SCCO Ref: 1806557

SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/20

Before :

DEPUTY MASTER FRISTON

- - - - - - - - - - - - - - - - - - - -

Between :

DANNY JOHN ANTHONY

Claimant

- and –

KAREN COLLINS **Defendant**

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Mr Matthew Smith (instructed by **Contested Wills and Probate Lawyers Ltd**)
for the **Claimant**
Mr Andrew Hogan (instructed by **Morgan Phelps Ltd** for the **Defendant**)

- - - - - - - - - - - - - - - - - - - -

Judgment

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

.....

DEPUTY MASTER FRISTON

Deputy Master Friston:

Introduction

1. This is a detailed assessment of the Claimant's costs. I must decide whether the costs are claimed in breach of the indemnity principle, this being in the context of the Claimant's contracts of retainer being noticeably prolix and opaque. I must also decide whether I should impose a sanction pursuant to CPR, r 44.11 for the way in which the Claimant has presented his case.

Facts

2. The Claimant is a self-employed taxi driver. On about 11 September 2014, his father, who was in hospital at the time suffering from a serious illness, attempted to make a will using an on-line will-making service. A few days later—on 19 September 2014—he succumbed to his illness. He owned a long lease on property in north London ('the Property'), that lease having been purchased in 2003 under the right to buy legislation.

3. The Defendant was his long-term partner. She had moved into the Property about 30 years ago whilst it was still being rented from the local authority. In more recent times she had taken up residence elsewhere, but she continued to hold the keys to the Property and kept certain possessions there, so to that extent at least, she continued to be in occupation.

4. The Claimant believed that his father's purported will may have been unfavourable to him, so on about 19 February 2015, he instructed Contested Wills and Probate Lawyers Limited ('the Solicitors'). The principal of that firm is a Mr Terence Johansson, a solicitor who practises internationally; he first qualified as a solicitor in Victoria, but was admitted to the Roll in this jurisdiction in 2003. In his oral evidence, he told me that he manages firms in London, Dubai and in several territories in Australia, and that all of those firms specialise in wills and probate.

5. About 95 percent of the work the Solicitors do in this jurisdiction is funded by way of conditional fee agreements. I was taken to the Solicitors' website, which explains its ethos in the following way:

> 'Many claimants find the traditional Lawyer's fee agreement is too focussed on the fees and not enough on the service. It is usually written in complex language, so the claimant never really knows what their lawyer will do for his money. CWPL is not a traditional law firm. Before we start any application in court for you, we disclose what fee range we expect our fees to fall within. Then, in our [documentation] we clearly disclose how our fees will be charged …'

6. On 10 March 2015, the Claimant entered into a conditional fee agreement with the Solicitors ('the First Agreement'). Mr Johansson had responsibility for drafting that agreement. I will describe it later in this judgment, but for the moment, I will confine myself to saying that at the time it was made, not a great deal was known of the nature of the task in hand. Indeed, it was not known whether the Claimant's father had made a valid will. In view of this, the First Agreement made no specific mention of the Defendant, but instead focussed on the position as between the Claimant and his father's estate.

7. The day-to-day work of dealing with the Claimant was carried out by a Ms Larissa Wilson, a solicitor who was admitted to the Roll in 2007. She too gave oral evidence. She told me that she had extensive pre-qualification experience, largely in personal injury litigation. Ms Wilson was supervised by Mr Johansson, although most of that supervision was carried out whilst he was in Australia.

8. On 19 April 2016, the Defendant's then solicitors wrote to the Solicitors to tell them that, in their view, the Claimant's father's will had not been validly executed. As a result, it was not in dispute that the Claimant's father had died intestate. That letter went on to say that the Defendant had resided at the Property for many years, that she had a beneficial interest in it, and that she intended to make a claim under the Inheritance (Provision for Family and Dependants) Act 1975.

9. The Claimant entered into a further conditional fee agreement ('the Second Agreement), this being on about 2 May 2016. In essence, that agreement was for the purposes of securing either grant of probate or letters of administration.

10. On 27 January 2017, the Claimant wrote to the Defendant to challenge the factual basis of her claim. The Claimant disputed the fact that the Defendant had been in a committed relationship with the Claimant's father at the time of his death. He also said that the Defendant lived and worked in Birmingham and that she owned several investment properties in that area (the implication being that she did not reside at the Property even if she did have access to it). The Claimant asked the Defendant to vacate the Property. As I understand matters, the Defendant did not respond to that letter. The Claimant wrote again on 5 June 2017; this elicited a response by way of an email dated 20 June 2017, by which the Defendant refused to vacate the Property.

11. In the meantime, letters of administration had been granted (this being on 31 May 2017); the Claimant was named administrator of the estate. This meant that the Property (which was the only substantial asset in the estate) devolved to the Claimant as personal representative. As he was his father's only child, the Claimant potentially held the Property on statutory trust for himself. I understand that the net value of the estate was thought to be just under £400,000.

12. Possession proceedings were issued on 3 July 2017. On 3 August 2017, a Defence was filed. In essence, the Defendant contended that when the Claimant's father purchased the Property, this was done jointly and with her financial assistance. Amongst other things, the Defendant counterclaimed for a declaration under section 14 of the Trusts of Land and Appointment of Trustees Act 1996.

13. At this juncture, no separate contract of retainer had been made in respect of the possession proceedings. On 17 July 2017, the Solicitors wrote to the Claimant purportedly to vary the terms of the conditional fee agreement relating to those proceedings, but this was done in ignorance of the fact that no such agreement had been made. The Solicitors realised their error, so on 20 October 2017 a further conditional fee agreement ('the Third Agreement') was made. I pause here to note that the Solicitors were already providing legal services in the possession proceedings, and that this was on the basis that their remuneration would be conditional upon success in those proceedings. As such, the purpose of the Third Agreement was to regularise an already existing arrangement.

14. On 4 January 2018, the claim was allocated to the multi-track. The Claimant made an application to strike out the counterclaim for want of compliance with certain directions, that being on 26 January 2018. The court gave further directions, but on 7 June 2018, the parties reached a compromise (which essentially was a capitulation on the part of the Defendant). The Defendant agreed to pay costs on the indemnity basis.

The costs proceedings

15. On 13 July 2018, the Claimant served a Bill of Costs for £56,904 (inclusive of VAT). This related solely to the possession proceedings (including the counterclaim). The narrative to that Bill of Costs described the contractual arrangements between the Claimant and the Solicitors in the following way:

> 'The matter was conducted by Larissa Wilson, a senior Grade A Solicitor, under a private retainer providing for a charging rate.'

16. This was wrong: there had been no private retainer of any kind. Notwithstanding this, Ms Wilson certified the Bill of Costs both as to accuracy and the indemnity principle. In her oral evidence, Ms Wilson accepted that this was an error. The narrative had been drafted by a Mr Brian Varney, an experienced costs consultant, but it seems that he had not been given access to the documents that would have allowed him to draft it accurately.

17. On 9 August 2018, the Defendant served Points of Dispute. The Defendant pointed to the fact the Claimant was of limited means and went on to say that it was inherently unlikely that he would have instructed the Solicitors on a private client basis. The Defendant also pointed to evidence served in support of the Bill of Costs that implied that the Claimant's solicitors had, in truth, been instructed under a conditional fee agreement. As such, the Defendant said—entirely rightly, in my view—that a 'genuine issue' had been made out, and that as such, the Claimant ought to be put to his election. The Defendant requested voluntary disclosure of the retainer documentation.

18. In the Replies to the Points of Dispute dated 17 August 2018, the Claimant responded in this way:

> 'The Defendant has the information to which she is entitled in the bill and by the signed certificate [sic]. Any further funding information will be seen by the Costs Judge on assessment.'

This too was wrong (a fact that Ms Wilson accepted in evidence).

19. On 28 August 2018, the Defendant's costs draftsmen wrote to the Solicitors to reiterate their concerns and to ask the following question: 'Was the Claimant represented pursuant to either a Conditional Fee Agreement or a Contingent Fee Agreement?' Again, disclosure of the documentation was sought. That request was passed to Mr Varney, who responded on 29 August 2018 in the following terms:

> 'We have supplied you with all that you are entitled to. All work is post 1/4/13. You are not entitled to disclosure of any funding agreement. It is a fishing expedition.'

That email went on to say that a Part 18 Request would receive the same response and to ask for an offer or payment on account.

20. The Defendant responded on 3 September 2018 to say that the request for clarification was reasonable and to ask: 'Why will you simply not confirm that the retainer was a CFA or not?' That letter was accompanied by a Part 18 Request asking for clarification. In his written evidence, Mr Johansson said this about what his firm did next:

> 'After receiving Part 18 questions from [the Defendant] on 3 September 2018, Brian Varney asked for a copy of the CFA of 10 March 2015. At this point Brian Varney was still unaware that the CFA dated 20 October 2017 was in fact relevant. He amended the bill to incorporate reference to the earlier CFA, Mr Varney still believing that was the relevant CFA.'

21. An amended narrative was sent to the Defendant on about 6 September 2018, the relevant part of which reads follows:

> 'The matter was conducted by Larissa Wilson, a senior Grade A Solicitor, under a retainer/retainer by way of CFA dated 10 March 2015 extended on 17 July 2017 providing for a charging rate of £375 per hour.'

22. Thus, it would seem that—at this point at least—the Solicitors believed that the relevant contract of retainer for the purposes of the Bill of Costs was the First Agreement as extended by the correspondence of 17 July 2017 (see paragraph 13 above). As I will explain below, however, even this was not correct.

23. The Defendant was not satisfied with what the Claimant had said, so on 29 October 2018 she made an application that the Claimant be put to his election. In his written evidence, Mr Johansson had this to say about what his firm did in response:

> 'On 22 November [2018], after conversing with Mr Varney by telephone, I held a telephone conference with counsel and made him aware of the existence of the CFA dated 20 October 2017. I concluded that this was the CFA that was relevant to this matter. Consequently I made a decision to withdraw the then-existing bill and to submit a new bill that was prepared with reference to the full correct funding.'

The barrister who advised in conference was a Mr Ian Simpson, a well-respected specialist in costs.

24. By way of a consent order made on 27 January 2019 (sealed on 4 February 2019), the Bill of Costs was replaced with yet a further iteration. The Claimant also agreed to make a witness statement clarifying the basis of the retainer. Whilst I am not sure of the date on which it was served, the re-amended narrative read as follows (with my emphasis):

> 'The claim against the estate of Terence Henry Anthony deceased and the Defence of the Counterclaim for possession and equity, by Karen Collins, were funded by a conditional fee agreement date 10/3/15 effective 19/2/15, a letter dated 17/7/17 and a conditional fee agreement dated 20/10/17 effective from 6/6/16, ***whether singly, in combination or otherwise.*** The conditional fee agreements provided for an

> additional liability that is not recoverable from the Defendant but which is recoverable from the Claimant.'

25. I pause here to note that even by this stage—namely, after a specialist counsel had advised—the narrative still lacked clarity as the precise contractual relations between the Claimant and the Solicitors. That version of the Bill of Costs had been certified by Mr Johansson, but in his oral evidence, he volunteered that even this was incorrect.

26. After having received the amended Bill of Costs, the Defendant served Amended Points of Dispute in which she alleged misconduct by reason of miscertification. On 6 March 2019, the Claimant served Replies to the Amended Points of Dispute. The Claimant resisted giving voluntary disclosure of the retainer documentation. In particular, the Claimant maintained that no 'genuine issue' had been made out. The Claimant denied the allegations of misconduct.

27. The matter came before me on the papers on 3 July 2019, supposedly for the purposes of a provisional assessment. I was wholly unable to understand the retainer documentation. I made an order that the Bill of Costs was not suitable for provisional assessment and I gave directions that required the parties to better articulate their respective cases, especially in so far as the allegations of misconduct were concerned. The matter was subsequently set down for a detailed assessment hearing. The Defendant served a summary of her case on misconduct on 25 July 2019. The Claimant responded by way of a document dated 20 August 2019.

28. The detailed assessment hearing (including the application relating to misconduct) took place on 18 September 2019. The Claimant was represented by Mr Smith and the Defendant by Mr Hogan, both of whom were of considerable assistance to the court. This judgment would be overly long if their submissions were set out in full, so I will deal with points that they made in my analysis. I should add, however, that after the hearing I circulated a draft judgment in which I made certain findings; the parties agreed that I ought to reconsider one of the issues (relating to 'the ATE condition' at paragraph 50 below) with the benefit of further evidence and submissions. I have considered that issue afresh and without reference to my initial draft judgment.

The contracts of retainer: overview

29. I now turn to the retainer documentation. Before I deal with that documentation in any detail, I should explain that it is quite unlike anything I—or, I suspect, any costs judge—have ever seen before. Some of it was provided to me electronically, but when printed onto paper, it filled an entire lever-arch file. I spent some time removing duplicate pages, but even once I had done this, it barely squeezed into a standard ring binder. The documentation was difficult to navigate: not only were the three conditional fee agreements (which were linked to each other in various ways), but those agreements were divided into a number of 'kits', 'sections', 'parts', 'topics' and 'schedules'.

30. Whilst I have read the documentation carefully, I do not attempt to describe it in full. Instead, I deal with only those aspects of the matter that I regard as being relevant. I do, however, deal with the First Agreement in some detail, this being for the purposes of giving a flavour of the matter. I pause here to say that I had to consider the documentation as a whole because it was not entirely clear which agreement related to the costs that the Claimant claims.

The First Agreement: structure

31. The First Agreement was sent under cover of a letter dated 19 February 2015 ('the 2015 Letter'). The body of that agreement is about 67 pages long. In addition, there is a 48-page 'Disclosure Kit', so in total, it is about 115 pages long.

32. The 2015 Letter had the following to say:

> 'We are required to ensure that you are fully informed before You and Us enter into the fee agreement in this CFA, and it is important that you read the 4 contract documents before You sign the Signature Confirmation Page and become bound by the CFA.'
>
> 'The 4 contract documents are the Disclosure Kit, this Outline Letter, the Fee Terms and the Standard Conditions … please read the Disclosure Kit first. It covers all the important things you need to know, including the things we must Disclose to you by law.'

33. I pause here to say that this was an unreasonable request. It took me just under two hours to read the First Agreement (not including the time I had to spend placing tabs on the various 'kits', 'parts', etc for the purposes of being able to navigate it); it was simply too long and too opaquely drafted to expect *any* client to read it (especially a consumer client—in this instance, a taxi driver).

34. The structure of the First Agreement seems to be as follows:

> 'Guide/Overview of your CFA Documents
> Signature Confirmation Pages [which included a summary of the agreement]
> Fee Terms [which had the Notice of Right to Cancel on the second page]
> Part 1: Scope of Work/Information on How Fees Calculated [sic]
> Schedule 1: Factors the Court May Take into Account when Assessing Your Claim for Further Provision (and Award) from an Estate
> Standard Conditions [which I assume to have been intended to have been headed Part 2];
> Section 2A: How CWPL Charges & Collect Fees on a Now Win No Fee basis
> Section 2B: Security Terms
> Section 2C: When Can CWPL Stop Acting as Your Solicitor
> Section 2D: Other Terms of the agreement between You and CWPL
> Section 2E: Definitions Used in the CFA'

35. In addition, the Disclosure Kit dealt with six 'topics', namely:

> 'Topic 1: Information on Our Fees, Interest and Other Charges CWPL may make
> Topic 2: Other Information on Your fee agreement and contract with CWPL
> Topic 3: Estimate/Range of Total Legal Costs that may be payable by You for our work
> Topic 4: Likely Recoverable Fees if You win were [sic] successful in the litigation/After the Event Insurance
> Topic 5: Dispute Resolution Procedure: Procedure for Dealing with any Disputes between us
> Topic 6: Important Words'

36. I pause here to say that not only was this structure difficult to follow, but the First Agreement is remarkably repetitious and prolix; it is littered with typographical errors, and is replete with language that was anything but easy to understand. In short, it is a badly drafted document. The same can be said of the other two agreements.

The First Agreement: scope

37. The heading to the 2015 Letter refers to the 'Claim Against the Estate of Terence Henry Anthony'; it then goes on to define the scope of the First Agreement in this way:

> 'In summary, you have asked Us to claim an Award from the estate of your late father.
>
> 'Essentially, the word "Claim" refers to the pursuit of Your rights, and CWPL will enforce and secure those right for You.
>
> 'CWPL will pursue Your rights to secure, by legal proceedings in the first instance, an Order of the Court that you should be paid an Award from the estate, because the deceased failed to sufficiently provide for You on their death, as required by the legislation dealing with this type of Claim.
>
> 'The Claim will be made against the estate of the deceased, under the Inheritance (provision for Family & Dependants) Act 1974 (UK).'

38. As such, the First Agreement contemplated a dispute with the Claimant's father's estate (although this would necessarily have involved the Defendant as a potential beneficiary). I note the absence of any words of restriction in these provisions. For the reasons set out below (see paragraph 40), I take the view that the scope of the First Agreement was not limited to challenging any will that may have been made, but that it also included obtaining letters of administration.

The First Agreement: definition of success

39. Success is defined in Section 2E (as well as in the Disclosure Kit)(which is set out here without correction of typographical errors):

> '"Successful Outcome" means that; subject to the provisions of paragraph 2.126 [which dealt with incapacity], in connection with, as a consequence of or in any way related to the Claim … an Existing Entitlement … or the estate:
>
> (a) an Order or Award of a tribunal Ombudsman or courts (including Grant of Probate or Letters of Administration (a grant of representation)) is made in respect of the Claim … or any estate or interest of any estate in any Fund or in any way connected with the Claim;
>
> (b) You become entitled to monies or benefits or any Existing Entitlement, or Your right to them is confirmed;
>
> (c) CWPL has recommended that You accept an offer to settle the Claim; or
>
> (d) If CWPL is not acting as Your solicitor, at any time You enter into any terms of settlement whereby the Claim is settled;

> pursuant to or in compliance with which You (or any other Settlement Funds Recipient … are entitled to receive any Settlement Funds … from any person, or would have become so entitled if You had accepted any offer referred to in sub-paragraph 2.125(a) and had received all monies and benefits due as a consequence of that offer and settlement; and any such Settlement Funds shall include any monies or benefits derived from or in any way related to any Existing Entitlement … or vesting in You pursuant to any grant of representation.'

40. In essence, this appears to say that the condition of success will be met if either (a) an award is made in favour of the Claimant (or an agreement is reached that has the same effect), or (b) the Solicitors recommend that an offer in the Claimant's favour be accepted. The condition of success will also be met if the Claimant obtains letters of administration. It seems to me that this has a bearing on the ambit of the First Agreement in the sense that if the obtaining of letters of administration would amount to success, it must follow that the First Agreement covered this.

The Second Agreement

41. The Second Agreement is 69 pages long. I am not wholly sure of the precise date on which it was made, but it was on about 2 May 2016.

42. The scope of the agreement was 'to secure a Grant of Probate/Letters of Administration to the estate without Legal Proceedings, to enable an orderly winding up of the estate'. Whilst the context may have changed (this being because by this stage, it had become known that the will purportedly made on 11 September 2014 was not valid), it seems that the subject matter of the Second Agreement overlapped with that of the First Agreement, at least to an extent.

43. The Second Agreement was linked to the First Agreement; the relevant provisions may be found in 'Standard Conditions Schedule 3':

> 'Establishing Link to the Earlier Legal Claim
>
> 'A. You have already entered into a fee agreement (set out in the fee agreement/Contract Documents) with CWPL in relation to the Earlier Matter described as such in the Covering Letter (the Earlier Matter and the Earlier Contract Documents).
>
> 'B. You and we agree that both this New Matter (the Claim in connection with which these Contract Documents were sent to you) and the Earlier Matter can be considered to be related due to either the timing of both matters, the similarity of the matters, links between the subject matter of each and/or because the outcomes can be considered together when considering whether there has been a Successful Outcome and/or because the same or related or similar people are making your Claim.
>
> 'C. Because of this, CWPL requires that both files be considered as if they were one so that all its fees on both files are payable as soon as there is a Successful Outcome to one of the matters, even though the other one is still in progress …'

44. In the light of these provisions (and the fact that there was overlap between the First and Second Agreements more generally), I take the view that the two agreements ought to be read together. Put otherwise, I take the view that the Second Agreement varied the First Agreement so as to make a single contract of retainer.

45. In my view, both agreements became spent when letters of administration were granted on 31 May 2017. At that point, the Claimant became the personal representative, so his status changed, as did the nature of the work that needed to be done. Neither the First Agreement nor the Second Agreement made any mention of the tasks that lay ahead, and in particular, neither of them made express reference to the Property. This was not quite the case urged upon me by Mr Smith as he sought to draw a distinction between the First, Second and Third Agreements that was based on different reasoning, but it is consistent with the thrust of his submissions, namely that the First and Second Agreement were separate from the Third Agreement.

The Third Agreement

46. The Third Agreement is the contract of retainer upon which the Claimant seeks to rely (namely, it is the agreement that deals specifically with the costs that are claimed in the Bill of Costs).

The Third Agreement: structure and scope

47. As with the other two agreements, the Third Agreement is a lengthy document comprising many parts. That said, it is somewhat shorter than other two, being a relatively svelte 30 pages long. It is also slightly better written.

48. The Third Agreement is governed by a letter dated 25 September 2017 ('the 2017 Letter'). That letter explains that the Third Agreement is intended to be effective from 6 June 2016. This was necessary because the Solicitors were already providing legal services to the Claimant in the possession proceedings, and this was, at all times, on a conditional fee basis (see paragraph 13 above).

49. In my view, the subject matter of the Third Agreement was materially different from that of the other two agreements; this is because the dispute was solely over who had a beneficial interest in the Property (as opposed to a dispute over the effect of any will that the Claimant's father may have made or his estate in general). Moreover, the Claimant was acting as the personal representative, so his status had changed. The description of the scope of the Third Agreement is somewhat opaque as it repeatedly refers to the Claimant's father's will (which, of course, was known not to have been validly made), but it was not in dispute that it was intended to cover the possession proceedings, so I proceed on that basis.

The Third Agreement: the ATE condition

50. The 2017 Letter contains the following condition ('the ATE Condition'), this being in such a place that, in my view, governs the Third Agreement generally:

> 'Our agreement is conditional upon you getting insurance cover to cover the risk that you may need to pay the legal costs of the other side, and we must approve the terms of the cover.'

No such cover was ever taken out.

51. In his statement dated 6 November 2019, Mr Johansson says that the ATE Condition was included by reason of a mistake on his part. His intention was 'to insert wording that made the CFA conditional on ATE Cover only at the option of [the Solicitors]'. That may be so, but this is not what the ATE Condition says. It seems that Mr Johansson was not the only one who was unaware of what the ATE Condition said; indeed, the Claimant's evidence is that he was entirely unaware of it.

52. These things being so, it is not surprising that Mr Smith has been unable to point to any evidence that there was an express agreement—still less a written agreement—that, in some way, disapplied or waived the ATE Condition. As such, Mr Smith has been forced to rely on implied disapplication or waiver.

53. In this regard, Mr Smith drew my attention to the fact that attempts were made to obtain after the event insurance. I do not set out the details: it is sufficient to say that at the time the 2017 Letter was written, the Solicitors were making active efforts to obtain an offer of suitable insurance. By 31 October 2017, the Solicitors had formed the view that those attempts had failed, so they wrote to the Claimant to say insurance appeared to be 'unobtainable'. Mr Smith has this to say about what happened next:

> 'The claimant's solicitors have continued and continue to act. It is submitted therefore that it is plain that both the claimant and his solicitors have waived any opportunity to consider themselves relieved of their respective liabilities under the contract of retainer. That being so, the paying party cannot take the point either.'

54. Put otherwise, Mr Smith says that the Claimant and the Solicitors impliedly waived the condition by way of their conduct, that conduct being the fact that the Solicitors continued to supply legal services which the Claimant continued to accept. In a similar vein, Mr Smith says that the Claimant and the Solicitors are estopped from relying on the ATE Condition, this being for similar reasons.

55. I do not agree. It seems to be uncontroversial that the Solicitors were already providing legal services on the basis that their remuneration would depend on success in the claim (see paragraph 13 above). In my view, the purpose of the Third Agreement was not to create a new conditional fee agreement in the context of there being no pre-existing retainer, but to regularise the position upon the Solicitors having realised that they had overlooked the need to create a written agreement that covered the possession proceedings. The fact that Solicitors continued to provide legal services says nothing about whether that state of affairs was regularised.

56. In any event, Mr Hogan is right in saying that it is difficult to see how the Claimant could have waived the ATE Condition given the fact that he was unaware of its existence. The same point could be made of the Solicitors, as they too seem to have been unaware of what the ATE Condition actually said. In essence, Mr Smith is asking the court to simply ignore the ATE Condition; this, in my view, is not something that the court is able to do.

57. I also agree with Mr Hogan that the putative waiver upon which Mr Smith seeks to rely would, in truth, have been a variation to the Third Agreement (as opposed to waiver in the sense of mere forbearance), and that as such, it ought to have been in writing. In this regard, I note the following observations made by Judge Cotter QC in *Brookes*

v DC Leisure Management Ltd [2013] EW Misc 17 (CC) at [30] (that being a case concerning a putative oral variation relating to the scope of a conditional fee agreement):

> 'In my judgment as the requirements for a variation derive from the law governing contract formation the same formalities apply to the variation of the contract as apply to its formation. If a contract such as a CFA is required to be in writing then the variation needs to be in writing to have the same effect before a court. The CFA agreement requires certainty … and I do not believe there can be a back door through subsequent oral variation even if there is some limited supporting documentation.'

58. Judge Cotter's comments are not binding on me, but I agree with them. I would not go so far as to say that conduct or oral representations would never be relevant to the question of whether an enforceable conditional fee agreement exists (it may well be the case, for example, that such matters could be relevant to issue of materiality), but in my view, where the court is looking at the issue of whether a written conditional fee agreement came into existence, conduct is largely irrelevant. In my view, on the facts of this case, the ATE Condition could only have been waived or disapplied by way of a written agreement to that effect (or, at the very least, an oral agreement confirmed in writing).

59. Mr Smith also relies on the fact that the Third Agreement was intended to be retrospective and that the Solicitors 'had mistakenly been acting for him on this issue on the mutual understanding that it was on CFA terms but without a written CFA having been incepted'. I struggle to see how this helps Mr Smith; if anything, it illustrates the fact that the Solicitors knew the importance of making an enforceable, written conditional fee agreement. This being so, it is somewhat curious that Mr Johansson intended to reserve the right not to enter into the Third Agreement (as this was to reserve the right of his firm not to have the benefit of an enforceable conditional fee agreement), but that is precisely what he did.

60. Mr Smith did not suggest that the court had the power to rectify the Third Agreement (no doubt for good reason), but he did suggest that the court had the power to interpret the ATE Condition in a way that preserved the effectiveness of the Third Agreement, this being an approach that is sometimes referred to as 'common law rectification'. In this regard, he said that where an agreement is conditional upon the happening of some event, 'there is scope for argument either that the non-satisfaction of the condition results in no agreement or that the non-satisfaction of the condition results in the failure to satisfy a term of the contract that is so important that a contracting party may consider itself relieved of its obligations under the contract'. Put another way, Mr Smith contended that the ATE Condition is not a condition precedent to the making of the Third Agreement, but that it gave rise to a conditional right that would allow one or both parties to elect whether to continue to be bound by the contract. Mr Smith contended for the latter interpretation. The difficulty with this argument is that the condition could not be clearer: it says 'our agreement is conditional upon you getting insurance'. I cannot see how this could be interpreted to mean anything other than what it says, which is that the formation of the Third Agreement was conditional upon insurance being obtained.

61. In any event, even if the ATE Condition were sufficiently ambiguous to permit of competing interpretations, I am not sure that it would be appropriate to interpret it in the way contended for by Mr Smith. This is because such an approach would cause an unacceptable degree of uncertainty that could adversely affect the Claimant. If, for

example, the possession proceedings had been decided against the Claimant, the Solicitors could have claimed that their fees were payable on a private basis (although I do not for one moment suggest that the Solicitors would have acted in such an unscrupulous way). To my mind, a client—especially a consumer client—is entitled to know with certainty whether he or she has entered into a conditional fee agreement: where a legal services provider fails to make the position clear, the court should, in my view, be slow to resolve that uncertainty in favour of the legal services provider.

62. Mr Smith has drawn my attention to certain textbooks and Australian authorities that support the contention that a contractual provision should not be construed as a condition precedent to the formation of a contract unless the contract read as a whole plainly compels that conclusion. That may be so, but I do not believe that this assists the Claimant on the facts of this case, this being because, in my view, the ATE Condition does not permit of competing interpretations.

63. In view of the above, I take the view that the ATE Condition was a condition precedent to the making of the Third Agreement and that it could not be disapplied by the parties' conduct. As such, I find that the Third Agreement was never made. It is not in dispute that the possession proceedings were intended to be funded on a conditional fee basis, so I conclude that the Claimant entered into an unwritten conditional fee agreement, this being in breach of section 58(3)(a) of the Courts and Legal Services Act 1990 (as amended)('the 1990 Act').

64. The next question is whether this was a material breach. Whilst an obvious point, I find that the breach was material because the Claimant was entitled to a written conditional fee agreement. Moreover, the fact that there was no written agreement could have had a materially adverse effect on the consumer protection afforded the Claimant, this being for the reasons set out in paragraph 61 above.

65. As such, whilst I reach the conclusion reluctantly and with regret, I find that the Claimant's costs are claimed in breach of the indemnity principle. For the avoidance of doubt, I do not believe that the existence of the First or Second Agreements is of any assistance to the Claimant, this being for the reasons set out in paragraph 45 above.

66. Unless the contrary is obvious from the context, much of what follows (namely, paragraphs 67 to 100) is on the alternative basis that I am wrong in saying that the Third Agreement was not made for want of satisfaction of a condition precedent created by the ATE Condition.

The Third Agreement: contractual certainty

67. Mr Hogan placed some reliance on the fact that the retainer documentation was so darkly penned as to be virtually incomprehensible. He did not initially take the point that the Third Agreement may be void for uncertainty, but towards the end of his oral submissions, he invited the court to consider that possibility.

68. I bear in mind that it is possible for a putative agreement to lack contractual force because it is incomplete, or because it is so nebulous or unclear that no definite meaning can be attributed to it without adding further terms. I was not referred to any authority to support the contention that the court was able to find that an agreement was void for uncertainty

by reason of it being so prolix and convoluted as to defy comprehension, but I can see no reason why, in principle, the court should not make such a finding in an appropriate case.

69. That may be so, but I note that Rix LJ had this to say (in *Scammell v Dicker* [2005] EWCA Civ 405 at [30] and [39]):

> '… it is simply a *non sequitur* to argue from a disagreement about the meaning and effect of a contract to its legal uncertainty … For that to occur—and it very rarely occurs—it has to be legally or practically impossible to give to the parties' agreement any sensible content … that is certain which can be rendered certain …'

70. I also note that Leggatt J had this to say (in *Blue v Ashley* [2017] EWHC 1928 (Comm) at [61]):

> 'The courts are … reluctant to conclude that what the parties intended to be a legally binding agreement is too uncertain to be of contractual effect and such a conclusion is very much a last resort.'

So, the hurdle that Mr Hogan must clear is a high one: indeed, he is asking the court to reach a conclusion of last resort.

71. It is undoubtedly true that the Solicitors have created a contractual quagmire in which even they lost their way. That may be so, but I take the view that it is necessary to distinguish between conceptual uncertainty (where the court is, for all practical purposes, asked to write the terms of the contract for the parties) and uncertainty arising out of inconsistent or ambiguous terms (where the court is asked merely to determine the meaning of the words used). In my view, the uncertainties in Third Agreement fall into the second of these two categories. In this regard, I note that Mr Hogan has not directed me to any aspect of the Third Agreement where there is a contractual lacuna that cannot be filled by a process of interpretation (still less has he directed me to such a lacuna that is relevant to the indemnity principle).

72. I have no doubt that there are dozens, if not scores, of ambiguous and inconsistent terms in the retainer documentation that would take days to disentangle. Indeed, the retainer documentation (including the Third Agreement) could be likened to a hydra. That may be so, but Mr Hogan has not been able to direct me to any aspect of the Third Agreement where the court's duty to interpret the documentation would be 'legally or practicably *impossible'*. In view of this, I am unable to find that the Third Agreement is void for uncertainty (although I have, of course, already found that it is unenforceable for other reasons).

The Third Agreement: comprehensibility in general

73. Mr Hogan urged the court to take comprehensibility into account in a more general sense. In particular, his submissions focussed on the obligations imposed by the (now-revoked) SRA Code of Conduct 2011 (as amended). I paraphrase his submissions, but in essence, Mr Hogan said that if a solicitor has created a contractual quagmire, it is open to the court to find that this so offends against public policy as expressed in the SRA Code of Conduct 2011 that the paying party ought to be relieved of the obligation to pay costs.

74. Whilst it related to an earlier iteration of the code of conduct (namely, the Solicitors Practice Rules 1990), I take the view that the starting point remains *Garbutt v Edwards* [2005] EWCA Civ 1206, in which Arden LJ said this (at [31]):

> 'In making these Rules, the Council of the Law Society is acting in the public interest … The inference I would draw is that the Code is there to protect the legitimate interests of the client, and the administration of justice, rather than to relieve paying parties of their obligations to pay costs which have been reasonably incurred.'

75. Mr Hogan accepted that breaches of the SRA Code of Conduct 2011 are largely irrelevant for the purposes of the indemnity principle. He went on to say, however, that this is not an absolute rule; he directed me to the following comments of Arden LJ (in *Garbutt* at [43]):

> 'I conclude that it is a question for the discretion of the judge assessing costs in any particular case whether to take into account any failure by the receiving party to provide an estimate in the circumstances and of the kind required by the Code.'

76. Mr Hogan accepted these comments went to the quantum of costs rather than the indemnity principle, but he said that they indicate that if a breach of the SRA Code of Conduct 2011 is so egregious that the court cannot ignore it, this may justify a finding that the contract of retainer is unenforceable in general. Put otherwise, he said that it was a matter of degree.

77. Having made those points, I now turn to the SRA Code of Conduct 2011. I note that O(1.6) reads as follows (emphasis added):

> 'You must achieve these outcomes … you only enter into fee agreements with your clients that are legal, and *which you consider are suitable for the client's needs* and take account of the client's best interests.'

78. This, to my mind, prohibits solicitors from entering into fee arrangements that they do not 'consider are suitable for the client's needs'. In essence, Mr Hogan says that if a solicitor enters into an agreement that he or she knew was unsuitable for the client's needs, then it would be open to the court to find that it should not be enforced. I note, in passing, that O(1.6) of the SRA Code of Conduct 2011 seems to have no counterpart in the SRA Code of Conduct for Solicitors, RELs and RFLs 2019; that may be so, but the Third Agreement was made well before that new code came into force, so I disregard this fact entirely.

79. I bear in mind that the SRA Code of Conduct 2011 has the force of statute (see *Swain v The Law Society* [1983] 1 AC 598 at 621), and that if a specific type of contract of retainer is prohibited, it will be unenforceable (see, for example, *Awwad v Geraghty* [2001] QB 570). I also note the following comments of Browne-Wilkinson LJ in *Coral Leisure Group Ltd v Barnett* [1981] ICR 503 at 509:

> 'The fact that a party has in the course of performing a contract committed an unlawful or immoral act will not by itself prevent him from further enforcing that contract unless the contract was entered with the purpose of doing that unlawful or immoral act or the contract itself (as opposed to the mode of his performance) is prohibited by law.'

80. In my view, these authorities support Mr Hogan's submissions to the extent that if a contract is a prohibited contract, it will be unenforceable. This may be so even if the prohibition is implied. Indeed, this is a principle that is well established.

81. What I am less sure of, however, is whether O(1.6) of the SRA Code of Contract 2011 does, in fact, prohibit 'unsuitable' contracts. I will return to this point later in this judgment (see paragraph 83), but for the moment, I will give Mr Hogan the benefit of the doubt on this point.

82. In certain respects, I agree with Mr Hogan. I find that each and every one of the agreements was not just unsuitable for the Claimant's needs, but entirely unsuitable; the mere fact that the Claimant could not have even begun to understand them compels me to such a conclusion. I also find that no reasonable solicitor who properly understood his or her professional obligations would have believed otherwise. To compound matters, Mr Johansson told me that the Solicitors had a policy of not proactively giving clients advice about the meaning and effect of their contracts of retainer, this being because he believed that the documentation spoke for itself. I have no hesitation in saying that Mr Johansson was as wrong as can be in that regard.

83. This, however, is not sufficient for me to find that the Solicitors did not 'consider [the Third Agreement] suitable for the client's needs'. In my view, in order to find that there had been a breach of O(1.6) of the SRA Code of Conduct 2011, I would need to find that the Solicitors had *actual* knowledge of the unsuitability of the Third Agreement.

84. Here, the Claimant (or, in reality, Mr Johansson) escapes by the skin of his teeth. The agreements had their origins in contracts of retainer drafted for use in Australia; this goes some way to explaining their length and complexity, this being because retainers in that jurisdiction have to comply with what *Quick on Costs (*2nd ed) describes (at [50.410]) as a 'legal labyrinth of contract law and legislation'. Having seen Mr Johansson give evidence, I have formed the view that it was only during the course of the hearing it dawned on him that it was exceptionally unwise to take a contract of retainer drafted in one jurisdiction and to attempt to adapt it for use in other. The tipping point came when he said—almost as a throwaway remark—that he did not realise quite how bulky the agreements were as he had not seen them in printed form before. It was only at that point that Mr Johansson started to become uncomfortable with what he had drafted. I find that at the time that Mr Johansson drafted the retainer documentation, he genuinely (albeit entirely unreasonably) believed them to be suitable for the Claimant's needs. As such, I am unable to find that there has been a breach of O(1.6) of the SRA Code of Conduct 2011.

85. For the sake of completeness, I should say that Mr Hogan also relied on IB(1.19) of the SRA Code of Conduct 2011, which reads as follows:

> 'Acting in the following way(s) may tend to show that you have achieved these outcomes and therefore complied with the Principles … providing the information in a clear and accessible form which is appropriate to the needs and circumstances of the client.'

86. There is no doubt that the Solicitors have not demonstrated this behaviour, but an 'indicative behaviour' is just that: it is no more than a very general guide to what a solicitor should and should not do. As such, I do not regard IB(1.19) as being sufficiently certain in its terms to justify a finding that there has been a breach of the indemnity principle.

87. In any event, I bear in mind the interests of the administration of justice. In my view, it would be undesirable if paying parties were to be permitted to raise challenges as nebulous as whether a contract of retainer was 'suitable' or in the 'best interests' of the receiving party. This, to my mind, is materially different from the situation in *Awwad v Geraghty* (in which the receiving party's solicitors entered into a contract of retainer that was prohibited as a matter of black-and-white rules). Mr Hogan's submissions were measured and were put with great skill, but I view with some trepidation the spectre of parties asking the court to make an evaluative judgment as to whether contracts of retainer were sufficiently 'suitable' to satisfy the indemnity principle. In my view, it is not the role of a costs judge carrying out an assessment between opposing parties to consider such matters.

88. I also bear in mind the points made by Arden LJ in *Garbutt v Edwards* (see 73 paragraph above), namely, that the SRA Code of Conduct 2011 is there to protect clients, rather than to relieve paying parties of their obligation to pay costs. I am firmly of the view that the mere fact a contract of retainer is difficult to understand is not sufficiently contrary to public policy to give rise to a finding that the indemnity principle has been breached.

The Third Agreement: control, champerty and public policy

89. Mr Hogan drew my attention to a number of provisions that he said gave the Solicitors excessive control over the Claimant's affairs. Whilst I paraphrase him, Mr Hogan said that the Solicitors had such a degree of control that they had offended against public policy as expressed in the SRA Code of Conduct 2011 (and generally), and that as a result, the contract of retainer was tainted with illegality.

90. Mr Hogan had this to say in this regard:

> 'The client has assigned not only his interest in any sums recovered described as Settlement Funds, but also his rights to claim the Settlement Funds, a purported assignment of his rights of action and giving control of the claim to the solicitors.
>
> 'The solicitor has taken control of the litigation: through extensive covenants and requirements for the client to accept his direction of the litigation including any settlement, reducing the client to a mere cipher …
>
> 'In short, the solicitor has displaced the client as the real party to the litigation, and by contract assumed a role very different from that as independent officer of the court that a solicitor normally occupies, advancing his client's case, but with an overriding duty to the court.
>
> 'The solicitor has put himself into conflict with his client, by subordinating the client's interests to his own through an extremely onerous and unfair agreement.'

91. Mr Hogan then went on to refer the court to certain 'outcomes' and 'indicative behaviours' in the SRA Code of Conduct 2011 (as amended). In essence, those provisions confirmed that a solicitor must act in the best interests of his or her client. He also drew my attention to a number of well-known authorities on champerty. Having done that, he went on to summarise his case the following way:

> 'In summary:

(a) Whereas a solicitor may lawfully defer and make contingent his fees upon success in litigation, he has no wider legitimate interest in a suit.

(b) The assignment to the solicitors of the client's right to claim in litigation is "wanton and officious" meddling, in the client's business.

(c) The solicitor's role as independent officers of the court is compromised by their assuming contractual and *de facto* control of the litigation and reducing the client to a cipher.

(d) By way of example, the solicitors can act to the client's detriment, by directing settlement of the claim at any level which secures their fees, potentially leaving the client with nothing.

(e) The solicitors throughout the litigation, had a beneficial interest in the Property over which the litigation was being fought.

(f) The solicitors have not only acted in conflict with their client's best interests, they have subordinated those interests decisively to their own, and have contractually barred the client from complaining about actions they have taken as agent and attorney.'

92. To a limited extent, I agree with Mr Hogan. Whilst I do not set out the relevant provisions, I agree with him that the Solicitors had a degree of control over the Claimant's affairs that was greater than one would normally expect. I remind myself that it is not unusual to find provisions that are intended to provide legal representatives with a degree of security (such as provision for lien, solicitors' charging orders, control over payments by opponents, etc), but in this instance, the Solicitors have gone much further than this in that all three agreements are overly defensive in both their tone and their content. Indeed, I would even go so far as to say that the Solicitors seem to have forgotten that they were there to assist and advise the Claimant, not to treat him as an adversary.

93. All that being said, I do not believe that this gave rise to a situation that was quite as foreboding as Mr Hogan suggests. This is for the following reasons:

    i) First of all, I reject the notion that there has been an assignment of the claim (or anything that was effectively the same as an assignment). This is because the Claimant still had an interest in the matter, namely the right to any monies recovered from the estate that were not applied to the Solicitors' fees and disbursements.

    ii) Secondly, there was, in my view, no champerty; this is because there was no division of the spoils. To my mind, a division of the spoils means something other than a solicitor merely taking steps to ensure recovery of his or her fees and disbursements.

    iii) Thirdly, I remind myself that not only is it permissible for legal representative to require clients to give security for unpaid fees, but such practices are commonplace. I can see nothing inherently wrong—and certainly nothing 'wanton' or 'officious'—with solicitors having a degree of control over a client's affairs in this regard. The Claimant's claim was in respect of a disputed

estate, and I can fully understand why in those circumstances (where life-changing amounts of money may be involved) the Solicitors demanded a greater degree control over matters than, for example, they would have asked for had they been representing a client in a modest personal injury claim. The way they have achieved this may have been excessive and possibly even objectionable, but on the facts of this case, I am unable to say that they went so far as to offend against public policy.

iv) Finally, having seen Mr Johansson give evidence, I was struck by the fact that when skilled counsel forced him to examine the provisions he had drafted, he was genuinely shocked and embarrassed by how assertive his own words were. I have no doubt at all that if push came to shove, the Solicitors would have acted reasonably. Mr Hogan said that when considering whether a contract of retainer offends against public policy the court should look at the tendency of the *contract* to corrupt; I agree with this, but I do not agree with him that this should be done without reference to the facts generally.

94. For all these reasons, I do not find that public policy has been so offended that the contract of retainer is tainted with illegality. In any event, I repeat the points made at paragraphs 87 and 88 above.

The Third Agreement: suitability in terms of the success fee

95. The next issue concerns the fact that the Third Agreement provided for a success fee. In essence, Mr Hogan submitted that the success fee was entirely unjustifiable on the facts of this case, and that this was a factor that I ought to take into account when looking at the Third Agreement as a whole.

96. According to the 2017 Letter, success under the First or Second Agreement would amount to success under the Third Agreement. In addition to this, the Third Agreement (in so far as it is relevant) defines success in this way:

> 'The term "Successful Outcome" in relation to the matter means that one of the following events:
>
> > a verdict judgment or award in your favour, and including or a Grant of Probate or Letters of Administration (a grant of representation);
> >
> > …
>
> is made entered into or occurs in relation to the Claim, the estate, a fund or any of them or arising out of or in the circumstances of the matter, and as a consequence there are Settlement Funds arising payable or transferable which are retained paid or transferred to you or on your account, in relation to your defence and in relation to an account CWPL proposes to or has raised in relation to the matter, but if no the Settlement Funds are so retained paid or transferred within 30 days of the first event to occur or within such later period permitted by CWPL, a Successful Outcome shall be deemed to have occurred on the happening of that event.'

97. My reading of this provision is that if letters of administration were to be granted and if this were to entitle the Claimant to recover monies out of the estate, there would have been

a successful outcome either upon payment of those monies or from 30 days of the date of entitlement, whichever came first. Given the fact that the Claimant had already become the personal representative at the time that the Third Agreement was made, and given the fact that the dispute with the Claimant was about quantum rather than entitlement in principle, I can understand why Mr Hogan said that there had already been a successful outcome even before the Third Agreement had been made.

98. In his written submissions, Mr Hogan had this to say (albeit in a slightly different context):

> 'The effect of this is to increase significantly the Claimant's liability to his solicitors and turn what are term[ed] Conditional fees into Unconditional fees. Yet a 50% success fee was still charged to the client.'

In his oral submissions, Mr Hogan put this point slightly more direct terms: he said that the Solicitors had 'stitched the Claimant up like a kipper'.

99. I would have agreed with Mr Hogan on this point were it not for the fact that the Third Agreement also contained the following provision:

> 'Any Uplift Fee charged would be 50% of the Service Fees, calculated up until the Successful Outcome occurs.'

In my view, this means that the success fee is charged only up to the point that a successful outcome occurs. In view of the above, I do not accept Mr Hogan's submissions concerning the suitability of the Third Agreement.

100. In any event, Mr Hogan's submissions relied heavily on putative breaches of the SRA Code of Conduct 2011 (as amended). In essence, his argument was that it so offended against public policy as reflected in that code that I should find it unenforceable for that reason. For the reasons set out above (see paragraphs 87 and 88), Mr Hogan would have had an uphill struggle on this point in any event. This, however, is largely academic as I have already found that the Third Agreement is unenforceable for other reasons.

Misconduct

101. I now deal with the issue of misconduct. It is possible that some costs (such as paid disbursements) may still be payable notwithstanding my findings concerning the indemnity principle, so it is necessary that I deal with this point.

102. Mr Hogan summarised the Defendant's allegations in the following way:

> '(i) The Claimant and/or the Claimant's representatives negligently represented or wilfully concealed the true nature of the retainer on multiple occasions.
>
> '(ii) The Claimant and/or the Claimant's representatives negligently represented or wilfully miscertified a Bill of Costs on multiple occasions.
>
> '(iii) The Claimant and/or the Claimant's representatives failed to answer fully completely or accurately the enquiries made as to the retainer on multiple occasions.

> '(iv) The Witness Statement of Mr Terence Johansson does not comply with [an order] and conflicts with the description of the retainer in the replacement Bill of Costs. Either the account contained in the witness statement is inaccurate or the account contained in the replacement Bill of Costs [is inaccurate], or both.'

103. These allegations refer to certain failings as being 'negligent'. In fact, CPR, r 44.11—unlike the wasted costs regime—makes no mention of negligence. I do not regard this as being fatal to Mr Hogan's submissions, however, as it is tolerably clear that by 'negligent' he meant 'unreasonable' (which is the terminology used in CPR, r 44.11(1)(b)).

104. I remind myself of the fact that in *Gempride Ltd v Bamrah & Anor* [2018] EWCA Civ 1367 at [21], Hickinbottom LJ adopted the following tests of what is 'improper' and 'unreasonable' (both of which had their origins in *Ridehalgh v Horsefield* [1994] Ch 205):

> 'Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.'
>
> 'The expression ['unreasonable'] aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. … The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.'

105. I also remind myself of the summary of the law as given by Hickinbottom LJ (see *Gempride Ltd* at [26]):

> 'i) A solicitor as a legal representative owes a duty to the court, and remains responsible for the conduct of anyone to whom he subcontracts work that he (the solicitor) is retained to do. That is particularly so where the subcontractor is not a legal representative and so does not himself owe an independent duty to the court.
>
> ii) Whilst "unreasonable" and "improper" conduct are not self-contained concepts, "unreasonable" is essentially conduct which permits of no reasonable explanation, whilst "improper" has the hallmark of conduct which the consensus of professional opinion would regard as improper.
>
> iii) Mistake or error of judgment or negligence, without more, will be insufficient to amount to "unreasonable or improper" conduct.
>
> iv) Although the conduct of the relevant legal representative must amount to a breach of duty owed by the representative to the court to perform his duty to the court, the conduct does not have [to] be in breach of any formal professional rule nor dishonest.
>
> v) Where an application under CPR rule 44.11 is made, the burden of proof lies on the applicant in the sense that the court cannot make an order unless it is satisfied that the conduct was "unreasonable or improper".

vi) Even where the threshold criteria are satisfied, the court still has a discretion as to whether to make an order.

vii) If the court determines to make an order, any order made (or "sanction") must be proportionate to the misconduct as found, in all the circumstances.'

106. I reject entirely any suggestion that the Claimant personally has been at fault; there is no evidence of any wrongdoing whatsoever on his part. I also make no criticism of Mr Simpson, not least because he would have been just as overwhelmed by the retainer documentation as I was when I first saw these papers. Similarly, I find that Mr Varney was 'drip fed' information, so what I say below should not be regarded as reflecting too badly on him.

107. I note that Judge LJ had this to say in *Bailey v IBC Vehicles Limited* [1998] 3 All ER 570 at 575:

> 'As officers of the court, solicitors are trusted not to mislead or to allow the court to be misled. This elementary principle applies to the submission of a bill of costs.'

108. I find that the original Bill of Costs was miscertified, this being because it stated that the work had been carried out under a private client retainer. I bear in mind that mistakes happen even in well-managed offices, but there are two aggravating features here that mean that this was not just unreasonable, but also improper. The first is the fact that on her own evidence, Ms Wilson was aware of the fact that nearly all of the work that the Solicitors did was funded by way of conditional fee agreements; as such, the miscertification ought to have been obvious. Indeed, the error ought to have leapt off the page at her. The second is the fact that Ms Wilson accepted that she had made no real attempt to access the digital store on which her firm kept copies of the relevant contracts of retainer. These things in combination indicated an unacceptably lax attitude towards certification that, in my view, a consensus of professional opinion would regard as being improper (as well as unreasonable). It is, however, very much at the lower end of the spectrum of impropriety.

109. As to Mr Varney's email of 29 August 2018 and the Replies, I find that it was unreasonable and improper for the Defendant's (entirely reasonable) enquiries to be rebuffed as being a 'fishing expedition'. By this stage, Mr Varney ought to have been given sight of all the relevant documentation; it would seem that this did not happen until much later. In my view, by this stage the Solicitors ought to have been aware of the fact that the Bill of Costs had been miscertified; as such, they ought to have taken proactive steps to rectify this. The failure to do so was unreasonable, and the attempt to deflect the Defendant's enquiries was improper. In particular, on the facts of this case, the Defendant ought not to have been put in the position of having to serve Part 18 Requests. Again, however, this was very much at the lower end of the spectrum of impropriety.

110. I am less critical of errors in the amended Bill of Costs served on about 6 September 2018, this being because I find that the failure to refer to the Third Agreement may have been as a result of the Solicitors being overwhelmed by impenetrability of the documentation that they had drafted; it was, however, still unreasonable.

111. As to the reamended Bill of Costs served in about January 2019, I make no findings of misconduct; the mere fact that the narrative was wrong does not lead to a finding of

misconduct. Instead, it was merely a consequence of the fact that the Solicitors had created a contractual quagmire and had lost their way. Similarly, I make no findings of misconduct in relation to Mr Johansson's witness statement; the fact that it did not entirely tally with what was said elsewhere was unfortunate, but I do not regard this as amounting to misconduct.

112. In addition to the above, I find that the failure to offer voluntary disclosure of the retainer documentation was unreasonable (but not improper). On the facts of this case, it ought to have been obvious from the very outset that a 'genuine issue' had been made out: it was unreasonable to contend otherwise.

113. In my view, this is a case in which it would be appropriate to impose a sanction; that may be so, but any such sanction must be proportionate to the misconduct and must take into account all the circumstances. In this regard, it is relevant that the problems were entirely of the Solicitors' own making. That said, I also bear in mind the fact that one of the those problems arose was because Mr Johansson attempted to use a contract of retainer that had originally been created for use in another jurisdiction; this was an exceptionally unwise thing to do, but I find that he did it because he believed that it would enhance client care (although, in the event, it had precisely the opposite effect). I also bear in mind the fact that one of the reasons Ms Wilson did not check the retainer documentation was because she found the on-line facilities afforded to her were difficult to use. I have also had regard to the fact that both Mr Johansson and Ms Wilson were entirely honest and straightforward witnesses who did their best to assist the court, and that they made no attempt to disguise or conceal their shortcomings.

114. In view of the above, the sanction I impose is a reduction of the Claimant's profit costs (but not disbursements) of 25 percent. In view of the fact that I have already found that the Third Agreement is unenforceable, this sanction is likely to be of little practical effect.

115. Finally, I would like to thank counsel for their assistance. It is possible that there are certain disbursements that still need to be assessed; the parties should liaise and let the court know if further directions are required in this regard.