Neutral Citation Number: **[2023] EWHC 3318 (SCCO)**
Case No: SC-2022-BTP-000021

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London WC2A 2LL

Date: 22 December 2023

Before :

DEPUTY COST JUDGE BEDFORD

- -

Between:

Frances Cooke (1)

Terence Chin (2)

Sharon Biron (3)

Claimants

- and -

Woodchurch House Limited

Defendant

- -
- -

Mr Joshua Munro (instructed by **TMC**) for the **Claimants**
Mr James Wibberley and Nicholas Lee (instructed by **Lester Aldridge**) for the **Defendant**

Hearing date: 30 January 2023
Further submissions: 12 September 2023
Judgment date: 22 December 2023

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Approved Judgment

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

…….....

Deputy Cost Judge Bedford:

1. This Judgment concerns a claim for costs arising out a civil claim following the tragic death of Mr Paul Chin whilst in the Defendant's care. During the course of a Detailed Assessment the Defendant has advanced the following preliminary issues relating to the manner in which the Claimants' funded their various claims as identified across a ten part *interpartes* Bill of Costs:

    i) Whether a valid retainer, implied or otherwise, existed pre 6 May 2016;

    ii) The scope of the Legal Aid retainer entered into on 6 May 2016;

    iii) Whether the Claimants can bring themselves within the scope of Reg. 21(1) Civil Legal Aid (Costs) Regulations 2013 for the purpose of the disapplication of the Indemnity Principle;

    iv) Whether a conflict of interest invalidates the Claimants' retainers;

    v) Whether a contractual indemnity provided by the Claimants' former solicitor negates any personal liability on the Claimants to pay the costs of their newly appointed solicitors;

    vi) Whether that contractual indemnity operates as a cap on the Inquest costs;

    vii) The reasonableness of the First and Second Claimants taking out Legal Aid funding;

    viii) The recoverability of an ATE premium taken out by the Third Claimant.

2. I am informed by Counsel that the third issue, whether the indemnity principle in these factual circumstances is disapplied under Reg. 21 (1) Civil Legal Aid (Costs) Regulations 2013, is a point in respect of which there is currently no authority.

Background:

3. The Defendant is the operator of a care home charged with the care of Mr Paul Chin ["Mr PC"] who was 46 years old at the relevant time. The First Claimant and Second Claimant are the parents of Mr PC. They had been long separated. The Third Claimant is Mr PC's sister who is a resident of the United States of America. As with most, if not all, claims where an inquest is held, the circumstances of this claim are tragic.

4. Mr PC had a history of learning difficulties and cerebral tuberculosis which, although well managed, caused episodes of mental confusion. In February 2013 he suffered a fall from his bicycle and suffered an injury to his knee which significantly limited his mobility and contributed to his eventual obesity. By June 2014 his ability to stand was severely limited to such an extent that he ultimately became bed bound.

5. In September 2014, Mr PC began suffering with episodes of mental confusion. He was consequently admitted to Queen Elizabeth Queen Mother Hospital where he was treated for tuberculosis and other conditions arising his bed bound state.

6. Once his condition stabilised sufficient for him to be discharged, the decision was taken to place him in the Defendant's care rather than return him to his own home with the intention that the Defendant would be able to provide rehabilitation and support sufficient to mobilise Mr PC.

7. Mr PC was therefore transferred to the Defendant's care on 29 January 2015.

8. Thereafter there followed a ten-month period of neglect by the Defendant, including confinement to a room without any sunlight, leaving him in a dirty state, failing to properly protect him from assault by another resident and failing to adequately care for him during the serious illness which preceded his eventual death on 26 November 2015, aged just 47 years old.

9. The Inquest into the cause of Mr PC's death commenced on 8 July 2019 and eventually concluded on 26 July 2019 ["the Inquest"]. It is right to record that the Inquest was more protracted than originally anticipated by the parties, including an extension from an initial five day listing to a 12 day listing along with two further pre-inquest reviews. The Coroner ultimately made a finding of neglect which contributed to Mr PC's death.

10. The Claimants initially instructed Leigh Day in January 2016. During their tenure they issued protective proceedings on 25 November 2016 following a refusal by the Defendant to agree a standstill agreement.

11. A conflict of interest arose between Leigh Day and the Claimants which precipitated a transfer of instructions to Hodge Jones Allen Solicitors ["HJA"] in December 2016.

12. Following the outcome of the Inquest HJA prepared and served a Letter of Claim which was accompanied by a Part 36 offer in the sum of £60,000 in October 2019. That was met by a Letter of Response from the Defendant denying liability.

13. Proceedings were issued on 25 November 2016. These were finalised and served on 20 March 2017. The First Claimant brought a claim on behalf of the Estate including a claim under Article 2 Human Rights Act. The Second and Third Claimants brought claims on their own behalf as secondary victims. The litigation which followed was allocated to the Multi-Track and was hard fought, with minimal agreement and frequent applications being necessitated.

14. It was not until August 2020 that the parties came to the negotiating table which ultimately led to settlement in the sum of £37,500 on 22 September 2020.

The Cost Proceedings:

15. The costs proceedings have continued in much the same vein as the substantive action: hard fought and with no quarter given.

16. The Bill of Costs was served under N252 on 28 April 2021. It is split into ten parts reflecting differing contracting parties and funding arrangements in place from time to time, making the overall position convoluted. It is signed with the usual Precedent F certification by both Leigh Day and HJA covering their respective parts.

17. Points of Dispute and Replies were filed and served. The Points of Dispute contain a plethora of preliminary issues against the various funding positions.

18. The Replies served were extremely brief by any standards, but particularly so considering the extensive objections taken.

19. The matter first came before me on 12 September 2022. During my preparation for that hearing I found the funding position opaque, particularly because of the unhelpful Reply and despite having had access to the Claimants' Assessment Bundles.

20. Following an unsatisfactory explanation as to the funding position during the hearing, the Claimants were put to their election as to whether to produce various retainer documents or rely upon alternative evidence. Consequential directions were given to update the pleadings only in so far as they related to the funding position in respect of which the Claimants were put to their election. Despite these directions, the signed CFAs were not disclosed until a week prior to the re-listed hearing on 30 January 2023.

21. The Amended Points of Dispute take a myriad of issues in respect of funding. It is common ground that the funding objections only go to the Parts 1-6 of the Bill of Costs. In so far as the PODs contain objections to the balance of the Parts these were not advanced orally by the Defendant.

22. The Claimants filed Amended Replies alongside a witness statement of Ms. Nancy Collins of HJA.

23. Skeleton Arguments and a List of Issues were prepared. Whilst the List of Issues was settled by the Defendant and not agreed prior to the re-listed hearing, it is nonetheless a helpful guide from which to analyse the number of live issues. The arguments extend to 22 separate issues and engage with Parts 1 through 6 of the Bill of Costs, with a further separate 7 issues identified thereafter. Thus, in total 29 preliminary issues were identified.

24. Two different funding bundles exist: one which contains documents as produced to the Defendant and entitled "Claimant's Retainer Bundle – Served on the Defendant" ["the Retainer Bundle"] and one which is entitled "Funding & Correspondence – Privileged Bundle" which have not been produced to the Defendant. Upon questioning, the Claimant made very clear that they were not relying upon any documents within the

Privileged Bundle. I have accordingly excluded from all those documents from account.

25. The hearing then came back before me on 30 January 2023 wherein submissions alone took the full day. Given the vast extent of the technical issues taken and the involved nature of them, I deemed it appropriate to reserve Judgment.

The Law:

Relevant Legislation:

26. The relevant legislation in respect of legal aid is to be found across three main interlocking provisions: Legal Aid, Sentencing and Punishment of Offenders Act 2012 ["LASPO"] and The Civil Legal Aid (Costs) Regulations 2013 ["the Regulations"]; the Civil Legal Aid (Remuneration) Regulations 2013 ['the Remuneration Regulations"]. Both the Regulations and the Remuneration Regulations were enacted further to the powers granted to the Lord Chancellor under LASPO. All have the same commencement date of 1 April 2013. To that extent, they are interconnected.

27. LASPO contains various provisions in respect of the availability of legal aid. Its enactment brought with it a significant chilling effect on the application and availability of legal aid in civil claims. It identifies two broad types of legal aid: civil legal aid and criminal legal aid. The provisions in respect of civil legal aid are to be found in sections 8 through to 12 and criminal legal aid provisions are to be found across sections 13, 15 and 16.

28. S.9 LASPO sets out the general types of cases under which the government will provide civil legal aid, and thereafter provides a list of such services in Part 1, Schedule 1.

29. Part 1 of Schedule 1 creates a list of types of legal services for which civil legal aid is theoretically available. That list expressly includes Inquests at 41(1).

30. This position is echoed in the Remuneration Regulations, in particular, Reg. 9 clearly signposts that work in respect of inquests is considered to be civil legal services.

31. The Regulations provide more granular provisions in respect of the making of costs orders both in favour and against a legally aided party.

32. Reg.2 sets out various definitions of the terms used throughout the statutory instrument. The relevant provisions are as follows:

"costs order" means an order that a party pay all or part of the costs of proceedings;

"court" includes any tribunal having the power to award costs in favour of, or against, a party;

"legally aided party" means an individual or legal person to whom, in relation to relevant proceedings, civil legal services have been made available under Part 1 of the Act;

"legally aided party's costs order" and "legally aided party's costs agreement" mean, respectively, an order and an agreement that another party to relevant proceedings pay all or part of the costs of a legally aided party;

"Relevant proceedings" means relevant civil proceedings (or contemplated proceedings) before a court.

33. In particular, Reg.21 expressly disapplies the common law indemnity principle. Absent this statutory disapplication, any receiving party to whom legal aid is granted would be restricted to the significantly reduced rates under which the Legal Aid board engages solicitors. The Regulation provides as follows:

Amount of costs under a legally aided party's costs order or costs agreement

21.*—(1) Subject to paragraphs (2) to (4), the amount of costs to be paid under a legally aided party's costs order or costs agreement must be determined as if that party were not legally aided.*

(2) Paragraph (3) applies only to the extent that the Lord Chancellor has authorised the provider under section 28(2)(b) of the Act to take payment for the civil legal services provided in the relevant proceedings other than payment made in accordance with the arrangements.

(3) Where this paragraph applies, the amount of costs to be paid under a legally aided party's costs order or costs agreement is not limited, by any rule of law which limits the costs recoverable by a party to proceedings to the amount the party is liable to pay their representatives, to the amount payable to the provider in accordance with the arrangements.

(4) The amount of costs to be paid under a legally aided party's costs order or costs agreement may include costs incurred in filing with the court, or serving on any other party to proceedings, a notice or any other document in accordance with regulations made under section 12 of the Act.

34. S.25(1) LASPO provides as follows in respect of an individual's liability to repay the Lord Chancellor via the statutory charge:

(1)Where civil legal services are made available to an individual under this Part, the amounts described in subsection (2) are to constitute a first charge on—

(a)any property recovered or preserved by the individual in proceedings, or in any compromise or settlement of a dispute, in connection with which the services were provided (whether the property is recovered or preserved for the individual or another person), and

(b)any costs payable to the individual by another person in connection with such proceedings or such a dispute.

(2)Those amounts are—

(a)amounts expended by the Lord Chancellor in securing the provision of the services (except to the extent that they are recovered by other means), and

(b)other amounts payable by the individual in connection with the services under section 23 or 24

35. S.28(2) LASPO contains the statutory prohibition against 'topping up':

(2) A person who provides services under arrangements made for the purposes of this Part must not take any payment in respect of the services apart from—

(a)payment made in accordance with the arrangements, and

(b)payment authorised by the Lord Chancellor to be taken.

36. S. 46 LASPO contains provisions which significantly curtail the Court's ability to make an *interpartes* costs order permitting the recovery of ATE premiums. That section provides as follows:

(1) In the Courts and Legal Services Act 1990, after section 58B insert—

"58C Recovery of insurance premiums by way of costs

(1) A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2).

(2) The Lord Chancellor may by regulations provide that a costs order may include provision requiring the payment of such an amount where—

(a) the order is made in favour of a party to clinical negligence proceedings of a prescribed description,

(b) the party has taken out a costs insurance policy insuring against the risk of incurring a liability to pay for one or more expert reports in respect of clinical negligence in connection with the proceedings (or against that risk and other risks),

(c) the policy is of a prescribed description,

(d) the policy states how much of the premium relates to the liability to pay for an expert report or reports in respect of clinical negligence ("the relevant part of the premium"), and

(e) the amount is to be paid in respect of the relevant part of the premium.

Relevant Authorities:

37. ***Robinson v EMW Law LLP*** **[2018] EWHC 1575 (Ch)** concerns implied retainers. The circumstances arose from proceedings in the High Court relating to a Bankruptcy petition brought by the defendant. Mr Robinson initially approached his solicitors to act for him in October 2014. Despite going on the record and taking steps in the litigation, they did not turn their minds to the terms of engagement between client and solicitor until May 2015, being five months before the listed trial date.

38. After reviewing the relevant authorities, Mr Justice Roth identified two questions which must be addressed when considering whether an implied retainer is present: firstly, whether the solicitors whose costs are sought were acting for the receiving party as their client. If so, that creates a rebuttable presumption that liability for the solicitors costs exists and one goes on to address the second question: does an agreement exist between solicitor and client that there would be no liability for costs in any circumstances. In answering the first question, Mr Justice Roth found it determinative that Fidelity were on the record for Mr Robinson as his solicitors from the outset.

39. ***Plevin v Paragon Personal Finance Limited*** **[2017] UKSC 23 at [19]** is authority for the proposition that the definition of 'proceedings' can have different meanings depending upon the context in which the phrase is used. Therefore in order to ascertain the meaning in any given provision, one must look to the statutory context in which it is used.

40. ***Hyde v Milton Keynes NHS Foundation Trust*** **[2017] EWCA Civ 399** stands as authority that a publicly funded litigant must not be required to make any payment in respect of services provided whilst publicly funded. Put shortly: a solicitor cannot 'top up' legal aid funding by charging client directly for the same services covered by the legal aid certificate during its currency.

41. ***Forde v Birmingham City Council*** [2009] EWHC 12 (QB) provides at [§81/82] that agreement to continue to act for a client was adequate consideration in circumstances where a party enters into a further retainer prior to an original retainer being either terminated or spent.

42. Furthermore [§111] stands as authority for the proposition that an external party to a contract, as is the position with an *inter partes* paying party, cannot take advantage of a voidable contract in circumstances where the parties privy to that contract have not taken steps to void the contract themselves.

43. ***MWB Business Exchange Centres Ltd v Rock Advertising Ltd*** **[2018] UKSC 24** concerns the formation and variation of a clause in a licensing agreement which expressly precluded the oral modification of the agreement. Argument was raised as to

whether commercial advantage was capable of constituting good consideration for variation of an agreement. However, [§18] of Lord Justice Sumption's decision sets out that the determination of that question was unnecessary on the appeal. Whilst rumination on the issue was thereafter set out based on the prior conflicting authorities of ***Foakes v Beer*** **(1884) 9 App Cas 605** and ***Williams v Roffey Bros & Nicolls (Contractors) Ltd*** **[1991] 1 QB 1**, as the issue was not determined it cannot be properly said that the issue was determined such that it is binding on me in these circumstances.

44. ***Renveille Independent LLC v Anotech International (UK) Limited*** [2016] EWCA Civ 443 concerned the formation of a contract between the parties in circumstances where the written contract expressly stated that the terms set out therein would not be binding until signed by the offeree, who failed to so sign but nonetheless performed their contractual obligations. [§40 and 41] of the Judgment of Mr Justice Cranston sets out a number of trite contractual principles concerning the enactment of contracts and practicalities of offer and acceptance of terms. In particular, where a contract prescribes the mode of acceptance, such as a requirement to be signed by both parties before it can take contractual effect, [§41] says this:

> *In my view, it follows that where signature as the prescribed mode of acceptance is intended for the benefit of the offeree and the offeree accepts in some other way, that should be treated as effective unless it can be shown that the failure to the failure to sign has prejudiced the offeror: see Chitty on Contracts, 32 ed, 2015 §§2-066, 2-067..*

Part 1 of the Bill of Costs:

Issues:

45. The Bill of Costs identifies the costs claimed under Part 1 from 8 December 2015 until 9 January 2017. It is silent as to the funding arrangements, merely stating that part as Costs of Leigh Day Solicitors.

46. The List of Issues in respect of Part 1 identifies the following:

i) Whether there was a retainer in place allowing the recovery of costs up to 6 May 2016;

ii) Whether an implied retainer existed for that period:

iii) The identity of the Parties to the Legal Aid Retainer created on 6 May 2016 and whether it extends to all parties or is confined to Ms. Cooke only;

iv) Whether the indemnity principle is disapplied by the Civil Legal Aid (Costs) Regulations 2013;

v) Whether the conflict of interest that caused Leigh Day to cease acting prevents the recovery of any costs.

47. These issues can broadly be split into three categories: arguments against the existence of an implied retainer, arguments engaging with the application of the Regulations and the effect of a conflict of interest.

Evidence:

48. The Bill of Costs attests that Part 1 of the Bill covers the work done by Leigh Day and claims a total of £19,925.40. It does not state the nature of the retainer under which that work was undertaken.

49. In addition to the Replies, the Claimant relies on the Witness Statement of Ms Nancy Collins, a Partner in the firm of HJA. She gives brief evidence engaging with the period of time in which Leigh Day were instructed. The height of her evidence in respect of Leigh Day is as follows: At [§6]:

..*Leigh Day acted for all three Claimants under Legal Help. I can see from their file that the CW1 form was sent to Mr Chin on 5 January 2016 and this was returned on or around 3 May 2016.*

50. She goes on at [§8] to say this:

…protective proceedings in the civil claim were issued on 25 November 2016 on behalf of all three Claimants. It is evident from Leigh Day's file that Ms. Biron made payment to Leigh Day for the Court issue fee by credit card on 5 November 2016.

51. And this at [§9]:

…Leigh Day were acting for all three Claimants without any written retainer to cover those proceedings. However, there was an implied retainer. Leigh Day were the Claimants' solicitors at that time.

52. The Claimant relies on the following documents in the Leigh Day Bundle:

i) An undated file note wherein there is brief reference to "Chin- General File – Electronic Bundle EC – Claim 1";

ii) A telephone attendance note dated 3 May 2016 which reads:

Client Description: Terence Chin

Notes: Call from Sharon Biron to confirm that LAA forms have been returned. Confirmed that we have received papers and that MV is in the early stages of looking into the matter. SB happy and will update in due course.

iii) An entry in the time recording ledger dated 19 December 2016 which states:

DDU drafting EC-Claim 1.

The time recording ledger refers to the case number ending 733, which is the case number for Terence Chin: Death of Son at Woodchurch House.

iv) That entry is supported by an attendance note bearing the same description on the same date at page 628 of the Bundle.

v) However, the time recording ledger at the same page notes:

Letter costs agreement

DDU creating table of costs, amending and calculating profit costs. Noting that Misc LH claim schedule authorisation is only £79 with £237 exceptional case threshold

53. Finally, the Claimant relies on the Client Care Letter of 5 May 2016 which is accompanied by a document entitled Your Legal Costs which provides as follows:

…

The Legal Aid Certificate:

Your Legal Aid certificate will say what work on your case it covers. At the start it won't cover all the work needed to finish your case and we will have to apply to have it extended to cover further stages as the case develops. It will only cover work done from the date it is granted. It will not cover work done before this date.

You will be liable for work that we carry out on your case prior to securing legal aid. Sometimes it is necessary to carry out significant amounts of work, sometimes on an urgent basis, before confirmation of a legal aid certificate is received from the LAA.

i) *Hourly Rates and Expenses*

Whilst you are in receipt of Legal Aid, we will be paid for our work by the LAA but at hourly rates far below our commercial rates. However, in the event that we succeed in obtaining an order that your Opponent must pay your costs, we are able to recover those from your Opponent at our commercial hourly rates.

You will at all times remain liable to us for any work we carry out for you that is not covered by Legal Help or your Legal Aid certificate. For the avoidance of doubt, this will include:

- *Any work we do for you following instruction but before LAA funding is obtained*
- *Any work we do for you after your certificate is withdrawn*
- *All work we have done for you in the event that your certificate is disregarded*

Such work is charged at our commercial rates.

54. The Legal Aid rates and the Commercial Rates are then set out thereafter.

55. The Defendant relies on the following documents within the Retainer Bundle:

i) A letter to Ms. Cooke dated 5 May 2016, the pertinent elements of which read as follows:

Thank you for instructing Leigh Day to deal with your case. I offer you and your family my sincere condolences for the loss of your son.

The purpose of this letter is to explain and record for the avoidance of any doubt, the nature of the instructions that you have given to us, the advice that we have given you so far and the action that we have agreed to take to pursue the case further.

It should be read in conjunction with the enclosed Leigh Day's "Your Guide to our Services and Costs" and the document called Your Legal Costs, which sets out information about the costs of your case. These documents contain important information about the costs of your case our standards of service and procedure for dealing with complaints.

Your Requirements and objectives:

You wish to secure an Inquest into Paul's death and be represented at the Inquest.

You require us to advise you regarding the Coroner's duty to hold an Inquest and to try and persuade the Coroner to open an Inquest.

……

Limitations and exclusions:

At this stage, we are not advising you in relation to any claim that may arise out of the circumstances of Paul's death, however, we will discuss that with you in due course once we have further information.

> *Our current funding is also only for assistance to **secure an inquest.** If one is secured, further legal aid is likely to be available to assist you to prepare for that inquest and we will also advise you about the possibility of seeking legal aid to cover the cost of representing you at any inquest.*
>
> .....

56. The file was transferred to HJA around 7 December 2016 due to a conflict of interest. Those costs fall under Part 2 of the Bill of Costs.

57. It is relevant that upon questioning, the Claimants were unable to produce any documents directly pertaining to the retainer. The best evidence is that set out above in the attendance notes and the time ledger which merely refer to its existence.

58. As a matter of fact, I find whilst those documents do refer to a Legal Help certificate, they fail to set out any of the specifics as to the application or scope of the certificate.

59. My own perusal of Leigh Day's file of papers show that in December 2015 they were initially contacted by Ms Biron on behalf of her father the Second Claimant. Almost immediately discussions were had in respect of the availability of Legal Help and eligibility [16 December 2015/5 January 2016]. Those forms were chased on 1 February 2016 with clear advice that Leigh Day required return of the funding forms prior to being able to assist. Initially the forms were not completed correctly and had to be resent. It is clear that Leigh Day were not prepared to progress matters or undertake any formal steps until Legal Aid had been secured [Letter 14 March 2016/email 12 April 2016].

60. A safeguarding meeting was held on 13 April 2016. On 12 April 2016 Ms. Biron emailed Leigh Day stating she would be 'unrepresented' and enquired if she could pay Leigh Day to attend privately. This request was not specifically engaged with by Leigh Day other than to repeat that they were unable to progress matters absent Legal Aid being *in situ*.

61. The Legal Help forms were then completed by Ms. Cooke and returned in early May 2016. An email dated 3 May 2016 shows that at this point Leigh Day accepted the claim under the Legal Help scheme in respect of Ms. Cooke.

62. Additionally, on 24 February 2017 a fee earner by the name of Mr Beagent undertook a file review and discovered that the Legal Help certificate was issued on 14 April 2016 and was in fact in the name of Ms. Cooke only.

Discussion:

Implied Retainer:

63. The Amended Points of Dispute allege that the Claimants have presented an inconsistent account as to how the Claimants funded the claim at this stage. They say that inconsistency arises because the Bill is silent as to funding, the Replies thereafter asserting that a private retainer existed between Ms Biron and Leigh Day, but being silent as to the other Claimants, that further, no evidence of a retainer exists prior to the letter of 5 May 2016 and in any event, that that letter only records Leigh Day acting for Ms Cook under the Legal Help scheme expressly restricted to the inquest only.

64. The Defendant says the consequence of that position is:

i) Firstly, no implied retainer can be present before 5 May 2016 because there is no evidence that the Claimants were the clients of Leigh Day. All Leigh Day were concerned with at that time was preliminary enquiries scoping out the possibility of a claim, which, if answered positively, Leigh Day would then sign up the Claimants as clients with costs to be paid under the provisions of the Legal Help scheme. However, that position is to be contrasted with signing up the Claimants as clients from the very outset. In consequence, the Claimants fall at the first ***Robinson*** hurdle;

ii) Secondly, that even if they are wrong on the first position, that there was an implied agreement that the Claimants would not be required to pay Leigh Day's fees. That such a position is apparent from the admission in the Replies that Leigh Day would act under Legal Aid only and that further support for this position can be found from the "Claimants lack of funds" and the lack of evidence supporting advice from Leigh Day to the Claimants that they would need to make payment and lack of any evidence as to an attempt to create a retainer until Leigh Day could apply for Legal Aid.

65. In answer to the Defendant's objection, the Claimant's say this:

i) Firstly, Leigh Day acted for all Claimants under the Legal Help scheme from 7 January 2016. This was obtained for the entire family and not any specific individual. Whilst it was accepted that the Claimants are unable to produce the certificate or any correspondence from the Legal Aid Board, Mr Munro says that the evidence above is clear and compelling evidence that a Legal Help certificate was in place which covered all Claimants as a family unit;

ii) Secondly, that an implied retained exists prior to Legal Help being instigated on 7 January 2016. Here Mr Munro relies upon ***Robinson*** as support for the proposition that, absent direct evidence to show the solicitors agreed to act for the Claimants for free, an implied retainer exists prior to Legal Help being instigated. He says there is no such evidence and consequently the implied retainer is made out.

iii) Finally, in so far as there is any doubt, the Client Care Letter of 5 May 2016 creates a private paying retainer which covers any 'gaps' which may exist.

66. The parties are agreed on the law in respect of the formation of an implied retainer and agree as to the relevant principles contained in ***Robinson.*** Furthermore, the Defendant accepts that there was a 'legal aid retainer' covering the costs post 6 May 2016 subject to the argument on the Regulations.

67. Having considered matters carefully, I reject the Claimants' positions for the following reasons:

68. Firstly, I reject the evidence given by Ms Collins that an implied retainer existed. She cannot give direct evidence as to the state of contractual relations between Leigh Day and the Claimants given that she was not employed by Leigh Day. She relies upon her own review of the file of papers, which I cannot accept as reliable given the lack of reference to the critical aspects referred to above on my own review of the papers. Her reliance upon Ms. Biron paying the Court Fee is misplaced: that was paid on 5 November 2016, ***after*** the Legal Help retainer was in place and during the currency of Part 2. It does not assist in respect of Part 1. Thereafter, [§9] contains a bare assertion as to an implied retainer that is unsupported by reference to any evidence. That is evidentially insufficient.

69. Secondly, the earliest documents from the file upon which the Claimants rely is the note of 3 May 2016. This does not engage with the first ***Robinson*** test as to whether the Claimants were a client from the outset and certainly well before 3 May 2016. Consequently, the ***Robinson*** test cannot be satisfied by that attendance note.

70. Thirdly, the overwhelming evidence on the file of papers is that Leigh Day were simply not prepared to accept the Claimants as clients without having first secured Legal Aid funding. This was repeatedly set out to Ms. Biron in writing and stands as clear and compelling evidence against the Claimants' position. In the face of such evidence, I am simply unable to accept that the Claimants were clients sufficient to engage the rebuttable presumption. Consequently, the Claimants fall at the first ***Robinson*** hurdle for this reason also.

71. In the event that I am wrong on that, I find that in any event, the Claimants fail the second ***Robinson*** test: the implication from the email of Ms. Biron dated 12 April 2016 is that the Claimants had no liability to pay for the services of Leigh Day. If such a liability existed from first contact, Ms Biron would not have to specifically ask if she could pay for a singular step being taken. The two positions are mutually exclusive.

72. Finally, the letter of 5 May 2016 does not create a retrospective private retainer in the manner suggested by Mr Munro. There is no express language therein to create retrospective liabilities. Furthermore, prior to the Claimants becoming clients there is no liability for costs. The natural and ordinary meaning of the language "from first

instruction" must engage with the first instructions ***from a client***. The concept of being a client and providing instructions cannot be divorced. As I have found as a matter of fact that the Claimants were not clients until the Legal Aid retainer was in place, it must follow that they did not provide instructions upon which Leigh Day were duty bound to act sufficient to create a liability for costs extending back to December 2015.

73. In any event, the type of agreement Mr Munro contends for would run contrary to the prohibition on a solicitor against entering into a concurrent retainer providing for payment for the same work already covered by a public funding certificate pursuant to ***Hyde.***

74. For all these reasons, I find that no implied retainer existed before the Legal Help retainer was created.

Legal Aid Retainer:

75. Before addressing the substance of this point, it is important to put the argument in its proper context. The funding position in this Part is highly unusual. In my experience, either a civil CFA is enacted at the outset in respect of a potential civil claim which sits alongside the Legal Aid funding in respect of the Inquest, or once an Inquest is concluded it is usual for a civil CFA to be enacted at that point with retrospective effect to capture any inquest work which is 'of and incidental' to the civil action. The test of 'of and incidental to' pursuant to ***Re Gibsons Settlement Trust*** as upheld in ***Roach v The Home Office*** has stood the test of time.

76. In this case, the Claimants moved firms before work in respect of the Inquest could really get off the ground. No further civil retainer providing for commercial rates was enacted. Leigh Day are therefore left to rely solely upon the Legal Aid retainers in respect of the Inquest and for the purpose of being 'of and incidental to' the civil proceedings. That makes this situation highly unusual and as such the decision herein ought to not be taken as being reflective of the general position of inquest costs which are incurred as 'of and incidental to' civil proceedings.

77. Returning to the substance, three questions are posed by the Defendants:

78. Firstly, the Defendants assert that the only retainer letter disclosed identifies Ms. Cooke as the contracting party. They point to the absence of any evidence engaging either Mr Chin or Ms. Biron under the terms of the Legal Help scheme. They say it follows that she is the sole client under the Legal Aid retainer.

79. Secondly, the Defendant says that in order to recover the costs claimed in the Bill of Costs the Claimants must bring themselves within the scope of Reg. 21.(1) Regulations which disapplies the indemnity principle. Reg.21(1) of Regulations prescribe that only a 'legally aided party' who has received civil legal services in 'relevant proceedings' can benefit from the disapplication of the indemnity principle.

80. The Defendant says that Ms. Cooke cannot satisfy this definition because under Reg. 2, 'relevant proceedings' are defined as proceedings before a 'court'; a 'court' is defined as being any tribunal having the power to make a cost order. A coroner does not have that power. Consequently, an inquest cannot amount to 'relevant proceedings';

81. Finally, that Ms. Cooke needs to show that she is liable to reimburse the LAA for the funding it has provided in order to recover any costs under the indemnity principle. Absent such a requirement to refund the LAA, the Claimant herself has no liability to Leigh Day and as such the Defendant has nothing to indemnify.

82. In response, the Claimants say this: firstly, that Legal Help was obtained "for the family" and consequently they were obviously and self-evidently a 'legally aided party'. They say that as civil proceedings were contemplated at the time of the Inquest, that is sufficient to satisfy the test and thus the Claimants are brought within scope.

83. Mr Munro again relies on the Client Care Letter and says that it creates a prospective private paying retainer. For the reasons set out above, I find that such a retainer cannot concurrently exist alongside the Legal Help retainer in respect of the Inquest.

84. Finally, the Claimant relies upon the Statutory Charge to say that they are liable to account to the LAA for any inquest costs which are recoverable under the civil claim cost order.

Scope of the Legal Help retainer:

85. As a matter of fact, I find that the Legal Help retainer was between Ms. Cooke and Leigh Day. It did not extend to the balance of the Claimants. I am driven to this conclusion in the absence of the Legal Help certificate being presented in evidence. I am therefore left to resolve the question by reference to alternative best evidence. The best evidence is the file of papers. The witness statement of Ms. Collins and the Replies do not assist me for the reasons set out above. The only conclusion which can be drawn from the file of papers, in particular, the file note of 24 February 2017, is that Legal Aid help was provided in respect of Ms Cooke alone.

86. In any event, s.9(1) of the Regulations expressly provide that Legal Aid funding is applied to individuals rather than a collective of people. I do not find that the natural and ordinary meaning of the word "individual" can properly be extended to include a collective or a family without fundamentally destroying the normal understanding of the word itself. Consequently, and against an absence of evidence as to the scope of the Legal Aid certificate itself, I find it implausible that the Legal Aid agency would have granted a certificate in favour of a group of people against the provision of its own Regulations. Particularly a group which included a resident of the USA.

Interpretation of the Legal Aid Regulations:

87. Both "Legally Aided Party" and "Relevant Proceedings" are terms defined by Regulation 2 of the Regulations. "Relevant Proceedings" is specified as being proceedings "before a court".

88. "Court" is also a defined term. Importantly, it expressly requires a jurisdictional power to make a costs order. Put otherwise, the term is not all encompassing: it does not include all jurisdictions in England and Wales, given that the power to make a cost order is not one vested in all courts and tribunals. That creates a bright line test such that the definition of "court" is therefore the critical factor in determining whether the Claimants are able to rely on Reg 21(1) and the disapplication of the indemnity principle.

89. As a matter of law, the Coroners Rules 2019 confer wide powers upon a coroner in respect of an Inquest. However, they do not include the power to make a cost order. I do not find the authority of ***Roach*** determinative or instructive, as the argument before me was not addressed therein, other than to observe that counsel accepted that a coroner did not have the power to make a cost order. That concession appears to have been one correctly made.

90. I reject the Claimants' argument that this conclusion requires a narrow interpretation of the Regulation and a gloss on the natural and ordinary meaning of the words. "Court" is defined in the Regulations. The language attributed to that definition is clear and unambiguous: the power to make a cost order must be present within the proceedings in which legal aid has been granted. To find otherwise would be destructive of that clear requirement.

91. I also reject the argument that this interpretation is starting at the wrong place and that the Regulations require a 'look back test' from the vantage point of the civil cost order within the civil proceedings. Mr Munro says that as long as legal aid has been made available to the Claimants at some point, then Relevant Proceedings is satisfied.

92. Not only can I not find retrospective application within the language of the Regulations, such a conclusion seems to me to be destructive of the definition of "Legally Aided Party" itself. The definition requires civil legal services to have been made available in relation to *relevant* proceedings, not *any* proceedings. That creates a nexus between the relevant proceedings and the civil legal services that cannot be divorced. As a matter of fact, Legal Help was only made available in respect of the Inquest and it is those services which amount to the civil legal services. Legal Aid was not made available in respect of the civil proceedings and as such that they can amount to the relevant proceedings to which the Legal Help relates.

93. I then turn to whether the intention behind the rules lead me to arrive at a different conclusion.

94. There are two elements which comprise the overall protection afforded to an assisted person who is in receipt of Legal Aid. Firstly, the rights and liabilities of an assisted person in respect of which the Legal Aid board agrees to fund the costs of bringing the action. That is governed by the provisions in LASPO. In practical terms, this relates to the funding of the assisted person's own costs.

95. The secondary element afforded by Legal Aid to an assisted person is in respect of rights and liabilities of third parties in respect of cost orders against a legally aided person. That encompasses both adverse cost protection in favour of any third party who succeeds in securing an adverse costs order and cost liabilities of third parties towards the assisted person. Such provisions are delegated to the Regulations by virtue of s. 30 LASPO. In particular, s30 (1) provides that the rights and liabilities of third parties are not affected by the person being an assisted person unless the Regulations provide otherwise.

96. Thus, LASPO and the Regulations are addressing two different situations. They may be two sides of the same coin and complementary in the overall Legal Aid funding package, but they are nonetheless aimed at two different situations. Much in the same way that a CFA governs the relationship between solicitor and client and an ATE agreement governs adverse cost protection between the insurer and client. Interlinked, but not identical.

97. Adverse cost protection and the disapplication of the indemnity principle for the purpose of costs recovery is provided for by the Regulations, which govern the rights and liabilities of third parties in respect of costs. Such rights and liabilities can only exist in a cost shifting environment where a court has the power to make a cost order. The Regulations would make no sense otherwise. Thus, the interpretation of "court" must therefore be seen against that background.

98. I am therefore driven to the conclusion that intention behind the Regulations is supportive of the natural and ordinary meaning arrived at above. The inescapable conclusion is that the Claimants are unable to bring themselves within the confines of "relevant proceedings" for the purpose of Reg. 21(1).

99. Finally, I do not find that the letter of 5 May 2016 assists the Claimants. In arriving at the above conclusion, I have not disregarded the Legal Aid certificate. On the contrary: I have found that it applies to the First Claimant. The conclusion I have reached is through interpreting the application of that certificate to the governing Regulations. That position is not expressly provided for within the letter of 5 May 2016.

Indemnity Principle:

100. The indemnity principle is the bedrock of cost law. That foundation is intended to ensure that a receiving party cannot recover more from an opponent than she is liable to pay for her legal services expended in connection to the dispute in which she has the

benefit of a cost order. Such manifestations being found in both ***Gundry v Sainsbury*** **[1910] 1 KB 645** and ***Harold v Smith*** **(1860) 5 H&N 381.**

101. The legislature has intervened to disapply the indemnity principle in certain specified circumstances. One such exception being those found in the Regulations. However, the disapplication set out in the Regulations only engages with the '*amount of costs'.* It does not answer the question as to whether there is a primary liability upon the legally aided beneficiary of a cost order to repay the LAA.

102. That question is answered by s.23 LASPO which engages with the statutory charge. S.23(1) LASPO confirms that the amounts set out in subsection 2 are to constitute a first charge over not only any property recovered in proceedings connected with the services provided, but also any costs payable by another person in connection with such proceedings or dispute.

103. The Defendant points to an absence of three critical aspects; any civil claim in respect of which legal services were provided, any dispute, and any proceedings. They say that inquest proceedings do not satisfy the test laid out in s.23(1) LASPO and consequently the statutory charge does not bite and there is no liability upon the Claimant to refund the Lord Chancellor such that there is a residual cost to indemnify.

104. I reject this approach. The difficulty the Defendant faces is this: the language used in s.23(1) LASPO requires *'civil legal services'* to have been made available. That is a wide definition and stands in comparison to the narrower "*relevant proceedings".* Where civil legal services have been made available, s.23(2)(a) fixes the legal aid beneficiary with liability for the cost outlay expended by the Lord Chancellor in securing the civil legal services. That liability constitutes a first charge over any costs payable to that individual in connection with those services under s.23(1)(b).

105. The language as expressed is clear and unambiguous. I cannot import requirements from the Regulations into LASPO in circumstances where the language does not expressly so provide.

106. That conclusion sits happily with the conclusion reached above as to the recovery rate due to the different provisions across LASPO and the Regulations. The reason the Defendant succeeded on the quantum of the rates is that Ms. Cooke could not bring herself within the definition of *'relevant proceedings'* due to the lack of power vested in the inquest to make a cost order. However, that fatal aspect is absent from s.23(1) LASPO.

107. Thus, the statutory test under s,23(1) is two fold:

i) Whether civil legal services encompasses inquests;

ii) Whether costs payable in connection with the inquest are recoverable under the civil cost order.

108. S.9 LASPO and 41(1) Part 1 of Schedule 1 together confirm that civil legal services includes inquests. Additionally, Reg. 9 Remuneration Regulations clearly signposts that work in respect of inquests are civil legal services. There is insufficient plasticity in the statutory wording to conclude otherwise.

109. Under the ***Roach*** principles, it is well established that costs in respect of inquests are recoverable under a civil cost order if such costs are 'of and incidental' to the civil claim.

110. Consequently, I conclude that to the extent that costs are recoverable under the ***Roach*** principles, s.23(1) LASPO confers a liability upon Ms. Cooke to repay the cost outlay initially made by the Lord Chancellor by way of the statutory charge. Thus, there is a clear liability against which the Defendant has to indemnify. There is no breach of the indemnity principle.

111. However, such costs will be restricted to the Legal Aid rates for the reasons given above.

Conflict of Interest:

112. Finally, the Defendants argue that the existence of a conflict of interest between Leigh Day and the Claimants prevents the Claimants from recovering their costs. The Defendant has not made good this submission by reference to any principle of law supporting their proposition. Neither have they identified a specific point in time by reference to the Bill of Costs at which they say Leigh Day acted unreasonably in either accepting instructions or continuing to act. In my judgment there is at least some initial burden upon the Defendants to identify the point in time at which they say the Claimants' acted unreasonably in order to make this point good. A general objection to the entirety of the costs under this Part is insufficient.

113. They instead point to what they categorize as the Claimants and Leigh Day's 'refusal' to answer questions as to the nature of the conflict and thereafter use that as a launch pad to invite the Court to find that the Claimants have not satisfied the burden of proof as to whether the costs incurred were reasonable or not.

114. I cannot conclude on the evidence available that Leigh Day acted unreasonably, not least because the Defendant has not identified a time at which such unreasonable conduct was said to occur. From my perusal of the papers, Leigh Day were approached, preliminary steps were taken and funding was obtained as set out above. The test of reasonableness does not require perfection that it what the Defendant's argument amounts to. Anything else is a regulatory issue which falls outside the jurisdiction of the Costs Office.

115. Even if I am wrong on that, any preliminary investigatory work which satisfies the 'of and incidental' test would still have to be undertaken by whatever firm of solicitors was instructed. Consequently, I cannot see in any event that the existence of a conflict here would negate whether the work was reasonably incurred as part of the civil proceedings in any event.

116. The only question thereafter is whether duplication has occurred, which is a question for the line by line assessment.

Part 2:

117. This Part runs from 1 December 2016 until 27 June 2017. The Bill of Costs attests that it is brought under a private retainer between the Third Claimant and HJA in respect of the Inquest ["Retainer Pt2"].

118. The objections are centred on an agreement between Leigh Day and HJA dated 7 December 2016 to indemnify the Claimants up to £25,000 in respect of the inquest costs ['the Agreement']. The Defendant says:

i) The Agreement is drafted in such a way that the Claimants have no liability at all to HJA in respect of any incurred costs;

ii) That in the alternative, the Agreement amounts to a fixed fee such that the Claimants' costs for the entire Inquest are limited to £25,000.

119. The retainer relied upon is dated 6 December 2016 and is expressly stated to be in respect of the Inquest. It was sent to the Third Claimant upon first instruction. ["Pt 2 Retainer"]

120. The relevant provisions of Pt 2 Retainer are as follows:

Dear Sharon

Inquest:

Thank you for instructing this firm to act to handle your case. …

What we will be doing for you

The scope of our instructions are limited to representing you and your family at the inquest touching upon the death of your brother Paul Chin.

…

Charges and Expenses

Our charges are based on the time we spend dealing with your case. …

We will charge £220 per hour for each hour engaged on your matter by me ….

In your case, Leigh Day have agreed to indemnify your costs to a limit of £25,000. This means that our costs for representing you at the inquest will not exceed £25,000 and that Leigh Day will pay those costs.

Costs Estimates and Costs Limits:

At this stage we estimate that our charges, expenses and VAT on each for carrying out your matter will be between £15,000 and £20,000. This is obviously an estimate based on the information we have at present and our previous experience of similar cases. Costs are likely to escalate if the inquest becomes significantly more complex through the disclosure of additional evidence. This estimate is not intended to be fixed. ….

We will inform you if any unforeseen additional work becomes necessary. … we will also inform you of its estimated costs in writing before any extra charges and expenses are incurred. …..If we think an estimate is likely to be exceeded we will give you an appropriate warning.

Billing Arrangements

We will send Leigh Day interim bills regularly, usually every month so that you and they will keep up to date with your legal costs. …..

We will charge you interest on the bill at 8% from the date on which payment of our bill is due if you do not pay our bill within this time.

Legal Aid and Other Funding Arrangements

… You have decided to instruct us privately and on the basis that Leigh Day will pay our costs.

Please let us know if your circumstances or requirements change in this respect. In particular, if your financial circumstances change significantly you may wish to enquire about eligibility for legal aid once more.

Time scale

I would hope that an inquest will be listed to take place in 2017 so that your case will conclude within the next 12 months.

Recovering Costs from Opponents:

… "Leigh Day will still be responsible for our costs of representing you at the Inquest whether you won or lose the civil claim…..

121. Mr Wibberley also points to the Undertaking given by Leigh Day to HJA which includes the following provision at paragraph 4:

We, Hodge Jones & Allen Solicitors, hereby undertake to:

…

Preserve Leigh Day Solicitors lien as to costs in this matter and in particular, the costs paid by Leigh Day Solicitors in the sum of £25,000 (Plus VAT) to Hodge Jones and Allen Solicitors.

122. The Defendant says this in respect of Pt 2 Retainer:

i) That it is drafted in such a way that the Claimants have no liability at all to HJA for the Inquest costs as the contract is between Leigh Day and HJA;

ii) As a sub set of that question whether the Claimants have to prove a liability to reimburse Leigh Day in the event of cost recovery; and if so whether such a liability is evidenced;

iii) That alternatively, that the express provisions impose a cap to pay no more than £25,000 in respect of the entirety of the Inquest costs.

Scope of Pt 2 Retainer:

123. Mr Wibberley correctly identifies the well-trodden path in respect of contractual interpretation. Adopting the correct objective approach, he says the natural and ordinary meaning of Pt 2 Retainer is the creation of a direct relationship between Leigh Day and HJA and that can only be consistent with the understanding that Leigh Day are in fact liable and not the Claimants. In doing so, he criticises the quality of the drafting and points to Pt 2 Retainer being a standard document that HJA have amended.

124. I reject these submissions. The Defendant's construction requires an approach that is both too narrow and destructive of the natural and ordinary meaning of the language used in the totality of Pt 2 Retainer. The references to Leigh Day have to be viewed in the context of the nature of indemnity. Whilst the drafting may be inelegant the clear objective intention of the parties based on the express language was that the contracting parties were only Ms Biron and HJA. The primary liability for HJA's fees unequivocally rests with the Third Claimant in principle.

125. I arrive at this conclusion primarily through assistance from the repeated use of "your claim" and "your costs" and derivatives thereof. "You/your" is by reference to Ms. Biron and not Leigh Day. I cannot find any term which identifies Leigh Day as a contracting party. Equally, I cannot find any other term which absolves the Third Claimant from her clear primary liability for HJA's costs. The height of the Defendant's position is reliance on the words "Leigh Day will pay those costs".

However, those words must be placed in the context of the wider retainer. Isolating and exclusively focusing in on these without placing them in their proper context is an impermissible approach. But in any event, the words "those costs" clearly refer to a vantage point external to Leigh Day, and as such stand in contrast to the creation of a strict liability between Leigh Day and HJA as contracting parties. The reference to 'those costs' can only be in respect of the costs incurred by HJA in respect of which the Third Claimant has a liability to pay.

126. Furthermore, practically, in order for the indemnity to function, the Claimants must first incur a liability for HJA's fees. The indemnity cannot exist in a vacuum. For this reason, it appears to me that the foundation for the Defendant's submission is misplaced.

127. The Undertaking does not avail the Defendant either: paragraph 4 speaks to the preservation of a lien. It does not stand on its own as the creation of an agreement to accept a primary liability for costs between HJA and Leigh Day.

128. Equally, I cannot find any support for the Defendant's proposition that this is an insurance situation predicated upon the existence of the indemnity. That may be an example of an indemnity situation, but it is not the only example in which an indemnity can arise: one obvious one being where a losing litigant is ordered to pay the costs of a successful litigant. Consequently, I do not find the line of argument predicated upon the insurance principles constructive or determinative.

129. I therefore find that there is a primary contractual liability upon the Third Claimant for the fees of HJA.

130. Consequently, the question as to whether the Third Claimant needs to prove a liability to reimburse Leigh Day is not apposite given that the primary contractual liability to pay the fees of HJA rests with the Third Claimant and Leigh Day only provided an indemnity. That liability to indemnify can only properly operate once all avenues of recovery have been exhausted and a final loss exists. Again the indemnity cannot exist in a vacuum.

131. In so far as there was a suggestion that the retainer created a joint retainer between HJA and all three Claimants, I reject that submission. The Bill of Costs clearly claims the part was funded in respect of the Third Claimant alone. That is supported by the retainer itself which only identifies Ms. Biron. I have not seen any evidence at all that the retainer extended to either the First or Second Claimants. I do not find that Pt 2 Retainer properly interpreted created any liability on the part of the First or Second Claimant to pay HJA's costs.

Contractual cap:

132. Turning to whether the retainer created a cap on the level of cost, the Defendant says that the only plausible objective reading of "*our costs for representing you at the inquest will not exceed £25,000…"* is the creation of a contractual cap on the overall inquest costs. Mr Wibberley says that this construction is supported by the whole scheme of the retainer which was that the Claimants need not pay anything towards the costs of the Inquest and that the only way Leigh Day would be responsible was in the circumstances of a cap. He also points to the estimate of between £15,000 - £20,000 which he says supports an overall cap of £25,000. Finally, he says that there was no further adequate consideration to support an amendment to the retainer, nor was an amendment to the retainer executed by Deed.

133. However, in somewhat contradictory terms, the Defendant also invites me to place limited weight upon the provisions relating to estimates as they say they amount to generic provisions which are subjugated to the specific provision relating to the £25,000.

134. In consequence, the Defendant says that HJA were obliged to represent the Third Claimant for the entirety of the Inquest for a ceiling price of £25,000 and no more.

135. The language used in respect of the overall charges and the reference that the costs *"will not exceed £25,000"* is clear and unequivocal, sufficiently so that I accept that the retainer intended to create a cap in respect of the Inquest costs. I also accept that this construction makes sense given the wider funding concerns expressed by the Third Claimant.

136. However, that is not the end of the matter: the cap cannot be viewed in isolation but must be placed in the context of not only the balance of the retainer but also factual developments within the case.

137. I accept that Pt 2 Retainer contains a mixture of specific and generic provisions and that the £25,000 cap is a specific provision, but that the following paragraph dealing with ***Costs Estimates & Costs Limits*** ["the Estimates/Limits provision"] contains generic, standard provisions (save for the figures). However, that does not result in an immediate conclusion that I must subjugate the generic to the specific, unless I find that the provisions are so contradictory that I am unable to reconcile all terms as a balanced whole through normal principles of interpretation.

138. I do not find that to be the case with this retainer, which is capable of being construed as a cohesive whole.

139. The Estimates/Limits provision expressly applies to 'limits' in addition to 'estimates'. The phrases 'cap' and 'limit' are interchangeable, but pragmatically amount to the same thing. Thus, there is connection between the two key paragraphs such that they must be read together.

140. The Estimate/Limitation provisions contain the usual confirmation that the estimates given are based on current information and thus that they may change dependent upon future developments. They confirm that the estimate itself is not fixed. Provisions are set out as to the process of updating the estimate in the event that unexpected developments occur, including that further advice and warnings will be given to the Claimants in the event that the estimate is exceeded. However, in order to give pragmatic effect to the ability to increase an estimate, it must follow that the objective intention of the parties was also the ability to revisit the cap in the event of unexpected developments. To find otherwise would make the ability to adjust the estimate unworkable and thus undermine the business efficiency of the contract.

141. I therefore find that I must read the two provisions together. Doing so, I reach the conclusion that the parties intended to create an exception to the fixed charging provisions upon the specific advent of unexpected developments. In my experience, this is a provision in most – if not all - well drafted retainers and is in common use throughout the legal profession.

142. As a matter of fact, as often happens, the Inquest did not proceed as initially anticipated and the complexity of the matter increased. These issues are set out at [§18] of Ms Collin's witness statement. In consequence, on 1 November 2018 Ms Collins wrote to Ms Biron in the following terms:

…Due to the complexity of your case, I have revise this estimate to £27,500 to £32,500.

As you are aware, Leigh Day have agreed to indemnify your costs to a limit of £25,000.

…

For your information, our costs till (sic) date have now exceeded £25,000. As you are aware, we have continued work by securing funding from the Legal Aid Agency under your father's name.

143. Mr Munro accepts that this is another example of inelegant drafting. However, he submits that the letter was sent further to unexpected developments as anticipated within Pt 2 Retainer. He says thereafter that the Claimants permissively agreed different terms in respect of the balance of the work pursuant to the exception provision. Those further charging terms being under the Legal Aid/CFA funding in respect of subsequent parts.

144. In this respect, he refers me to ***Forde*** at [§81/82] which he says is binding authority on me that an agreement to continue to act amounts to adequate consideration for entering into a further retainer in these circumstances.

145. In response, the Defendant refers me to the Judgment of Lord Sumption in ***MWB Business Exchange Centres Ltd,*** which they say is support for the proposition

'practical benefit' of a contractual performance does not amount to good consideration based on the trite principles in ***Foaks v Beer*** **(1884) 9 App. Case 605.**

146. Mr Wibberley also invites me to read ***Forde*** narrowly, otherwise, he says, there would be an obvious and problematic inconsistency with ***Roach.***

147. I cannot accept the Defendant's position. In my judgment, ***Forde*** is clear, unequivocal and binding on me given that it deals with this exact situation. I do not find that the specific facts require me to place a narrow and restrictive interpretation upon that authority. I also am unable to accept that ***Forde*** creates any inconsistency or fetter upon ***Roach*** given that they deal with such disparate issues. ***Roach*** informs as to the approach to quantification where an Inquest was held before the civil claim. It is manifestly different from what amounts to proper consideration for further contractual relations.

148. Furthermore, ***MWB*** is not a case concerning variation of a solicitor's retainer but was concerned with the ability to rely upon a 'no oral modification' clause. As set out above, the question of whether commercial advantage was good consideration was not determined by the Court. It is therefore not on point and so I do not find it instructive, particularly against ***Forde***.

149. In any event, even if I'm wrong on that, the factual position in ***MWB*** arose from a dispute between two parties to a contract. The position here is manifestly different given that it is an indemnifying third party, outside the privity of contract, who is attempting to void the contract in circumstances where the contracting parties have not. Thus, ***MWB*** and the line of authorities set out therein can be distinguished on their facts. In my judgment an indemnifying paying party cannot attempt to avoid a contract to which it is not a party in circumstances where the contracting party themselves have not taken any such steps. It short: it would make the contract *voidable* not *void* as set out at [§111] ***Forde*** which is binding on me. As the Third Claimant has not taken any steps to void the contract, it is not an avenue open to the Defendant.

150. Finally, as set out above, the ability to return and re-negotiate terms in the event of unexpected developments was clearly set out in the original Pt 2 Retainer and that is exactly what has happened. The limit was reached as a result of unexpected developments and so the parties found themselves with a need to find alternative funding. In this respect I accept the evidence given by Ms. Collins at [§18] of her witness statement which is consistent with my perusal of HJA's file of papers. I see nothing wrong with HJA's approach: indeed, I find it to be entirely consistent with a solicitor acting reasonably upon realising that the contractual cost cap had been reached.

151. Consequently, I reject the Defendant's secondary position that the Claimants are limited to an overall contractual cap of £25,000 in respect of inquest costs. That of course, must not be confused with any determination in respect of the reasonable quantum of

any inquest costs which may be considered 'of and incidental' to the civil action. That is a matter for the line by line assessment.

Parts 3 and 4

152. The Bill of Costs claims that Parts 3 and 4 are in respect of the Second Claimant and funded pursuant to Legal Help and exceptional funding in respect of the Inquest. The Bill of Costs shows that they claim costs from 4 October 2018 onwards. That date is critical.

153. The issues taken by the Defendant in respect of this Part are as follows:

    i) Contingent upon Part 2, whether the totality of the Inquest costs are limited to £25,000;

    ii) Whether it was reasonable for the First and Second Claimants to enter into legal aid retainers for the Inquest;

    iii) Contingent upon Part 1, whether the indemnity principle is disapplied further to Reg. 21 (1) Regulations;

154. In the Amended Points of Dispute the Defendant had also taken a further point in respect of the scope of the Legal Aid Certificates. Mr Wibberley helpfully confirmed in submissions that that point has now been conceded.

155. Issue One falls away given my findings in respect of Part 2.

156. I find that Issues Two and Three are principally interdependent and in respect of which I find the Defendant's approach starts at the wrong place and thus fails to address the apposite question. The Defendant's position engages with the contract in respect of the Inquest and not the civil claim. That is an error into which this Defendant has repeatedly fallen. I found the Claimants' position equally unhelpful given they also engaged with this incorrect starting point.

157. I remind myself that I am not assessing the Inquest costs: I am assessing the civil costs pursuant to the cost order in the civil action. Whilst it is correct that any costs 'of and incidental' to the Inquest are recoverable in the civil action, it does not follow that I am necessarily concerned with the peculiarities of the specific Inquest funding **if** there is a civil retainer *in situ* for the relevant period. The correct question is whether there is a retainer in place under which the costs 'of and incidental to' the civil proceedings can be recovered. It is important not to confuse or conflate those two distinct positions.

158. The lack of a retainer specifically in respect of the civil action was the primary peculiarity which coloured Part 1. However, that peculiarity is absent from Part 6 for the reasons that follow.

159. I immediately accept that the reason for the Defendant's approach is likely to be the retainer position set out within the Bill of Costs and the approach adopted by the Claimant during the assessment. The consequential effects of that will need to be revisited at the appropriate time. However, for the purposes of whether there is a retainer in place under which civil costs can be recovered, I find myself unable to ignore the plain apposite question.

160. In answering that question: all three Claimants entered into CFAs dated 22 September 2017 in respect of the civil claim. Importantly, that was over 12 months ***prior*** to the commencement of work claimed under this Part. All are expressed in the same terms which, in so far as the scope is concerned, state that they relate to the '*Civil claim arising from the death of …. Paul Chin".* They are all expressed to be retrospective in effect. All are accompanied by a covering letter stating *"to be valid, the agreement must be in writing and signed by both parties".*

161. Whilst the Defendant initially took the point that the CFAs were not signed correctly, this point was not seriously pushed by Mr Wibberley in oral submissions. That decision was eminently sensible. The CFAs which appear in the Funding Bundle in respect of the First and Second Claimants bear the signatures of both individuals alongside HJA. It appears to me on that evidence that the First and Second Claimant's retainers have been signed correctly and so are validly enacted.

162. Having arrived at that position, it is inescapable that the CFAs cover the civil claim within Parts 3 and 4. There is no explicable reason why a civil retainer enacted over 12 months before this part somehow does not continue to operate from 4 October 2018 onwards in respect of civil costs. I remined myself that a CFA is an entire contract and there is no evidence that it was somehow suspended for the period of time which Parts 3 and 4 cover.

163. In so far as this conclusion leads to a dispute as to the correct hourly rate, it must also follow that the Claimants are restricted to the amounts claimed in the Bill of Costs irrespective of whether the contractual hourly rates under the CFAs may differ.

164. In an email of 12 September 2023 Mr Wibberley invites me to either decide this issue based upon the submissions made by the Parties or to take further submission on it. In doing so he identified the nature of those additional submissions, both of which are grounded in the prohibition against 'topping up', namely;

    i) Whether the CFA breaches s.28(2)(a) LASPO

    ii) Whether the CFA provisions breach the principles laid out in ***Hyde.***

165. Having considered these, it is immediately obvious that the Defendant is simply compounding their previous error by conflating the civil claim and the inquest. I am not assessing the inquest costs. I am assessing the civil costs.

166. To this extent, there is no prospect of the Claimants being in receipt of topping up payments because of the co-existence of two retainers dealing with different claims arising from the same set of factual circumstances.

167. For the exhaustive reasons set out above, the Legal Aid retainers are in respect of the inquest and any costs incurred during their currency which amount to costs 'of and incidental to' the civil claim can be recovered under the cost order.

168. The statutory prohibition against 'topping up' is contained within s.28(2) LASPO which prohibits the solicitor taking any additional payment in respect of '*the services'* over and above that being paid by the Lord Chancellor. '*The services*' in this instance is the service provided to the Claimants in respect of the Inquest. That is clear from the Legal Aid Certificates. The Lord Chancellor is not funding the civil claim.

169. Therefore, in order to offend the statutory prohibition against topping up there must be an agreement for the Claimants to pay additional fees to HJA *in respect of the inquest.* The CFAs do not so provide. They provide for payment of HJA's fees in respect of the co-existing civil claim. There is a clear distinction between the two which must not be confused. And in my judgment that is the trap the Defendant repeatedly falls into. Taking further detailed submissions on that point is unlikely in the extreme to add anything pertinent or improve the merit of the argument.

170. The merits of the potential argument must be balanced against proportionality. The depth and breadth of the Defendant's current objections within these proceedings are already extraordinary. The list of preliminary issues extends to 29 separate issues, the vast majority of which are highly technical arguments aimed at the validity of the Claimants' funding position. Whilst it is of course the Defendant's prerogative to take the points they wish, the unavoidable reality is that proportionality has to be taken into account when managing these proceedings. To permit yet further expansion of issues to encompass yet more technical points which have little, if any merit, would be vastly disproportionate and have the unreasonable result of taking up yet more court time on preliminary issues and expanding and delaying an already extensive written judgment. It is not a reasonable exercise of the Court's case management powers. A line has to be drawn.

171. Consequently, I reject the request for further submissions.

172. The true mischief here is in the costs associated with the Claimant's incorrect starting point and I have already indicated that I am sympathetic to an appropriate application at the appropriate time.

Part 5:

173. Part 5 of the Bill of Costs runs from 20 December 2016 until 30 July 2019. It is said to be brought in respect of the Inquest under a private retainer between the Third Claimant and HJA.

174. The issue in respect of this Part is limited to the Claimant's ability to recover VAT for Ms Biron given that she is not a resident of the United Kingdom.

175. Mr Munro concedes that VAT is not payable in respect of the Third Claimant and so all VAT in respect of such costs attributed is disallowed.

Part 6:

176. Part 6 covers costs incurred from 10 July 2017 until 23 September 2020. It is said to be brought in respect of the Inquest/Civil claim under a CFA between the Third Claimant and HJA.

177. The issues in respect of Part 6 are as follows:

i) Whether HJA entered into a CFA with Ms. Biron (specifically, whether the CFA was ever signed by HJA?);

ii) The apportionment of costs between any private retainer and any enacted CFA;

iii) The recoverability of VAT.

178. Some concessions have been made in respect of this part by Ms. Collins. Those concessions stand and the balance of the decision herein relates to those costs which remain in dispute.

Signature on the CFA:

179. The Client Care Letter which accompanied the CFA sent to Ms. Biron dated 13 September 2017 states this:

> **Your Claim:**
>
> *We have agreed to act for you on a 'no win no fee basis', and this letter is to confirm the arrangements and also give you some additional information.*
>
> **Conditional Fee Arrangement:**
>
> *Our in house panel has agreed that we are prepared to act for you on a conditional fee basis. I enclose a copy of the Conditional Fee Agreement. This is also known as a 'no win no fee' agreement.*

To be valid, the agreement must be in writing and signed by both parties. You should read the document carefully. We are required to explain the terms of the agreement to you before you sign it.

180. The CFA itself says this:

This agreement is a binding legal contract between you and your solicitors. Before you sign, please read everything carefully. This agreement must be read in conjunction with the client care letter sent to you which forms part of the agreement.

181. It is accepted by the Defendant that the effect of the point, in reality, goes to the applicable hourly rates, as the rates under the CFA are much higher than those set out in the Client Care Letter.

182. Mr Wibberley's specific point is that, whilst the CFA is signed by Ms. Biron, it is not signed by HJA. He says that it must be signed by both parties to the contract as that is what is expressly provided for within the Client Care Letter whose terms are conjoined with the CFA to create the four corners of the retainer. He therefore submits that signature to the CFA is a mandatory precondition that has not been satisfied and as such, the CFA has not been enacted.

183. He supports this primary submission by pointing to wider factors: that HJA were already under an obligation to act for Ms Biron under the private paying retainer. Therefore, he says, HJA cannot fall back upon the presumption of acceptance of the CFA terms further to conduct because one simply cannot identify conduct confirming acceptance as separate and distinct to the conduct of giving and receiving of instructions that were already continuing further to the private paying retainer: in short, HJA continued to do what they were already doing. As they were already obliged to act any conduct of so acting cannot amount to an unequivocal representation accepting the new terms under the CFA.

184. He concludes that as the precondition had not been satisfied, the CFA had not come into existence and thus the private paying retainer continued and that is the retainer under which the costs ought to be assessed.

185. In response, Mr Munro points out that the requirement for HJA to sign the CFA is contained in the Client Care Letter as opposed to the CFA. He says that the Client Care Letter is signed by HJA albeit not in the signature box and that Ms. Biron signed both the Client Care Letter and the CFA thus indicating in clear, express terms her intention to be bound by the new terms therein. He therefore concludes that this is an opportunistic point being taken by the Defendant which is without merit.

186. In support of his position he draws my attention to [§41] ***Renveille*** as support for the proposition that *'if signature is the prescribed mode of acceptance an offeror will be bound by the contract if it waives that requirement and acquiesces in a different mode*

of acceptance'. He says this is binding on this Court and urges me to follow its conclusion.

187. In my judgment, there is little merit in this point. The Defendant walks into the exact same difficulties as they faced in respect of advancing alternative contractual points in Part 2: the height of the argument would make the contract *voidable* and not *void.* Ms. Biron has not taken any steps to indicate that she does not consider herself bound by the CFA. In fact, the converse is correct given that she signed the CFA accepting the terms. Neither have HJA taken any steps to indicate that they do not consider themselves bound by the terms of the CFA: again, quite the opposite is evidenced. Consequently, it is simply not a point which is open to the Defendant to advance. In this respect I find myself once again bound by [§111] ***Forde.***

188. However, even if I am wrong on that, I agree with Mr. Munro that weight needs to be afforded to the signature on the Client Care Letter and secondly, that the contracting parties are able to indicate their acquiescence to a contract by means other than the signature as set out at [§41] ***Renveille.*** Indeed, I find that the factual situation before me is even more clear cut than the position in ***Renveille*** because here, the contracting party who has failed to sign is the *offeror* rather than the *offeree* and I find that to be a material factor.

189. The Client Care Letter and the CFA were both drafted by HJA as being the terms upon which they were prepared to continue acting. The CFA was then proffered to Ms. Biron. That is clear from the Client Care Letter itself. Upon analysis it is clear that the main body of the terms are set out in the CFA, rather than the Client Care Letter. The Client Care Letter includes additional explanatory advice over and above the terms upon which HJA were prepared to act. In other places, some terms, such as the hourly rates, are devolved to, and set out in, the Client Care Letter. Whilst this is perhaps another example of inelegant drafting, it does not follow that *everything* set out in the Client Care Letter amounts to an express term of retainer upon which the parties intended to be bound. In order to ascertain whether any particular provision is intended to be an express term or whether it is merely advice being given to the client, one needs to analyse the language used in its commercial context.

190. When one looks to the wording under **Conditional Fee Agreement** one immediately sees that the Client Care Letter at this section provides explanation that the '*in house panel has agreed that we are prepared to act for you on a conditional basis. I enclose a copy of the Conditional Fee Agreement*'.

191. Ms Biron is then informed that *'to be valid, the agreement must be in writing and signed by both parties'.* The context of that paragraph is advice. I also find the words to be indicative of an explanation as to the workings of the CFA rather than being express term amounting to a condition precedent. That is for this simple reason: the words and context of *'to be valid'* are indicative of advice being given to the client rather than words being used in the context of creating a mandatory express condition precedent

which one simply does not find in the body of the CFA itself. Furthermore, that advice in any event is inaccurate: whilst it is correct that in order for a CFA to comply with the mandatory requirements of s58(3)(a) Courts and Legal Services Act 1990 a CFA must be in writing, there is no express requirement for a signature.

192. Furthermore it would not amount to business common sense for the offeror to set out their intended terms in the CFA, but yet nonetheless require an additional step to be taken before they accept their own terms. That arrives at an absurd position which I must reject.

193. Thus had the parties intended to depart so starkly from usual contractual principles, a clear and unequivocal express term, identified as such, would have to be present, rather than an ambiguous provision more indicative of general advice as elsewhere given in the Client Care Letter.

194. However, even if I am wrong on that, Mr Wibberley accepts the principles as set out in ***Renveille*** [§40-41] as being a correct citation of the law, which confirms the many ways in which contractual terms can be accepted by conduct.

195. Furthermore, he sensibly accepts that I must look for any conduct specific to the CFA as opposed to continuing general conduct. That is a question of fact.

196. Turning to the DA Bundle as filed, there are attendance notes and letters/emails of advice around July 2017 which amount to clear and unequivocal evidence that HJA intended to be bound by the new terms of the CFA as opposed to the prior private paying terms.

197. For all these reasons, I reject the Defendant's position and find that the relevant retainer for Part 6 is the CFA under which the costs are currently claimed. Consequently, I do not need to determine whether and to what extent there ought to be any apportionment with the prior existing private paying retainer.

VAT:

198. Mr Munro has sensibly conceded that VAT is not chargeable in respect of Ms. Biron in this part.

ATE:

199. Item 1576 is a claim for £4,452.00 in respect of an ATE policy taken out by the Third Claimant on 24 March 2020.

200. The original Points of Dispute frame the argument in this manner:

The Claimants are invited to confirm:

…

3. Why ATE Insurance was taken out on 24 March 2020.

…

If it was unreasonable to have taken out the ATE Policy on 24 March 2020 then the premium should be disallowed.

201. The Original Reply responded:

As [Ms Biron's] case was being funded under CFA and she had limited or no costs protection it was reasonable for her to take out an ATE policy to cover any potentially adverse costs claim which was not covered by QOCs. This was a reasonable step to take given the Defendant's full and continuing denial of liability.

202. The Amended Points of Dispute then advance further submissions against the ATE premium based on the content of the Reply. The Claimant's say that was in breach of the September Directions Order which only provided for further objections in respect of the retainer position. They say that the issue ought therefore to be determined by reference to the original pleadings.

203. Whilst the Claimant is entirely correct on their interpretation of the September Order, it seems to me that the argument in respect of the ATE premium was properly raised in the original Points of Dispute. It is therefore not a 'new point' or a further objection. The Amended Points of Dispute then engage with the Original Reply as pleaded and simply condense to writing those points which would have been put orally in response during the hearing in any event. In any event the Amended Points of Dispute do not really take strength of the original point much further.

204. Dealing with the substance of the point: at the time Ms. Biron took out the ATE policy s.46 LASPO asset out above provides that an *interpartes* cost order may not provide for payment of an ATE premium outside of limited prescribed situations in respect of policies taken out post 1 April 2013.

205. This is a claim for an ATE policy taken out post April 2013. It is not in respect of a claim for clinical negligence given that the Third Claimant's claim was brought under the Human Rights Act. It therefore does not fall within the limited exception to s. 46 LASPO.

206. The ATE premium is disallowed.

Consequentials:

207. This Judgment will be circulated to the parties in the usual way for ***typographical*** corrections only. The parties will also be invited to agree any further necessary

directions for the balance of the assessment. In the event that a dispute arises, a short directions hearing will be convened at a time and date to be fixed.

……..