 in accordance with the CFA signed on 6 March 2018 and in accordance with the attached detailed narrative".

It was further described as

> "…a final invoice for all work up to and including 14 March 2018, excluding any costs for work done in relation to the bankruptcy of Sean Finnan and

enforcement of the March 2018 Settlement Agreement".

The covering letter stated the Respondent would commence legal proceedings without further notice if the Appellant did not pay the first and second invoices totalling £159,245 plus vat. A breakdown of costs drawn by Edward Strickland of Thomas Legal Costs for the entire £159,245 was attached.

9. The claim which was later issued sought enforcement of the agreement as a CFA under s. 61(2)(a) of the 1974 Act alternatively an assessment under s. 61(2)(b) of that Act, seeking payment of the first invoice and reserving the right to seek payment of the second invoice in the event the court set aside the CFA and ordered an assessment pursuant to s. 61(2)(b) of that Act. Before the determination of that claim, however, the Respondent formally withdrew the second invoice and made it clear no further invoices would be raised. What remained was the claim for £100,000 plus VAT; but if the CFA were set aside, the Claimant reserved the right to seek a traditional assessment of costs. The Defendant claimed it was invalid or unenforceable, alternatively that the conditions upon which he was required to pay fees to the Claimant had not been met.

The decision appealed

10. The decision under appeal was made at the hearing of a preliminary issue to decide the validity, enforceability and effect of the agreement dated 6 March 2018.

11. The Costs Judge decided that the agreement was a contentious business agreement in the form of a CFA. The Claimant had acted for the Defendant "in or for the purpose of proceedings". The fact that the agreement retained the ability to raise a charge on an hourly rates basis did not mean that a contentious business agreement had not been created. Although the Appellant had sought to set the agreement aside on the ground of dishonesty, unfairness and unreasonableness, the Costs Judge was not satisfied as to

any of those and declined to set it aside on those grounds.

12. He held that

> "…the intention of Clause 3 is to set out the circumstances in which costs could be recovered on an hourly rate basis only in circumstances where an order for the losing party to pay the Defendant's costs arose, or the underlying petition was settled on a damages plus costs basis…The intention of Clause 3 is to create a liability to pay costs on an hourly rate basis in the circumstances specified therein. It is thereafter a matter for the Claimant as to whether they wished to enforce that liability." [paras.132-133]

As to Clause 4 of the agreement, it

> "…required the Defendant to pay £60,000 plus VAT on account of costs, but does not specify by what date. The terminology of success is then, again, couched in the language of obtaining a costs order, or if any of the petitions sought are achieved. In either of those circumstances, a further £40,000 plus VAT is payable. Clause 4 also provides for up to 12 months from judgment being handed down to pay the sums owed under the agreement." [para. 134]

Clause 5 of the agreement related to disbursements, rather than costs.

13. The agreement was consistent, and the parties had agreed that the Defendant would pay no more than £100,000 plus VAT save in the circumstances set out in Clause 3; £60,000 on account and £40,000 on success. He held that the settlement agreement reached by the Appellant triggered the obligation to pay the additional £40,000 plus VAT, and it was those obligations to which the first invoice related. The intention was always to give the Appellant value and certainty:

> "The intended effect of the agreement was that the Defendant would pay the Claimant no more than £100,000 plus VAT, with £60,000 plus VAT to be paid on account and £40,000 plus VAT to be paid upon certain outcomes being achieved, but to be otherwise waived if none of the reliefs sought in the petition were achieved or no order for costs in Mr Finnan's favour were made (such that recovery under Clause 3 was activated)."[para. 148].

14. He did not accept that raising the second invoice created a liability to pay a success fee in excess of 100%, because the additional £40,000 was not in truth a success fee but a specified additional sum in the event that certain specified outcomes were achieved;

and the agreement did not refer to a success fee; when the Respondent first asked the Appellant to pay more than £100,000 plus VAT it had been a request to pay on a voluntary basis; and even if Mr Finnan had paid the sums in the second invoice they would for the purposes of the Courts and Legal Services Act 1990 have formed part of the base costs under the CFA, being, not costs which were contingent on a certain success, but representative of the costs over and above £100,000 plus VAT actually incurred by the Respondent. But even if the CFA had permitted a success fee to be recovered, the amount payable on success would have been less than the base costs incurred [para.150]. He considered the agreement not to be unfair and not unreasonable within s61(2)(a) of the 1974 Act and ordered the Appellant to pay the £100,000 plus VAT with credit for any sums already paid on account. The reference in Clause 4 to payment within 12 months of a judgment included payment within 12 months of a settlement.

15. Accordingly, he ordered the Appellant to pay the Respondent £120,000 (inclusive of VAT) by 4pm on 19 March 2024, plus interest and costs.

Appeal

16. As this is an appeal, my role is limited to a review of the decision of the lower court, and the appeal will be allowed only if I conclude that decision was wrong.

Ground 1

17. Clause 3 of the agreement contains an obligation on the part of the Respondent to record time at hourly rates and, in certain circumstances, to seek to recover costs so recorded from Mr Finnan's opponents. The circumstances are stated to be that the proceedings are successful, in that a costs order is made in his favour and/or that he obtains any of the relief sought by the petitions.

18. Clause 4 provides for Mr Finnan to pay £60,000 plus VAT on account of costs, and a

further £40,000 plus VAT in the event of success (in the same sense of success).

19. The Costs Judge found there to have been an agreement, as well, that while the Appellant would be liable under Clause 3 the Appellant need never actually pay the Respondent more than the £60,000, or in the event of success, £100,000, plus VAT; and that to the extent that the excess, if any, was not recovered from the opponents, it would be waived as against him. There is no basis for disturbing that finding.

20. As he expressed himself in paragraph [132], the Costs Judge might seem to have considered that costs could be recovered from Mr Finnan on an hourly rate under Clause 3 only where an order or agreement had been made for the losing party to pay the Respondent's costs; that is, that he considered that costs could not be recovered from Mr Finnan otherwise, even where he obtained any of the other relief sought by the petitions. However, it is clear from the context (and in particular paragraphs [131] and [133]), that he did not consider that Mr Finnan would not be liable under Clause 3 if he obtained relief or settled, but without an order or agreement for the losing party to pay the Defendant's costs; but he considered that the effect of the agreement that he need never pay more than £100,000 plus VAT was that to the extent that the excess, if any, was not recovered from the opponents, it would be waived as against him.

21. I therefore consider the effect of Clause 3 of the agreement, and in particular whether it gave rise to a liability on the part of Mr Finnan in respect of fees charged at hourly rates.

22. The word 'recover' in that provision is most naturally understood as referring to recovery from those opponents, and the Respondents would hardly undertake an obligation owed to Mr Finnan to recover from him; still less an obligation merely to seek to recover from him. Recovery from him would not be 'part of' any judgment or settlement of which he was the beneficiary. The reference to settlement on a 'costs

plus' basis contemplates any settlements including provision for a payment of or towards his costs.

23. However, the obligation to seek to recover costs from the opponents is an obligation enforceable by Mr Finnan. There would be no point in undertaking such an obligation if he were not liable to the Respondent for those costs calculated on an hourly rate: it would not matter to him. Success for these purposes arises, on the terms of the provision, even if no costs order or costs agreement is made in Mr Finnan's favour. That would make it impossible to recover from opponents in those circumstances, though not from Mr Finnan – but there was an agreement to waive in that event. The standard terms and conditions seem to me not to assist either way.

24. Accordingly, I conclude that, whether as a matter of construction or implication, Clause 3 of the agreement was intended to involve a liability on the part of Mr Finnan to pay the Respondent at hourly rates, albeit one which would be waived in certain circumstances.

25. Under Clause 4 of the agreement, Mr Finnan would be liable for the £60,000 plus VAT whether successful or not. He might meet the liability himself, or it might be met in whole or in part by satisfaction of a costs order or agreement, if there were one, by his opponents, whether on the basis of the Respondent's hourly rates or of Mr Finnan's liability for the £60,000 itself. He would be liable for the full £60,000 plus VAT whether the work recorded at hourly rates totalled more or less than that sum. But the £60,000 was not to be in addition to the hourly rates, if applicable, whether for Mr Finnan or the opponent: it was also a payment on account of the hourly rate costs, in the sense that it reduced the balance of the hourly rate total by £60,000.

26. Under Clause 4 of the agreement, Mr Finnan would be liable for the additional £40,000 plus VAT only if successful. Again, he might meet the liability himself, or it

might be met in whole or in part by satisfaction of a costs order or agreement, if there were one, by his opponents, whether on the basis of the Respondent's hourly rates or of Mr Finnan's liability for the £60,000 itself. He would be liable for the full additional £40,000 plus VAT whether the work recorded at hourly rates totalled more or less than the £100,000 total. But the £40,000 was not to be in addition to the hourly rates, if applicable, any more than the £60,0000, whether for Mr Finnan or the opponent: it was also a payment on account of the hourly rate costs, in the sense that it reduced the balance of the hourly rate total by a further £40,000.

27. In this limited sense, the £60,000 and the £40,0000 were payments on account of fees chargeable at hourly rates, as well as on account of the total maximum of £100,000 which he would have to pay. Mr Finnan undertook a liability in respect of fees at hourly rates, but was to be released to the extent they were not recoverable.

28. Clause 4 of the agreement specifies that 'the appropriate amount' was to be paid no later than 12 months from the date judgment was handed down. As the Costs Judge held, that applied equally to the date of any settlement. The 'appropriate amount' referred to whichever of the sums of £60,000 or £100,000 plus VAT would be payable, depending on the outcome.

29. Mr Finnan relies on an email from the Respondents dated 13 March 2019 setting out the construction of the agreement for which they then contended. The Costs Judge did not take this email into account when construing the agreement, and rightly so, as it was not admissible for the purpose*: Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] A.C. 583 (not cited below). I have not had regard to it for that purpose either.

30. What follows from this depends on the outcomes to the other grounds of appeal.

Ground 2

31. Section 59 of the Solicitors Act 1974 provides:

> "…a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him (in this Act referred to as a *"contentious business agreement"*) providing that he shall be remunerated by a gross sum or by reference to an hourly rate, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated."

This is a permissive, rather than a prescriptive, provision, and is apt to cover almost any agreement for remuneration for contentious business, subject to exceptions which do not apply here: see *Acupay System v Stephenson Harwood LLP* [2021] 6 EWHC 366.

32. The agreement in the present case was in writing and related to remuneration for contentious business done or to be done by the Respondent. It provided for remuneration by reference to hourly rates as well as gross sums. It was therefore a contentious business agreement.

33. By s.61 of the 1974 Act,

"(1) No action shall be brought on any contentious business agreement, but on the application of any person who—

> (a) is a party to the agreement or the representative of such a party; or
>
> (b) is or is alleged to be liable to pay, or is or claims to be entitled to be paid, the costs due or alleged to be due in respect of the business to which the agreement relates,

the court may enforce or set aside the agreement and determine every question as to its validity or effect.

(2) On any application under subsection (1), the court—

> (a) if it is of the opinion that the agreement is in all respects fair and reasonable, may enforce it;
>
> (b) if it is of the opinion that the agreement is in any respect unfair or unreasonable, may set it aside and order the costs covered by it to be [assessed][1] as if it had never been made;
>
> (c) in any case, may make such order as to the costs of the application as it thinks fit…

(4A) Subsection (4B) applies where a contentious business agreement provides for the remuneration of the solicitor to be by reference to an hourly rate.

(4B) If on the assessment of any costs the agreement is relied on by the solicitor and the client objects to the amount of the costs (but is not alleging that the agreement is unfair or unreasonable), the costs officer may enquire into—

(a) the number of hours worked by the solicitor; and

(b) whether the number of hours worked by him was excessive..."

34. This was an application by a party to a contentious business agreement pursuant to s.61(1) of the 1974 Act for the agreement to be enforced. The Costs Judge considered the agreement not to be unfair or unreasonable, and made an order to enforce it under s. 61(2)(a) of that Act by the payment of the £100,000.

35. The Appellant argues that the agreement was not a contentious business agreement capable of enforcement under s. 61of the 1974 Act because it provided for remuneration by reference to hourly rates which were not expressed with the precision required of a contentious business agreement. I have held under Ground 1 that it did provide for remuneration by reference to hourly rates.

36. Although *Chamberlain v Boodle and King* [1982] 1 WLR 1443 did not consider whether in principle hourly rates could form the basis of a contentious business agreement (that was settled by a subsequent amendment of the statute), it remains good law for the proposition that the agreement must be sufficiently specific, so as to tell the client what he is letting himself in for by way of costs.

> "Take, for instance, the rate. It certainly seems high enough to me. It is £60 to £80 an hour. What rate is to be charged? And for what partner? Of what standard? Then £30 to £45 an hour for associates who may be involved. Which legal executives? Of what standard? Which associates? Does it include the typists? That is one of the broad bands which is left completely uncertain by this agreement …"1445D per Lord Denning.

This passage demonstrates the degree of certainty required: *Pierre Wilson v The Specter Partnership & Others* [2007] 6 Costs L.R. 802. The purpose of a contentious

business agreement is to fix the fees, or provide a fixing mechanism so that the parties (and in particular the client) know where they stand: ibid.

37. The features upon which the Appellant relies are as follows (although I have re-ordered them for convenience).

    (1) The Respondent's waiting 3 ½ years after the work had concluded to inform the Appellant what the hourly rates amounted to and what rates were associated to certain solicitors.

    (2) The Respondent's having purported to reserve the right to claim more under the terms of the agreement had the agreement been set aside.

    (3) As the £60,000 on account could have been treated as a payment pursuant to hourly rates, what would have happened had that £60,000 been paid and the case settled when hourly rate fees were £10,000? Would the Appellant have received back £50,000? Would the Appellant have received back £10,000 (the Respondent keeping £10,000 and the £40,000 success fee)? Would the Appellant be required to have paid an additional £40,000 (success fee) on top of the £60,000?

    (4) a wide range from £150 per hour to £700 per hour and nothing more.

38. I can deal with the first three points shortly.

    (1) What the Respondent did after the agreement is irrelevant to the certainty of the agreement itself.

    (2) What the Respondents did after the agreement is irrelevant to the certainty of the agreement itself.

    (3) This is a matter of construction, not a matter of uncertainty. In any event, I have resolved it.

39. The fourth point requires more consideration. The range of rates under Clause 3 of the agreement is wide. Without knowing the intermediate rates, the quality of the fee earner to which the rates applied, the time to be taken and the distribution of work between the various rates, the Appellant could not know what he was likely to be in for with much specificity. No doubt to do so might be impracticable, at least to some extent; but that is not the point, as I see it. He would at least know the maximum hourly rate that could be applied, however. If the basis of his liability had been Clause 3 of the agreement, there might have been force in the assertion that it was not expressed with the precision required of a contentious business agreement.

40. In fact, however, there was a much greater degree of certainty than this. Anything not recovered over the maximum of £100,000 was to be waived. The £60,000 was payable in any event; the further £40,000 in the event of success. The time for payment was specified. That being the case, the uncertainty as to the hourly rate fees was, in effect, neither here nor there.

41. In any event, the Respondent does not pursue a claim based upon the hourly rate, but only on the entirely free-standing liability for £100,000. It seems to me that where a solicitor does not pursue sums for which liability arises only on potentially objectionable provisions in a contentious business agreement, but only separate sums based entirely on unobjectionable provisions, it is entitled to do so.

42. The Costs Judge was right to conclude that this was an enforceable contentious business agreement. I therefore reject Ground 2 of the appeal.

Ground 3

43. Section 61 of the 1974 Act provides as follows.

> "(4A) Subsection (4B) applies where a contentious business agreement provides for the remuneration of the solicitor to be by reference to an hourly rate.
>
> (4B) If on the assessment of any costs the agreement is relied on by the solicitor and

the client objects to the amount of the costs (but is not alleging that the agreement is unfair or unreasonable), the costs officer may enquire into—

(a) the number of hours worked by the solicitor; and

(b) whether the number of hours worked by him was excessive."

44. I have already rejected the proposition that the agreement was not a contentious business agreement. If the Respondent had been seeking payment by reference to the hourly rate, it would have been open to the Appellant to object to the amount of the costs by reference to the hours actually worked and whether they were excessive. But the Respondent did not in the end seek payment on that basis. The Respondent does not rely on the agreement in the context of its reference to hourly rates. Accordingly, it was not open to the Costs Judge to enquire into the hours worked or whether they were excessive. Moreover, such an enquiry would serve no purpose at all. He did not err in declining to do so.

45. The Respondent objected to this ground of appeal on the basis that it was a point not taken below. However, it was a point for which permission to appeal has been given, and accordingly it requires to be determined. For the reasons I have given, I reject it.

Ground 4

46. The Appellant argued below that the agreement created a liability to pay £60,000 plus VAT in any event, with an additional £40,000 plus VAT payable in the event of success, and that these are the specified circumstances which means section 58(2) of the Courts and Legal Services Act 1990 applies so that the agreement had to comply with s.58(1) of that Act and did not.

47. Section 58 of the 1990 Act provides, so far as relevant, as follows:

"(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.

(2) For the purposes of this section and section 58A—

(a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any

part of them, to be payable only in specified circumstances;

(b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances; and

(c) references to a success fee, in relation to a conditional fee agreement, are to the amount of the increase.

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

(a) it must be in writing;

(b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and

(c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor

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

(a) it must relate to proceedings of a description specified by order made by the Lord Chancellor

(b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and

(c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor

(4A) The additional conditions are applicable to a conditional fee agreement which—

(a) provides for a success fee, and

(b) relates to proceedings of a description specified by order made by the Lord Chancellor for the purposes of this subsection.

(4B) The additional conditions are that—

(a) the agreement must provide that the success fee is subject to a maximum limit,

(b) the maximum limit must be expressed as a percentage of the descriptions of damages awarded in the proceedings that are specified in the agreement,

(c) that percentage must not exceed the percentage specified by order made by the Lord Chancellor in relation to the proceedings or calculated in a manner so specified, and

(d) those descriptions of damages may only include descriptions of damages specified by order made by the Lord Chancellor in relation to the proceedings…"

48. The agreement is a conditional fee agreement, in that it provides for part of the Respondent's fees and expenses to be payable only in specified circumstances: that is, the additional £40,000 and the hourly rates under Clause 3, and are payable only in specified circumstances, that is, if the proceedings are successful in the relevant sense.

49. The Appellant argues that the agreement provides for the amount of the fees to which

it applies to be increased, in specified circumstances (that is success), above the amount which would be payable if it were not payable only in specified circumstances, and that there was therefore a success fee of £40,000, so that the further conditions in s.58(4)(b) and (c) of the 1990 Act applied, and were not met.

50. The Costs Judge held that the agreement does not provide for the payment of a success fee at all. The Respondent's evidence and case (which he evidently accepted) was that the agreement was an arrangement to give Mr Finnan credit in respect of the estimated likely total time costs of about £100,000 to take the matter to trial. The fees which would have been payable if the agreement were not a conditional fee agreement would not have been less than that, and the Respondent would never have agreed to take a case where time costs would be £100,000 for a mere £60,000. He was entitled to come to that conclusion for the reasons which he gave. That being the case, the question whether the agreement satisfies the conditions in s. 58 (4) of the 1990 Act does not arise. The Costs Judge did not err. Accordingly I reject this ground of appeal, and dismiss the appeal on the above four grounds.