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Case/Appeal No: QA-2021-000084
SCCO Ref: SC-2019-APP-000068

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE
IN THE MATTER OF AN ASSESSMENT UNDER PART III
OF THE SOLICITORS ACT 1974
MASTER ROWLEY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2022

Before:

MRS JUSTICE FOSTER DBE

Sitting with:

MASTER SIMON BROWN

As an Assessor

- -

Between:

(1) DIAG HUMAN SE
(2) MR JOSEF STAVA

Respondents/Claimants

- and –

VOLTERRA FIETTA (A FIRM)

Appellant/Defendant

- -
- -

Mr Jamie Carpenter QC (instructed by **Mishcon de Reya LLP**) for the **Respondents/Claimants**
Mr Nicholas Bacon QC and **Mr Simon Teasdale** (instructed by **Saunders Law**) for the **Appellant/Defendant**

Hearing dates: 2-3 February 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday, 29 July 2022 at 3:30 pm.

MRS JUSTICE FOSTER DBE:

INTRODUCTION

1. This is an appeal against the decision of Master Rowley made on 17 December 2020 and a consequential decision on 19 March 2021. The matter arises from proceedings under the Solicitors Act 1974 and issues which arose at the start of proceedings in respect of a bill of costs dated 3 December 2019 regarding costs incurred from 6 September 2017.

2. The Claimants (in this appeal the Respondents) retained the Defendant (Appellant) firm of solicitors Volterra Fietta ("Volterra" or "the Firm") for the purposes of an arbitration under a bilateral investment treaty against the Czech Republic. The detail of that arbitration is not relevant to the issues before the court, however in broad terms, it related to a previous arbitration award in favour of the First Claimant ("Diag") which remained unsatisfied as against the Czech Republic. The amount claimed in the arbitration was about $2.4 billion, made up of the sum in question, interest and additional losses.

3. A retainer in respect of the work was entered providing for payment by reference to hourly rates and the terms were set out in a letter from Volterra to the Second Claimant, Josef Stava ("Mr Stava") dated 23 February 2017. This Engagement Letter indicated that the contract was between Diag and Volterra. The Engagement Letter contained the usual ancillary terms as to limitation of liability and billing. The history is described by the Appellant in terms that in late 2018 or early 2019, the Claimants were in substantial fees arrears to Volterra and the Firm found it difficult to continue acting, accordingly, on 29 May 2019, Mr Stava emailed Mr Volterra to terminate the Firm's retainer on behalf of the Claimants, with immediate effect.

4. On 6 September 2017 a Side Letter had been written stating that a new retainer was created which incorporated the terms of the Engagement Letter insofar as not inconsistent, and Mr Stava was expressly made a party to this new retainer. The Side Letter was signed by both Mr Volterra, the senior partner of the Firm, and Mr Stava. The learned Master dealt succinctly with the Engagement Letter as above. I set out with gratitude the description by him of the Side Letter in his judgment and his description of its effect, with which no issue is taken before me. He introduced the Side Letter thus:

> "*12. …After the introductory paragraph, there are 21 numbered paragraphs setting out the altered terms. They are at the heart of the issues between the parties. I set out the letter up to the end of the third numbered paragraph as follows:*
>
> "*"Dear Mr Stava*
>
> *This is a side letter to the engagement letter (the "**Engagement Letter**") signed between Diag Human SE ("Diag") and Volterra Fietta. To the extent of any inconsistency between the terms of this side letter and those of the Engagement Letter, the terms of this side letter shall prevail. All terms of the Engagement Letter, to the extent not inconsistent with this side letter, shall continue in force. Terms defined in the Engagement Letter and not otherwise defined in the side*

letter shall bear the same meanings in this side letter as in the Engagement Letter.

1. The terms of the Engagement Letter and this side letter shall (notwithstanding anything else contained herein) apply to you personally, jointly and severally with Diag, to the extent that you are a claimant in a BIT claim brought on your behalf solely or jointly with Diag against the Czech Republic. In the event that we believe that there is a conflict of interest between you and Diag, we may be required to terminate our engagement with one of you.

2. The fees payable by Diag to Volterra Fietta in the first instance, to be invoiced and paid as set out in the Engagement Letter, shall be subject to a discount of 30%. This discount shall apply only to fees for work done by Volterra Fietta. It shall not apply to disbursements paid by Volterra Fietta on behalf of Diag which are re-invoiced to Diag. Nor shall it apply to fees charged by third parties for work done for Diag, whether or not this work is requested, mandated or supervised by Volterra Fietta.

*3. In consideration of the discount referred to in paragraph 2, Diag shall, in the event (the "**relevant event**") of an award or settlement of its investment treaty arbitration claim against the Czech Republic, or enforcement or settlement of the Final Award (the "**commercial arbitration award**") issued in an ad hoc arbitration between Diag and the Czech Republic – Ministry of Health (Case No. RSP 06/2003) on 4 August 2008, or a combination of both, pay Volterra Fietta within 30 days of the relevant event additional fees as set out in paragraphs 5 to 7 (all of these paragraphs being cumulative)."*

…

"*13. Numbered paragraph 4 of the letter deals with exchange-rate issues arising from payment in any currency other than US dollars. Paragraphs 5 to 7, as stated in paragraph 3, set out sums which would be payable depending upon the outcome of the BIT arbitration. There are then paragraphs regarding payment and the effect of an early termination of the agreement. The last 10 paragraphs deal with how the sums payable in the event of a termination were to be calculated depending upon whether the issues of jurisdiction and merits were bifurcated.*

"*14. Since the terms in paragraph 5 onwards set out terms which were contingent upon the outcome of the arbitration, the agreement was subject to sections 58 and 58A of the Courts and Legal Services Act 1990 ("CLSA 1990"). It is common ground between the parties that the agreement did not comply with the terms of those provisions because the secondary legislation to them requires any success fee to be no more than 100% of the base fees (which in this case amount to the profit costs based on an hourly rate). Under the terms of the side letter, there was undoubtedly the prospect of more than 100% being claimed by way of a success fee. Indeed, the*

worked example produced to show the workings of the agreement apparently produced a figure of 280%." [Emphasis added].

1. THE PRELIMINARY ISSUES

5. Master Rowley was required to decide four preliminary issues between the parties described by him as follows:

   a. Is there an enforceable retainer between the Defendant and the Claimants (and/or either Claimant)?

   b. If not, can any offending provisions be severed so as to leave an enforceable retainer between the Defendant and the Claimants (and/or either Claimant)?

   c. If not, is there any other basis on which the Defendant is entitled to be paid for the professional services rendered to the Claimants (and/or either Claimant)?

   d. If not, should the Defendant be ordered to return the sums paid to date by the Claimants (and/or either Claimant) in respect of the work covered by the Final Statute Bill?

6. There was no dispute before the Master that the answer to "a" above was "*no*", as he recorded at paragraph 14 of his decision see paragraph [4] above.

7. The amount at stake is significant. Fees under the original agreement totalled $106,639.39 up to 6 September 2017, whereas under the Conditional Fee Agreement ("CFA") contained in the Side Letter, the Firm has charged $2,929,928.38 for work after that date.

8. The Master articulated the main dispute as being the second and third preliminary issues, namely severance, and the Defendant's entitlement to seek a quantum meruit for services provided. The Master concluded (as reflected in his Order dated 19 March 2021) the answers to the preliminary issues were as follows:

   a. no
   b. no
   c. no
   d. yes, sums beyond those chargeable for the period up to 6 September 2017 must be returned.

9. By notice of appeal dated 8 April 2021 the Appellant/Defendant sought permission to appeal arguing:

   a. That the Master was wrong in law to hold that severance was not available to the Defendant and an enforceable retainer for work from 6 September 2017 could not be established.

   b. That the Master was wrong in law to hold that remuneration on a quantum meruit basis was unavailable to the Defendant for its work from 6 September 2017 on the basis

that any enrichment was not just.

c. That the Master was wrong in law to hold that the consequence of his findings was that any sums paid to the Defendant in relation to work from 6 September 2017 should be re-paid to the Claimants.

10. The Master had granted permission to appeal in respect of his conclusions on the issue of return of monies paid but refused it in respect of his conclusions on severance and quantum meruit. Permission in respect of the remaining grounds was later given by Bourne J on 28 May 2021.

11. Mr Nicholas Bacon QC with Mr Simon Teasdale appeared before us for the Appellant, and Mr Jamie Carpenter QC on behalf of the Respondents. I am very grateful to them for their careful written and oral submissions.

2. THE LEGAL FRAMEWORK

12. It is well established, and common ground, that the public policy which prohibits maintenance and champerty at common law renders CFAs and certain variations of such agreements unlawful. More particularly, what is known today as a CFA would constitute maintenance at common law, and what is known as a Damages Based Agreement ("DBA") is, at common law, champerty, as was explained in *Wallersteiner v Moir* (No. 2) [1975] QB 373 by Buckley LJ at page 401D:

> "*A contingency fee, that is, an arrangement under which the legal advisors of a litigant shall be renumerated only in the event of the litigant succeeding in recovering money or other property in the action, has hitherto always been regarded as illegal under English law on the ground that it involves maintenance of the action by the legal advisor. Moreover, where as is usual in such a case, the renumeration which the advisor is to receive is to be, or to be measured by, a proportion of the fund or of the value of the property recovered, the arrangement may fall within a particular class of maintenance called champerty.*"

13. I take with gratitude the summary of the earlier law as set out by the Master. He encapsulates its effect thus:

> "*Public policy*
>
> "*66. In 1993, Lord Mustill said the following in the case of Giles v Thompson [1993] 3 All ER 321 at 350:*
>
> > "*…the crimes of maintenance and champerty are so old that their origins can no longer be traced, but their importance in medieval times is quite clear. The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litigation represented an obvious temptation to the suborning of justices and*

witnesses and the exploitation of worthless claims which the defendant lacked the resources and influence to withstand.

"*67. The support of litigation by someone other than a party (maintenance), particularly if that support led to a share of the spoils (champerty), was, as can be seen by the quotation above, long seen as being a crime as well as a tort. Both criminal and civil liability were abolished by the Criminal Law Act 1967. Section 14(2) of that Act said:*

"*The abolition of criminal and civil liability of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.*

"*68. A number of well-known cases in this area were dealt with in the 1970s and 80s. They all vehemently confirmed that agreements which were champertous were contrary to the common law. This view was neatly summarised in the Law Commission report from 1966 cited by Steyn LJ in the Court of Appeal decision of Giles v Thompson [1993] 3 All ER 321 at 329 as follows:*

"*16. There is, however, one field in which that particular species of maintenance – champerty – plays an effective role. There is a substantial body of case law to the effect that champertous agreements (including in this context "contingency fee" agreements) are unlawful as contrary to public policy… This rule has an important bearing upon the practice of solicitors. For instance [the Solicitors Act] reflects the rule…*

"*17. This rule of public policy has many implications for solicitors. The following are important: – (i) "Contingency fee" agreements are unlawful… (ii) a solicitor cannot recover from professional indemnity insurers loss arising from his having entered into an agreement in fact champertous… (iii) a solicitor who has made, or knowingly participates in the furtherance of, a champertous agreement is not entitled to enforce a claim for costs… (iv) a solicitor who is conducting his client's litigation on a champertous basis may find himself ordered by the court to pay the other side's costs.*

…

"*69. The earliest expression of this view that was referred to by either advocate occurred in the case of Wild v Simpson [1919] 2 KB 544 where Atkin LJ, at 563, said:*

"*A champertous agreement between solicitor and client is void therefore, not merely because of an abuse of the confidential relationship between solicitor and client, but because the agreement involves a continuing wrong, namely, the maintenance of the litigation against the opposing party. If this view is correct, it appears to me that it follows that in conducting a litigation under such an agreement*

> *as this the solicitor is performing an illegal act, or rather a series of illegal acts, and cannot recover remuneration for such acts though performed at his client's request. In other words, the consideration is illegal. But in fact, it matters not whether the consideration is illegal. The purpose of the contract is illegal, namely, the champertous maintenance of the litigation, and for services rendered to effectuate an illegal purpose no one in our courts can recover remuneration.*"

14. The common law position, reflected in numerous cases, has been the subject of a series of modifying enactments, beginning with the Courts and Legal Services Act 1990 (coming into force in July 1993). The Act made provision for stated exceptions to the general common law rule. Hitherto, the Solicitors' Practice Rules had reflected public policy and the common law position, and had proscribed under the Rules any arrangement to receive a contingency fee in respect of any action, suit or other contentious proceedings. Under the new statutory regime, fee agreements not conforming to a narrow statutory description were deemed unenforceable.

15. The 1990 Act as amended provides relevantly as follows with relation to conditional fees:

> "***58 Conditional fee agreements.***
>
> "*(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5) any other conditional fee agreement shall be unenforceable.*
>
> "*(2) For the purposes of this section and section 58A—*
>
> *(a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and*
> *(b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances; and*
> *(c) references to a success fee, in relation to a conditional fee agreement, are to the amount of the increase.*
>
> "*(3) The following conditions are applicable to every conditional fee agreement—*
>
> *(a) it must be in writing;*
> *(b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and*
> *(c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor.*

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

(a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;
(b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and
(c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates made by the Lord Chancellor.

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

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

"*(4B) The additional conditions are that—*

(a) the agreement must provide that the success fee is subject to a maximum limit,
(b) the maximum limit must be expressed as a percentage of the descriptions of damages awarded in the proceedings that are specified in the agreement,
(c) that percentage must not exceed the percentage specified by order made by the Lord Chancellor in relation to the proceedings or calculated in a manner so specified, and
(d) those descriptions of damages may only include descriptions of damages specified by order made by the Lord Chancellor in relation to the proceedings.

"*(5) If a conditional fee agreement is an agreement to which section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies, subsection (1) shall not make it unenforceable.*"

16. It may be observed that the wording of section 58 (as also section 58AA) presupposes the unlawfulness of contingent retainers at common law: it is drafted in terms of requiring fulfilment of the statutory conditions in order to except a contract from the (default) category of unlawfulness.

17. The provisions continue by making absolutely clear that a non-compliant agreement is unenforceable. The strictness of the statutory wording and the strictness with which the statute is applied has been reflected, as Mr Carpenter QC set out in his skeleton argument, by the case law. In particular, in *Garret v Halton Borough Council* [2007] 1 WLR 554 where Dyson LJ described the nature of the statutory language, which did not require detriment to the client. He said the following:

> "*[27] The starting point must be the language of section 58(1) and (3) of the 1990 Act. It is clear and uncompromising: if one or more of the applicable conditions is not satisfied, then the CFA is unenforceable. Parliament could have adopted a different model. It could, for example, have provided that where an applicable condition is not satisfied, the CFA will only be enforceable with the permission of the court or upon such terms as the court thinks fit. There is nothing inherently improbable in a statutory scheme which provides that, if the applicable conditions are not satisfied, the CFA shall be unenforceable with the consequence that the solicitor will not be entitled to payment for his services. Such a scheme can yield harsh results in certain circumstances, especially if the client has not suffered any actual loss as a result of the breach. It can also produce results which, at first sight, may seem odd: see the point made by Mr Bacon mentioned at para 26 above. But the scheme is designed to protect clients and to encourage solicitors to comply with detailed statutory requirements which are clearly intended to achieve that purpose. The fact that it may produce harsh or surprising results in individual cases is not necessarily a good reason for construing the statutory provisions in such a way as will avoid such results.*"

and

> "*[30] In our view, this is the approach which should be adopted in relation to section 58(1) and (3) of the 1990 Act. To use the words of Lord Nicholls, Parliament was painting with a broad brush. It must be taken to have deliberately decided not to distinguish between cases of non-compliance which are innocent and those which are negligent or committed in bad faith, nor between those which cause prejudice (in the sense of actual loss) and those which do not. It would have been open to Parliament to distinguish between such cases, but it chose not to do so. The conditions stated in section 58(3)(c) and in particular the requirements prescribed in the 2000 Regulations are for the protection of solicitors' clients. Parliament considered that the need to safeguard the interests of clients was so important that it should be secured by providing that, if any of the conditions were not satisfied, the CFA would not be enforceable and the solicitor would not be paid. To use the words of Lord Nicholls again, this is an approach of punishing solicitors pour encourager les autres. Such a policy is tough, but it is not irrational. The public interest in protecting solicitors' clients required that satisfaction of the statute conditions was an essential prerequisite to the enforcement of CFAs.*"

18. Earlier case law, subsequent to *Wallersteiner v Moir*, also made clear that entering into types of CFAs not sanctioned by statute was contrary to public policy. In *Awwad v Geraghty and Co* [2001] QB 570 the Court of Appeal considered the case where a client refused to pay a fee on the basis it was unlawful at common law. Schiemann LJ considered earlier case law including pre-1990 legislative consideration of conditional or contingent fee agreements under the Solicitors Act and the relevant Solicitors' Practice Rules. Having surveyed the cases, Schiemann LJ concluded that the general understanding of the effect of the common law, which formed the background to the new 1990 legislation, and probably to the earlier Solicitors Rules, was that agreements

referred to in Scotland as "*speculative*", or in England as "*conditional normal fee*" agreements (namely when recovery of a fee was to take place only in the event of success) were also prohibited. He cited from both the Green and White Papers preceding the legislative changes to reinforce his assessment of the policy approach.

19. The *Awwad* case is important in reflecting the court's reluctance to develop the common law at a time when Parliament itself was addressing the same issues through legislation. Schiemann LJ stated the approach thus:

> "*I would therefore hold that acting for a client in pursuance of conditional normal fee agreement, in circumstances not sanctioned by statute, is against public policy.*" [Pages 593-4].

20. The judgment of May LJ in the same case made clear that he also found it impermissible to apply a perceived public policy going beyond that which Parliament, by its relevant legislative interventions, had provided. In *Awwad*, the permissions granted by the new legislation were not fully in force, such that the solicitor might rely upon them to render her particular agreement lawful. The court accordingly declined to enforce an agreement that was contrary to public policy as they explained it, and not otherwise sanctioned [page 594].

21. There was an argument in that case, as in this, that a quantum meruit was available to reward a solicitor with a fair fee for the work done, even though the agreement was part of a champertous agreement which the court refused to enforce. The court however held that the public policy element was designed to prevent the solicitor "*continuing to act*" for a client under a CFA, which was what the solicitor had done in the *Awwad* case, the mischief being "*continuing to act*", and public policy decreed that the solicitors should not be paid for that. Mr Carpenter QC relies upon this finding in the present case in his resistance to the Appellant's quantum meruit case, to which I will return below.

22. It is clear, and indeed was not in issue, that the nature and scope of the various agreements examined by the courts through time, have been considered against the backdrop of public policy as it was expressed in *Wallersteiner v Moir*. In *Sibthorpe v Southwark* LBC [2011] 1 WLR 2111 Neuburger LJ stated in paragraph 37, that the common law of champerty remained as described in *Wallersteiner v Moir* and *Awwad*. The court there held that agreements involving those who conducted litigation or provided advocacy services were still subject to the strict common law rules of champerty, recognising that certain agreements which complied with section 58 of the Courts and Legal Services Act 1990 as amended were excluded from that common law rule.

23. The issue in *Sibthorpe* was whether the common law excluded the particular retainer in that case with terms which included indemnification of clients against adverse costs. It was held that it did not: it had never been champertous for a person to agree to run the risk of a loss if the action in question failed, without enjoying any gain if the action succeeded. *Sibthorpe* considered the legislative regime and various changes to it by way of amendment and held, consistently with Schiemann LJ in *Awwad*, that by section 58 of the 1990 Act as amended, the legislature had laid down rules as to which previously champertous agreements might be entered into by those conducting litigation, and which might not (at paragraph [40]).

24. The submission on behalf of the Appellant, acknowledging the effect of this case law, was that public policy had moved on since these decisions, and it was possible to discern a more flexible approach which accommodated the Appellant's case here.

3. THE DECISION OF THE MASTER

25. The Master - in a detailed reserved judgment - concluded that severance was not an available remedy for the Appellant, and also that he was bound by authority to conclude that a quantum meruit on any basis was unavailable. He concluded the effect of the unenforceable retainer was that the client has no liability for the costs under that retainer and as such any sums paid to the solicitors needed to be repaid to the client.

Severance

26. The Master characterised the arguments thus:

> "*17. The contractual remedy sought by the defendant is to sever some of the terms from the retainer so as to render the remainder enforceable. The proposal by the defendant is to sever numbered paragraphs 3 to 21 leaving the claimants to be liable to pay Volterra Fietta's fees based on hourly rates less a 30% discount. All of the success fee provisions would be removed.*"

27. He concluded that whilst the characterisation of the two parts as either one single, or a new second retainer was not material, he preferred the second characterisation:

> "*19. In my view, it is more accurate to describe the arrangement reached from 6 September 2017 as a second retainer for two reasons. The first is that numbered paragraph 1 of the side letter specifically includes Mr Stava as a party and not simply Diag and Volterra Fietta as the original agreement clearly set out. The second, is that the intention of the parties was to create an agreement in which the extent of Volterra Fietta's remuneration depended upon the outcome in exchange for a reduction in the ongoing costs payable by the claimants. This element of contingent payment is completely missing from the original terms and it does not seem to me that those two aspects of the revised arrangements can properly be described as simply a variation of the original agreement.*"

28. In dealing with the proposition that the offending part of the agreement could be severed, the Master dealt clearly and in my judgement accurately with the law and I adopt his approach. There is no suggestion by Mr Bacon QC that his setting out of the legal criteria was materially flawed. The Master said as follows with regard to the framework and the parties' submissions:

> "*50. The correct approach to be adopted when considering whether unenforceable provisions in the contract can be severed from the remainder of the terms was considered in the Supreme Court decision of Egon Zehnder Ltd v Tillman (SC(E)) [2019] UKSC 32. The three stage test set out in the case of Beckett Investment Management Group Ltd & Ors v Hall & Ors [2007] EWCA Civ 613 was approved. That test was originally set out in an earlier case cited with approval by Maurice Kay LJ in Beckett as follows:*

> "*A contract which contains an unenforceable provision nevertheless remains effective after the removal or severance of that provision if the following conditions are satisfied: 1 The unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains. 2 The remaining terms continue to be supported by adequate consideration. 3 The removal of the unenforceable provision does not so change the character of the contract that it becomes 'not the sort of contract that the parties entered into at all'.*

> "*51. If paragraphs 3 to 21 of the side letter were removed so as simply to leave the opening paragraph and the first two numbered paragraphs together with the original client care letter's terms and conditions, the parties are agreed that those paragraphs could be removed without having to vary the wording of what remains by either adding or subtracting to them. This so-called "blue pencil" element of the test is satisfied.*

> "*52. Similarly, the remaining terms would provide adequate consideration. Volterra Fietta would be providing the services and the claimants would be paying 70% of the fees. This is also common ground.*

> "*53. The parties do not agree however as to whether what remains is the sort of contract that the parties entered into at all. In Egon Zehnder Lord Wilson approved the Beckett test as follows:*

> > *"87. The third criterion is that "the removal of the unenforceable provision does not so change the character of the contract that it becomes 'not the sort of contract that the parties entered into at all'". This is the crucial criterion and I find it impossible to equate it with the Attwood requirement, as suggested by the Court of Appeal. In my view this third criterion was rightly imported into the general jurisprudence by the Beckett case and has rightly been applied by our courts ever since then, otherwise than in the decision under appeal. But I suggest, with respect, that the criterion would better be expressed as being whether removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract. It is for the employer to establish that its removal would not do so. The focus is on the legal effect of the restraints, which will remain constant, not on their perhaps changing significance for the parties and in particular for the employee.*"

29. On the severance issue the Master considered the submission of Mr Bacon QC that it was possible to sever numbered paragraphs 3 to 21 and Mr Bacon QC's reliance on *Garnat Trading and Shipping (Singapore) Pte Ltd v Thomas Cooper (a Firm)* [2016] EWHC 18 (Ch). In that case a private paying retainer had been agreed for a first instance case, and Garnat and Thomas Cooper then agreed to deal with funding matters in respect of the appeal, but on terms that were unenforceable because they amounted to a conditional fee agreement not satisfying the requirements of section 58 of the 1990 Act. Edward Murray

sitting as a Deputy Judge of the High Court concluded in *Garnat* that the removal of the unenforceable provisions did not change the character of the retainer nor cause it to become "*not the sort of contract that the parties entered into at all*". It was unenforceable in respect of work carried out by the Defendant relating to the appeal, but it continued to apply, without amendment, to work carried out within the scope of the retainer that did not relate to the appeal; the new provisions had only amended the basis for charging in relation to the appeal. Mr Bacon QC submitted below, as he did on appeal, this was directly analogous to the present case. Mr Bacon QC argued that severance was supported by the wording of section 58 of the 1990 Act, in particular the definition at section 58(2)(a) that a CFA is an agreement which provides for fees and expenses "*or any part of them*" to be payable only in specified circumstances. In both of the agreements here, Mr Bacon QC said, 70% of Volterra's fees were to be paid by Diag in any event, removing the paragraphs in the Side Letter dealing with the success fee made no difference. The remaining 30% of the base fees payable under the first agreement became conditional and so had to be removed, but nevertheless, the continuation of the obligation to pay the preponderance of Volterra's fees, win or lose, did not alter. This was therefore still "*the kind of contract the parties had entered into*", just as in *Garnat*.

30. Mr Carpenter QC had argued by contrast that the removal of 19 of the 21 paragraphs of the letter, showed that what remained was a different contract from that entered into on 6 September 2017. The agreement was, moreover, conditional. In consideration for discounted fees being charged as the case progressed, the Appellant stood to gain much more by way of both base fees and success fees if either arbitration bore fruit. The effect of severance was removal of the chance to get "*those spoils*" and would leave Volterra with just Diag's unconditional liability to meet the discounted fees.

31. Rejecting Volterra's reliance upon *Garnat* and the contention that all that was required to the first agreement was "*minor surgery*" (see *Freshasia Foods Ltd v Lu* [2018] EWHC 3644 (Ch)) the Master said:

> "*63. Purely numerically, a considerable amount of slimming is proposed by Volterra Fietta in order to save the contract here. Moreover, it removes all of the conditionality in the agreement. Whilst Mr Volterra said that he was quite happy to remain with the original hourly rates contract, his price for agreeing to reduce the upfront fees was the possibility of a considerable upside in the event of success. Now it has become clear that the agreement has fallen foul of the legislation, it cannot be an appropriate driver for Volterra Fietta to seek to forego that potential upside at this point simply in order to prevent a worse outcome.*"

32. He also rejected the severance contention on public policy grounds, holding that, contrary to the Appellant's submissions, there had been no shift in the public policy position concerning contingency fee agreements and the legal professions.

33. It had been argued by the Appellant below that the earlier cases (see *Wild v Simpson* above) referred to "*illegality*" not the "*unenforceability*" of section 58. Mr Bacon QC said this demonstrated a judicial view at the time that contingency fee agreements were illegal because contrary to the criminal law. It was not surprising therefore that the courts were keen to strike down any such illegal contracts and the language was significant. Maintenance and champerty were no longer illegal in the sense of being criminal. Recent

cases referred to unenforceability and not illegality; this was significant as demonstrating that the law had moved on and the courts were no longer being asked to promote the committing of an illegal act. Rather, the court could sever in an appropriate case. The Master rejected this distinction.

34. The Master also rejected *Garnat* as being factually analogous in any event, and applied the statement of Neuberger LJ in *Sibthorpe* as reflecting the stringent public policy in respect of lawyers' champertous agreements. Mr Carpenter QC on behalf of Diag, submitted that the extent of the nuanced approach contended for by Mr Bacon QC was circumscribed by Parliament, and not by the courts.

35. The Master held:

> "*86. In Garnat, a broad private retainer had been agreed and, for one specific element, a CFA was agreed in order to deal with an appeal. Other work done under the retainer which was outside the appeal was being challenged because of the element of the retainer that utilised a CFA. It was argued that the CFA infected the remainder of the retainer so that it all became unenforceable. The judge was able to excise the infected element so as to leave the private retainer to be relied upon for payment of work outside of the appeal.*
>
> "*87. In this case, Volterra Fietta's instruction was solely in relation to the BIT arbitration. Work done in respect of that arbitration was charged on a monthly basis until the side letter came into existence. From the point that it did, all work done was remunerable under the terms of the CFA that had been created. There was no work carried out which could only be paid for under the original terms since it was outside the scope of the side letter. As I have already set out, I prefer the construction that the terms on which the parties contracted from September 2017 was a new contract of retainer. But whichever is the case, the revised arrangements applied to all work done.*
>
> "*88. In the circumstances, there is no scope for the infected CFA to be removed so as to save the body of the agreement, in the manner contended for in Garnat. The whole arrangement had been converted into a CFA and as such the whole agreement needed to come within the statutory exception carved out from the common law. Having not done so, in my judgment the special category of champertous arrangements to which stricter rules apply – as described by Lord Neuberger in paragraph 37 of Sibthorpe – continues to reflect the public policy which prevailed in 2017 and which applies to this agreement.*"

The argument based on *Garnat* failed because the amended/new retainer here applied to all work done: it was not divided between different work streams as in *Garnat*.

36. The Master thus rejected the proposition based on *Garnat* that on the facts here a CFA had been created where a proportion of the work was payable win or lose, whilst the remainder was payable only if there was success. This was what was meant, Mr Bacon QC had submitted, by section 58(2)(a), where a CFA is defined as an agreement which, amongst other things, "*provides for his fees and expenses, or any part of them, to be*

payable only in specified circumstances". One example where *part* of the fees and expenses were "*payable only in specified circumstances*" is a CFA relating only to part of the case (*Garnat*). This could be only for a period of the case, or only for a proportion of the fees. In the present matter, he said, the 70% of the fees of Volterra which were payable win or lose, was the unconditional part, and the remaining 30% of the base fees and all of the success fees, were the conditional part.

37. This the Master rejected, because an analysis to the effect that only a proportion of the costs was at risk, fell foul of the reasoning in *Gloucestershire County Council v Evans and Others* [2008] EWCA Civ 21. In that case the parties sought to calculate the maximum success fee by reference to the "*costs at risk*" – which words do not appear in the statute. The court declined to construe section 58 in this way, saying also that the possibility that fixed success fees may lead to unreasonable results in some circumstances is not a reason to give the statute an impossible interpretation.

38. An argument based on *Garnat* was also raised by Mr Bacon QC in support of a quantum meruit. He argued, on the same analysis, that there was no reason why the unconditional part could not form the basis of an unjust enrichment claim so as to give rise to a quantum meruit because that "*part*" did not fall foul of section 58. The Master however, rejected this approach. He did not accept it was possible to distinguish, as Mr Bacon QC urged, the pronouncements of the Court of Appeal and House of Lords regarding the unavailability of a quantum meruit to rescue an unenforceable CFA.

39. The Respondent Diag characterised the *Garnat* case as being concerned with two separate work streams, submitting that if Mr Bacon QC's argument were correct it would amount to partial unenforceability wherever there was a discounted CFA since the discounted rates could still be claimed. If, however, a full CFA were used, then no fees would be payable by the client because there was no proportion which the client was bound to pay, win or lose.

40. The Master rejected the Appellant's case on the facts. He said:

> "*112. In my view, it would be possible to create a CFA which specified a proportion of the work would be paid win or lose and the remainder would be payable only in the event of a win. But it would require clear wording since it would be a novel arrangement. The agreement here, shorn of paragraph 3 to 21 of the side letter does not set out any such arrangement. It relates to the whole of the fees but simply discounts them.*"

41. The Master also accepted the Respondent's submission that consumer protection would be vitiated by such agreements between solicitors and their clients if the solicitor could just remove offending passages if they came to light, but otherwise rely upon those express terms of the agreement notwithstanding that they were in fact unenforceable. Accordingly, he rejected each of the Appellant's arguments on severance.

42. In determining the issue of unjust enrichment the Master applied the law as set out above and, on the issues referred to as (iii) and (iv), held that the statement of the public policy approach reflected in Schiemann LJ's observation in *Awwad* at page 596 (above), was still binding upon him – indeed the Appellant had acknowledged as much.

43. He therefore concluded on the issue of unjust enrichment, (reflecting on the speech of Lord Nicholls in *Wilson v First County Trust Ltd (No2)* [2004] 1 AC 816, that recognised the absence of a restitutionary remedy under the Consumer Credit Act 1974) that:

> "*100. … The claimants here are in the same position. If the agreement was unenforceable, they are simply not required to pay the fees and that cannot lead to an alternative route to payment via an unjust enrichment claim.*
>
> "*101. It seems to me that this argument is incontrovertibly correct. As such, only if the present case could be distinguished from those which I have just set out, would I not be bound to conclude that unjust enrichment is simply not available to Volterra Fietta.*"

44. Mr Bacon QC had argued that the case of *Aratra Potato Co Ltd v Taylor Joynson Garrett (a firm)* [1995] 4 All ER 695 was authority to the effect that no repayment of fees already paid under an unenforceable retainer should be made unless a case in restitution were made out – such as where the work for which payment had been received had not been done at all, and there had been a total failure of consideration – which, he urged, was demonstrably not the case here. He had submitted that the Master was bound by that decision and, there having been no restitutionary case raised here, should refuse to order the monies already paid to be returned. He argued that Diag's response was also erroneous. Diag argued that the relevant Court Order had required a detailed assessment of the Final Statute Bill in accordance with section 70 of the Solicitors Act 1974. The obligation to assess and certify fell upon the Master under section 70(7), which he could then do, without any need for a restitutionary claim to be separately made. There was a difference - argued Diag - as to whether funds were paid on account of costs or under an interim Statute Bill, otherwise a chance of reduction by detailed assessment could be lost by the client.

45. The Master determined the issue on a different basis, distinguishing *Aratra Potato*. The Master observed that the case had been decided as long ago as 1995 without the benefit of the subsequent development of the law. As he put it (in paragraph 119) "*… at that time, CFAs were barely in their infancy and it would not be for another half dozen years before the Court of Appeal grappled with such agreements.*" Looking at that later caselaw (unavailable to Garland J), the Master determined that it was clear that the draconian result feared by the judge had indeed been held to be the consequence of the legislative provisions. He referred to *Langsam v Beachcroft LLP & Ors* [2011] EWHC 1451 (Ch) where the result was egregious, and the client was entitled to hold on to monies paid to him on account of costs owed to his solicitor, and not pay them over the solicitor, because the retainer failed. The Master reflected that the issue had not been determined in the courts at the time since challenges came from defendants not claimants, and there was no incentive for claimants to litigate the issue. He concluded:

> "*122. There are many similar sentiments expressed in the Court of Appeal and The High Court regarding the sanction, normally described as "Draconian" of complete unenforceability of the retainer during the first decade of this century. All such pronouncements obviously postdate the words of Garland J. Given the conclusion of many judges that the solicitors ought to be deprived of their fees, if the agreement did not comply with the statutory requirements, I simply do not think that the choice described by*

> *Garland J as "unreal" is a difficult one to answer. The client is entitled to reap the benefit of the legal services provided by the solicitor who has not managed to produce a legal agreement which complies with the statute.*
>
> "*123. In these circumstances, the fees set out in the Final Statute Bill in respect of costs incurred after the side letter came into effect will be assessed at nil and any fees paid in respect of them will need to be returned to the claimants.*"

46. The Master accordingly held against Volterra on each issue, giving leave on the last point, in light of the High Court authority, *Aratra Potato*, which he had distinguished.

47. I have cited from the judgment of the Master at length given this Appeal has been by means of a root and branch attack on the detailed reasoning of the Master by reference to existing caselaw, in particular his approach to *Garnat* and to *Aratra Potato* and the public policy cases. The appeal has also been argued by reference to new authority decided after the Master's decision but before determination of the application for permission. There was a re-working of most of the main arguments before the Master before this court, in addition to a submission that subsequent authority assists Volterra's case.

4. THIS APPEAL

48. The Appeal was framed as two broad questions set out in the detailed skeleton argument of Mr Bacon QC thus:

> First Question
>
> "1. *Where a solicitors' retainer provides for part of their fees to be paid on a conditional (CFA) basis, and part of their fees to be paid on a conventional and unconditional basis, win-or-lose, are the solicitors able to claim their unconditional fees (or a sum to reflect that unconditional element) where the conditional part is unenforceable.*"
>
> Second Question
>
> "*2. Where a retainer is found to be unenforceable as a whole (and no entitlement to remuneration can be saved by severance or the award of a quantum meruit), does Garland J's decision in Aratra Potato Co Ltd v Taylor Joynson Garrett (a firm) [1995] 4 All ER 695 remain good law, to the effect that in those situations the client is not entitled to an automatic return of sums paid to date unless they can make good a case for restitution?*"
>
> He submitted the answer to each question was "*yes*".

49. As to the First Question, he argued that the Master had:
    a. Mischaracterised the retainer
    b. Misapplied *Egon Zehnder* and the 3-stage severance test
    c. Wrongly distinguished *Garnat Trading*

d. Misapplied the other authorities in particular on the issue of public policy, which had moved on so as to encompass severance in the present case.

As to the Second Question, he said the Master had:
a. Minimised the importance of the question concerning an obligation to return monies paid over
b. Failed to follow *Aratra Potato* which was binding upon him.

50. Dealing in more detail with each or those areas of attack. The first issue arising on the appeal against the Master relates to his decision refusing severance of the offending part of the retainer.

Severance
First Question

a. Mischaracterised the retainer

51. Mr Bacon QC argued the Master was wrong on the question of who were the parties to the contract. Although argued by Diag that there were different parties involved in the Engagement Letter and the Side Letter, that was not in truth the case because Mr Stava was already personally involved in around April 2017 and was himself, on his own admission, subject to the same terms as was set out in the First Retainer between the Firm and Diag. He was undisclosed but as much part of the agreement as he was of the Side Letter retainer, which only made explicit what had previously been implicit. Mr Stava is and was at all material times the controlling mind and ultimate beneficial owner of Diag Human SE; Diag Human SE existed purely to pursue the claim against the Czech Republic for the benefit of Mr Stava, said Mr Bacon QC. The Claimants are, in reality, one and the same and it was a relevant error to say that there were in fact two separate retainers with different parties as the Master did.

52. This was also the "*same kind of retainer*" as before said Mr Bacon QC, not different. The payment obligation was varied from 100% to 70% and varied as to how the remaining 30% would be payable together with certain uplifts. As he said in oral submissions, a "*different thing was not created*", the client was always going to pay the fees. The tone of the Side Letter smacked of a variation to the earlier agreement – although he did accept that all the conditional elements would fail.

53. He pointed also to the continued meaning of the terms as between the two and that all the terms of the Engagement Letter continued in force; all indicated a variation to an existing retainer. A further feature was that this variation applied he said only prospectively to a new contract; necessarily, but any variation will contain new terms so that cannot be the touchstone for determining whether or not there is a variation. He referred to the findings in *Garnat*. In that case the court was prepared to sever the offending new terms which dealt with any work relating to the appeal work stream which was unenforceable, but left untouched other work. He relied on paragraph [28] of *Garnat*:

> "*28. Thirdly, the removal of the unenforceable provisions of the 12 April 2011 Agreement does not change the character of the Retainer or cause it to become "not the sort of contract that the parties entered into at all". It is unenforceable in respect of work carried out by the defendant relating to*

> *the appeal, but it continues to apply, without amendment, to work carried out within the scope of the Retainer that does not relate to the appeal. There is independent and unimpeachable consideration for this work, namely, the promise to pay the defendant on the hourly basis set out in the Retainer. The 12 April 2011 Agreement cannot, in my view, be construed as having amended the basis for charging in the Retainer in relation to work other than that relating to the appeal.*"

Equally here, he submitted the character of the retainer did not change. This was the same as the *Garnat* retainer that "*continues to apply without amendments to work carried out within the scope of the retainer*".

b. Misapplied *Egon Zehlender* and the 3-stage severance test and

c. Wrongly distinguished *Garnat Trading*

54. Mr Bacon QC argued that caselaw, in particular the case of *Zuberi v Lexlaw Limited* [2021] EWCA Civ 16, supports the proposition that it is possible to sever an obligation to pay hourly rate fees from a contingent retainer, and that such severed agreement does not fall foul of the third test in *Egon Zehnder Ltd v Tillman* (SC (E)) [2019] UKSC 32 – a conclusion which the Master wrongly reached, concerning the severed contract in this case. He argued that only that part of the agreement between the Firm and their client was to be a DBA/CFA. All the unenforceable bits are excised leaving the other, binding parts, intact.

55. It had been suggested by Diag that here, the success fee was a function of the hourly rate and therefore was inextricably linked and could not be severed from the main agreement. However properly understood, said Mr Bacon QC, on the agreement as it remained, 70% was still payable because that did not fall foul of section 58. This was the argument wrongly rejected by the Master as inconsistent with *Gloucestershire*.

56. Mr Bacon QC submitted that there can be such a thing as a "*hybrid CFA*" which contains two distinct forms of payment: the fees to be paid win or lose, and those to be paid only in specified circumstances. He suggested it was uncontroversial that you could have a hybrid CFA, the case of *Garnat* was authority for that proposition.

57. It was not the case that *Garnat* referred to work streams - and that is why it allowed severance. What the cases proscribed was acting for a client in circumstances of potential conflict, save in certain very closely circumscribed circumstances; there was no material difference between a work stream split and a "*circumstances*" split, that is to say 70% in these circumstances and an extra 30% in specified circumstances. Whether it is 70% of the work or 70% of the fees, there is no material difference he submitted. He argued that his clients were in a like position to the solicitors in *Garnat.*

58. *Zuberi* was authority for the proposition that there was nothing objectionable in a part of the contract which was unenforceable as capable of being severed as a matter of public policy. There was no recovery in respect of the conditional component but the other part, which always had to be paid, win or lose, could be recovered. (See paragraph 107 of the Master's decision).

Garnat

59. *Garnat* was authority that you could sever certain categories of payments/costs, the example of work was just one manifestation of the principle. The vast majority of cases have been "*no win no fee*" cases and it is unhelpful to look to them for assistance in the submission of the Firm. The law as to contingency fees was becoming more nuanced and a broad brush approach as seen hitherto, he submitted, was no longer appropriate. *Garnat* was also authority for the proposition that where a retainer provides for two types of payments, conditional payments and conventional payments whether in parallel or as a series, it is possible to sever that part of the retainer providing for conditional payments.

60. Public policy Mr Bacon QC argued is not offended by such severance, as that case demonstrates. "*All of the CFA*" was removed in *Garnat*, and the case is a direct parallel to the current situation. The Master fell into error in failing to accept that in *Garnat* public policy may be seen to have developed since the earlier cases of *Wild v Simpson* and *Sibthorpe*.

d. Misapplied the other authorities in particular on the issue of public policy, which had moved on so as to encompass severance in the present case.

Zuberi

61. *Zuberi* had been determined by the date of permission to appeal. Arguments based upon it were advanced to the Master who dealt with it in the following way in his determination on permission:

> "*3. In particular I have considered the paragraphs* [*he*] *referred to in the case of Zuberi v Lexlaw Limited [2021] EWCA Civ 16 which was pronounced by the Court of Appeal after I had handed down my decision.*
>
> "*4. I refuse permission to appeal my decision in respect of these two preliminary issues on the ground that there are no reasonable prospects of success. The grounds of appeal are essentially a repeat of the arguments which did not find favour originally. In my view, the brief dicta in Zuberi additionally relied upon demonstrates no more than, on the facts of that case, severance was possible. So too was severance possible in the case of Garnat which, for the reasons that I gave, I distinguished from this case.*"

62. Mr Bacon QC submitted the case was analogous. In *Zuberi* a solicitor appeared to be disentitled from any remuneration in the event that the client terminated before the conditional events had arisen. The essence of the point he submitted was that where a lawful basis for payment is included, the law should not unravel the whole of the agreement; where only part of the agreement is champertous, the court should sever it. Although a new point, it was, he said, in effect what was reflected in paragraph 106 of the Master's decision, although *Zuberi* was decided after the judgment. Paragraph 106 (with paragraph 107) reflecting the submission of Diag, were in the following terms:

> "*106. Mr Carpenter described the examples given by Mr Bacon regarding a building claim being paid on private payment terms and a PI case being dealt with on a CFA – first as separate claims and then separately under one retainer as being baby steps towards the end proposition. The same*

> *was true regarding examples concerning the period in which the different agreements were involved. However, the final step of agreeing that a proportion of the fees could be conditional and the other proportion be unconditional was described by Mr Carpenter as being a huge logical leap which had not been foreshadowed in the pleading of Volterra Fietta's case.*
>
> "*107. Mr Carpenter did not accept that Garnat was authority for the proposition of one retainer containing two different fee arrangements as described by Mr Bacon. The agreement simply reflected two different work streams that were paid for on different pieces of work and as such were the same as the building claim and PI claim example given by Mr Bacon as one of his baby steps. If Mr Bacon's argument was correct then it would amount to partial unenforceability wherever there was a discounted CFA since the discounted rates could still be claimed. If, however, a full CFA were used, then no fees would be payable by the client because there was no proportion which the client was bound to pay, win or lose. No one had made such an argument in any of the leading cases and it was unlikely, in Mr Carpenter's submission, that the advocates or the courts in those cases would have missed such an argument.*"

63. The Master concluded (as set out above) that the agreement in the present case was not separable into two parts of work, like *Garnat*, in fact the agreement related to all of the fees and then discounted them – it did not specify parts of the work, or isolate work streams, and so was different in type from that in *Garnat.*

Gloucestershire v Evans

64. In *Gloucestershire v Evans* solicitors for the claimant were retained under a collective CFA which provided that they would be paid a basic fee of £145 per hour which would be discounted to £95 per hour if the client lost, but if the client won they would be paid the basic fee plus a success fee of 100% of the basic fee, bringing the total to £290 per hour. This was challenged as not falling within the section whereby the maximum success fee which could be provided for under a CFA was 100% of the fee which would be payable if it were not a CFA.

65. However Lord Dyson held that the percentage increase was to be measured not by reference to the costs at risk, which was not a concept referred to in section 58 of the 1990 Act, but by reference to the fees which would have been payable if the agreement had not been a CFA, which meant the fees payable under the agreement with all its conditional elements removed; those fees were £145 per hour; and that, accordingly, the success fee did not exceed the permitted limit of 100% and the agreement was enforceable (see paragraphs [27] and [28]).

66. Mr Bacon QC submitted that it was incorrect to say, as was suggested against him, that the issue has been determined authoritatively by reference to *Gloucestershire v Evans.* He was there referring to the Master's observations as follows in paragraph 111:

> "*If, by way of example, the solicitors were to receive 100% of their base fees in the event of success and 60% if unsuccessful, it would be easy to describe the 40% between the two outcomes as being the costs at risk. However, that would be a faulty analysis as the Court of Appeal concluded in the case*

> *of Gloucestershire County Council v Evans and Others [2008] EWCA Civ 21. It seems to me that Mr Bacon is treading a similar path in his submissions in this case regarding the 70% being payable win or lose and only the remaining 30% being at stake.*"

67. The Master had said that it would be theoretically possible to agree that a proportion of the fees were to be paid in any event and that the remaining proportion were contingent on outcome – but that was not what had happened here, where the agreement shorn of paragraph 3 to 21 of the Side Letter did not set out any such thing. It related to the whole of the fees, but simply discounted them.

68. *Gloucestershire*, said Mr Bacon QC, was all about measuring the success fee that is a 100% maximum; it had nothing to do with the points developed concerning section 58 in the context of a wider retainer, nor with severance, and it is not a case on public policy. He submitted it was supportive of the argument section 58 polices only the conditional element of the agreement, and had been misapplied by the learned Master.

69. Master Brown challenged Mr Bacon QC during the hearing on the submission as to two separate agreements, and that there was in law no requirement for those parts that were not the CFA to be reduced into writing. Master Brown suggested that it was difficult to see how such an agreement would work, and difficult to see how the public could be protected if the standard terms and conditions were not in writing. Mr Bacon QC accepted they would have to be written, in order to "*show how it works*".

70. Mr Carpenter QC observed that this argument as to two independent retainers, one enforceable, one not, one caught by section 58 and one not, was quite at odds with the agreed basis before the Master where it was expressly agreed (see the Master's paragraph [14] and paragraph [4] above) that since the terms in paragraph [5] onwards were contingent upon the outcome of the arbitration, it was common ground that the agreement did not comply with the terms of section 58, plainly the passage referred to the whole of the terms agreed. As set out above (Master's judgment paragraph [107]), he submitted the effect would be partial unenforceability wherever there was a discounted CFA since the discounted rates could still be claimed.

71. In *Gloucestershire* at paragraph 28 the court set out what a CFA was but Mr Bacon QC argued that the conditional fees only in the present case fell within section 58. The Respondents said that such an analysis left open the opportunity for misuse and manipulation. Mr Bacon QC said that solicitors will not manipulate the system. The statutory wording refers to "*all or part*" of fees; a proportion of hours, or of work. They are all he argued manifestations of the same thing, the commonality is that some parts are conditional and some unconditional so there are two forms of payment: it is not a question of "*streams of work*". The issue here is costs and there are two different sorts of costs.

72. Mr Bacon QC accepted that the stringency of the arguments against both severance and quantum meruit were founded in public policy. His broad submission was that the case law which appeared to suggest he was wrong, had been based upon 19th century cases at a time (pre-1967) when champerty was a criminal offence. Since that time policy had developed and did not proscribe recovery in the present circumstances.

Second Question
a. Minimised the importance of the question concerning an obligation to return monies paid over

Quantum Meruit and Repayment
b. Failed to follow Aratra Potato which was binding upon him

73. As to quantum meruit, Volterra argue here as below that the claimants have been unjustly enriched in the sense that they have received legal services but have not been required to pay for them. It was agreed below that in answering the four questions arising in the case of *Lowick Rose LLP (in liquidation) v Swynson Ltd* [2018] AC concerning a quantum meruit namely: (i) Has the 'defendant' been enriched by the receipt of the benefit? (ii) Has that enrichment come at the expense of the 'claimant'? (iii) Is the retention of that enrichment unjust? (iv) Is there any defence or bar to the claim? The issue in the present case was as to (iii) and (iv).

74. The Respondents relied on public policy arguments illustrated by Neuberger LJ's characterisation in *Sibthorpe* of legal services providers and upon Schiemann LJ's specific comment in *Awwad* at page 596 (see above) to defeat the Claimant's argument that a quantum meruit could arise.

75. Volterra argued the Master was wrong to order that sums already paid to Appellant for work from 6 September 2017 had to be repaid. In support of this argument, Mr Bacon QC relied again upon *Aratra Potato Co Ltd v Taylor Joynson Garrett (a firm)* [1995] 4 All ER 695. This case he argued was authority that where restitution is established, for example where a total failure of consideration is demonstrated, then a repayment may be ordered by the court.

76. Below, he submitted, the Master had wrongly rejected reliance upon *Aratra Potato*, but on different grounds, which Mr Bacon QC says, unfairly, were not canvassed in submissions. In any event, the cases mentioned by the Master did not derogate from what he submitted was the proper interpretation of *Aratra Potato.* He relied upon the case for the proposition that sums paid under an unenforceable retainer are not automatically repayable – a party must establish a case in restitution as, for example showing why the work done did not amount to sufficient consideration for the solicitors to be entitled to retain those sums.

77. He also pointed to the passage in *Chitty on Contracts* (33rd edition) supporting *Aratra Potato* as good law:

At [16-097], it provides:

> "*…where payment has been made to a solicitor under a champertous agreement and he has not behaved unconscionably towards the payor or has not been unjustly enriched, the payor is not entitled to recover the price of those services while retaining the benefit of them: the champertous agreement in this situation is simply unenforceable.*" [Emphasis added].

78. And at [29-085]:

> "*The mere fact that one party has paid money to another under a contract which he cannot enforce against the latter, either because of non-compliance with a statute requiring written evidence or on grounds of public policy, will not entitle the payer to recover the money automatically, for such a contract is not void, but merely unenforceable. A total failure of basis must be proved before restitution can be claimed in these circumstances and restitution will not, in any event, be given if it would run counter to the policy of the statute in question.*"

79. Similarly, he argued, public policy with respect to quantum meruit had developed in the Applicants' favour since the cases of *Giles v Thompson*, and *Awwad v Geraghty and Co.* The Master was wrong to hold that public policy prevented payment even of an unconditional part of solicitors' fees, and public policy was not undermined as long as the conditional element of fees remained irrecoverable.

5. ANALYSIS AND CONCLUSIONS

80. I have reached the clear conclusion that the Master was correct in the conclusions that he reached. Save for one aspect, by reference to the Solicitors Act 1974, I also agree entirely with the process of reasoning that led to them. Additionally, I am therefore able to state reasonably concisely, the reasons that support my conclusions.

Question 1

a. Mischaracterised the retainer and

b. Misapplied *Egon Zehlender* and the 3-stage severance test

81. In my judgement it is clear, whatever the involvement behind the scenes of Mr Stava, the parties in the second agreement, (and in my judgement it was a second agreement rather than a variation), were different from those in the first agreement. Even if there was an implied relationship before the Side Letter between Mr Stava and Volterra, he was not a party to the written contract contained within the Engagement Letter.

82. Further, and importantly, the nature of the agreement between the parties evidenced by the Side Letter was materially different from that evidenced by the Engagement Letter: the central features of the second, Side Letter agreement between the parties were the conditional elements. In my judgement the nature and character of the second agreement is wholly different from the nature and character of the terms that were agreed under the Engagement Letter. These differences feed into the severance question. As to severance, the intrinsic nature of the clauses sought to be severed is wholly different from what is left after severance, and as Mr Carpenter QC phrased it "[t]*he provisions which Volterra seeks to remove formed the very essence of the contract which the parties actually entered into*".

83. Further, and crucially, in this case, the work was to be governed up until 6 September 2017 by the old payment agreement which was not conditional, and that same work was to be governed by the new, conditional, agreement thereafter.

84. Accordingly, Diag were correct to say that under the new agreement, in consideration for discounted fees being charged as the case progressed, the Appellant stood to gain much more by way of base fees and success fees if either of the arbitrations bore fruit. Severing the provisions giving effect to this, removed the chance of that acquisition leaving them only with a liability upon Diag to meet the (now discounted) fees. It was not irrelevant that the Master noted at [64] that in evidence Mr Volterra indicated that he would not have agreed simply to have discounted the firm's fees by 30% - on that basis there would have been nothing in return to Volterra. This underlines in my judgement that it was not the same sort of agreement that Volterra had entered into. The third test set out in *Egon Zehnder* is not met here, and the Master correctly applied that authority to the facts of this case.

85. I agree that properly analysed, the Side Letter represented a quite different type of agreement from that encapsulated in the Engagement Letter, albeit that there was overlap, albeit that similar language may have been used and albeit, that there was a terminus at which one stopped and one started. None of those features in my judgement override the overwhelmingly different character of the second agreement. The second cannot possibly be described as the sort of contract the parties had entered into at all.

c. Wrongly distinguished *Garnat Trading* and

d. Misapplied the other authorities in particular on the issue of public policy, which had moved on so as to encompass severance in the present case

86. In my judgement the Master was correct in noting (at paragraph [85]) that the factual situation in the present case was different from that in *Garnat*. There a broad private retainer had been agreed but for one specific element of work, a CFA was agreed to deal with an appeal. The present case involved only the BIT arbitration work. This had been charged on a monthly basis until the Side Letter; thereafter, the work was to be done under the CFA. The Master correctly held (at [88]) there was "*no scope for the infected CFA to be removed so as to save the body of the agreement*". As he said, the whole arrangement had been converted into a CFA. The *Garnat* case involved two separable work streams, one was charged on one basis and the other charged on the other, hence, severance was possible. Here, the part sought to be severed, was the whole of the work, the totality of which it had been agreed would be subject to the new conditional basis. That is a different scenario, the Master was correct to distinguish *Garnat*. In *Garnat* the appeal CFA terms had no connection at all with the terms existing for paying for the other work.

87. I have set out above the Master's careful consideration of the development of policy in the common law from before to after the inception of the 1990 Act and its amendments. Mr Bacon QC before me emphasised what he said was a change through time, evidenced by the approach taken in *Garnat.* I disagree. That case was not decided on the basis of public policy, it was factually different. However, there seems to be a broader reason for refusing severance, aside from the factual differences. This situation cannot be saved by severance since, given the facts of this case, in the light of *Giles v Thompson* and *Awwad v Geraghty*, it would be contrary to public policy to permit severance. I cannot read *Garnat* as a case that seeks to recognise, or to propound a shift in public policy as it was expressed to be, it was merely a case where severance was appropriate and permissible.

If correct, Mr Bacon QC's submission would, as Mr Carpenter QC suggested, allow virtually all defective CFAs or DBAs to be put right late in the day. This is not the effect of the statute read in the light of the earlier and subsequent caselaw. Further, it would undermine consumer protection and the administration of justice.

88. A somewhat broader challenge was contained in Mr Bacon QC's Notice of Appeal based upon *Zuberi v Lexlaw Ltd* [2021] EWCA Civ 16, and what he argued was its relevance to a deeper question of "*what a CFA was*", and the true scope and focus of section 58 of the Courts and Legal Services Act 1990. The Master did not accept that this later case affected the soundness of his decision which was reached before the Court of Appeal delivered judgment.

89. In *Zuberi*, a DBA had been entered to finance a claim against a bank. Under one clause the solicitors were entitled to 12% of any sum recovered plus expenses. If the claim was lost, only expenses were payable. Under the agreement a clause also permitted the client to terminate at any time but, if they did so, the client became obliged to pay costs and expenses to the solicitors to the date of termination. It was argued that this last clause vitiated the whole agreement because it offended section 58AA of the 1990 Act as amended.

90. Lewison LJ described the issue in these terms:

> "*1. A client enters into a contract of retainer with solicitors to prosecute a claim. The contract provides that in the event of success the solicitors will be entitled to a share of the recoveries. The client achieves success by means of a settlement of the claim; and the solicitors claim their share. But the contract also contains a clause which says that if the client terminates the retainer prematurely (which she did not), she must pay the solicitors' normal fees and disbursements. Does the existence of that clause invalidate the whole contract? HH Judge Parfitt held that it did not. His judgment is at [2020] EWHC 1855(Ch).*"

The offending clause was 6.2 of the agreement which provided:

> "*With the exception of the circumstances set out in clause 6.3 … you may terminate this Agreement at any time. However, you are liable to pay the Costs and the Expenses incurred up to the date of termination of this Agreement within one month of delivery of our bill to you.*"

91. The costs were called "*time charges*" and were calculated at an hourly rate for time spent working on the claim. The Damages-Based Agreements Regulations 2013 by regulation 4 (1) prohibited the requirement to pay any amount other than the payment of costs that had been paid or were payable by another party to the proceedings by agreement or order – so any payment net of these costs on termination, which did not meet that description, arguably fell foul of the Regulations as part of a proscribed DBA and vitiated the whole agreement.

92. All three members of the Court of Appeal dismissed an appeal from the High Court in which the judge had held that the agreement which gave the solicitors their time costs on

early termination did not fall foul of the DBA Regulations. He had held as a matter of construction that Regulation 4 was only concerned with cases where a recovery had been made and did not apply to a clause where fees were recovered on a time basis where the client terminated early. The Court did not hear argument on the issue of severance and declined to decide it formally (paragraph [48]), although Lewison LJ observed that in his view the conditions for severing 6.2 from the remainder of the contract were "*amply fulfilled*" (paragraph [8]).

93. At paragraph [42] Lewison LJ said that it was clear that the regulation of circumstances in which lawyers could recover their costs and expenses on the termination of a DBA was not intended to be comprehended within the Regulations. By reference to the explanatory materials and legislative history of the Regulations, that matter was to be left to professional regulators to police. As a result, the time costs in question were outside the scope of the Regulations except where they were brought in as a requirement of a DBA under the statute.

94. Mr Bacon QC relies upon a passage in the judgment of Lewison LJ where he said at paragraph [33] there were two possible views of what the DBA consisted of: one was that if a contract of retainer contained any provision which entitled the lawyer to a share of recoveries then the whole contract was a DBA. He also said:

> "*But another view is that if a contract of retainer contains a provision which entitles a lawyer to a share of recoveries; but also contains other provisions which provide for payment on a different basis, or other terms which do not deal with payment at all, only those provisions in the contract of retainer which deal with payment out of recoveries amount to the DBA.*
>
> "*34. In my judgement there are good reasons for preferring the later view.*"

95. The judge then gave a series of reasons, namely the object of the legislation was to permit renumeration, the only part of the common law needing to be changed was the rule against champerty, and without the offending clause, the contract of retainer would have been enforceable anyway. Parliament, he suggested, intended to change the common law only expressly or by necessary implication and no express provision displaced the common law, other than the champerty rules. Further, he said, and Mr Bacon QC relies particularly on this phrase, "*the legislation cannot be said to be undermined by the co-existence of the common law*". Lastly, he said the legislative scheme was far from comprehensive.

96. Lewison LJ decided (paragraph [42]) that the statutory intention of the scheme reflected in the Regulations showed that:

> "*It is clear, then, from para 7.5 that the regulation of the circumstances in which lawyers could recover their costs and expenses on termination of a DBA was not intended to be covered by the Regulations, and was to be left to their professional regulators. In addition, if there is a dispute about a solicitor's "costs", the client is entitled to have those costs assessed by the court under s70 of the Solicitors Act 1974. There were, therefore, consumer protection measures already in place.*"

97. In the event, Lewison LJ expressly declined to consider the issue of severance which was raised by the Intervener (coincidentally represented by Mr Bacon QC), the Bar Council. The Bar Council did not challenge the judges' finding that the whole contract of retainer was not invalidated if clause 6.2 fell foul of Regulation 4.

98. Newey LJ, as stated, whilst agreeing upon the result took express issue with Lewison LJ as to the meaning of a DBA. He referred to the definition of a DBA in section 58AA of the 1990 Act as follows:

> "*An agreement…which provides that (i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.*"

He disagreed with Lewison LJ's wider reasoning. In his view "…*Lewison LJ's construction of "damages-based agreement" would leave a solicitor or other representative free to stipulate for payment even where the claim failed*" which he said was not the statutory intention. Newey LJ agreed however that clause 6.2 of the particular agreement did not fall foul of the 2013 Regulations, since Regulation 4 properly construed had no application to the termination provisions.

99. Coulson LJ in a separate judgment observed that the term "*damages based agreement*" should be given a narrow reading, consistent with Lord Justice Lewison. It meant the agreement between the parties relating to the payment as defined in the Regulations. Other elements of the agreement such as the solicitor's offices, the work etc or the termination provisions have nothing to do with the payment as defined in the Regulations and therefore are not part of the DBA itself. In any event even if wrong, neither the Act nor the Regulation in question affected the operation of the early termination provisions – they did not address termination at all and in that respect he agreed with Lord Justice Newey. He indicated his understanding that Parliament had deliberately shied away from imposing any restrictions on termination provisions. It was recognised in that case that the issue of costs on a termination was an important point and seen as one of the key uncertainties preventing the wider use of DBAs at the time.

100. In my judgement the facts of that case were, as the Master indicated, in refusing leave, significantly different from the present facts so as to make the case unhelpful when construing the effect of the agreements here in issue. Furthermore, the actual issue before the court was the discrete, limited question of whether Parliament intended by Regulation 4 to make the agreement in that case unenforceable because it included an obligation to pay incurred time costs and expenses if the client exercised a contractual right to terminate. If it did, it was agreed that there was no legitimate mechanism for the solicitor to be remunerated for work done before termination. In other words, the public policy aspect of this case was all one way.

101. There was no separate "*termination*" aspect to the offending conditional provisions in the present case, nor any persuasive parliamentary intention militating in favour of construing the Regulation as had been the case in *Zuberi*. Further, as the Master set out, the facts there supported severance, and they do not, for the reasons he explained and I accept, do so here. As Mr Carpenter QC expressed it "*there is a considerable difference*

between excising termination provisions from a DBA (still leaving a DBA) and excising all the terms from a CFA which make it a CFA." It seems to me that it was the statutory context that led the court in *Zuberi* to conclude that termination had been deliberately omitted from the relevant regulation; that context does not exist here, nor its equivalent and I do not take it to be laying down a general principle concerning the approach to CFAs and DBAs as was sought to be said by Mr Bacon QC.

102. For these reasons, whilst that part of Mr Bacon QC's argument that concerned a narrow interpretation of the meaning of a conditional fee agreement or damages based agreement might see some reflection in the observations of Lewison LJ, it does not affect the resolution of this case.

103. That there may be hybrid agreements where an element survives is clear from both *Zuberi* and from *Garnat* but in neither was it a case of a "*mere*" split between two forms of payment. The public policy proscription is against "*continuing to act for a client under a conditional fee arrangement*" (see Schiemann LJ in *Awwad)* i.e. what policy seeks to prevent is *working under* a retainer that is champertous. That policy holding is untouched by *Zuberi.* The underlying work is here common to both "*parts*" of the agreement and "*the work*" would still be undertaken under a champertous agreement. In *Garnat,* by contrast it would not: "*the work*" there was of two separate types. Again, in my judgement the Master was correct to reject Mr Bacon QC's arguments on behalf of Volterra.

Question 2

a. Minimised the importance of the question concerning an obligation to return monies paid over.

b. Failed to follow *Aratra Potato* which was binding upon him.

104. In fact Garland J in *Aratra Potato* held against severance in relation to a champertous contract. Garland, J dealt with severance (at 710):

> "*Mr Spearman submitted that severance could be effected by deleting the words "for any lost cases" from the sentence ending "our bills will be delivered when each matter is finalised in all respects with a 20% reduction from the solicitor/client costs for any lost cases". To my mind, this is not severance but an attempt at unilateral rectification by removing to TJG's pecuniary disadvantage, the words creating a differential fee. Severance is not possible*."

105. However, Mr Bacon QC relied upon the case also for its suggestion as to a remedy in restitution for monies already paid over in circumstances where such a restitutionary claim had been mounted – none of course has been mounted in the present case.

106. In answer to the first criticism made by Volterra, there is no evidence in my judgement that the Master in any way diminished the importance of the repayment or restitutionary point. He accurately reflected that the burden of argument had centred on other points. He answered the question whether there could be recovery of the sums already paid as a quantum meruit in the negative and also held that monies paid must be repaid. I agree

with him that the case in quantum meruit must fail and the sums already over must be repaid.

107. Garland J held in *Aratra Potato*:

> "*To allow the plaintiffs to recover but on terms would in effect be to allow TJG to recover on a quantum meruit if not to enforce the agreement. This cannot be right. Conversely, can it be a correct approach to take the view that the agreement is unenforceable and that the parties must therefore be left in the position in which they find themselves? This would enable TJG to take advantage of the champertous agreement dependent upon the plaintiffs' discovery of its true nature. Conversely, is justice done by allowing the plaintiffs to take advantage of the services rendered by TJG without having to pay for them?*"

108. The middle course prevailed, and the same was argued for in the present case by Mr Bacon QC, on the reasoning of Garland J. Volterra had provided legal services, it could not be said there was a total failure of consideration accordingly Diag had no restitutionary remedy. Indeed, they had claimed none. The fair outcome, consistent with *Aratra Potato* was that Volterra retained the monies for the work already done on a quantum meruit basis. Following *Aratra Potato*, Mr Bacon QC argued it was not possible to order a repayment of the monies absent a restitutionary claim: Diag had made none.

109. I disagree with Mr Bacon QC's arguments for a number of reasons. It is not the case, as was suggested, that the Master did not deal with *Aratra Potato* or properly distinguish it. His conclusion, which I share, is founded on the fact that the judge in *Aratra Potato* did not have the benefit of a number of later decisions at Court of Appeal level, in particular those of *Awwad* and *Sibthorpe*. In my judgement in the light of the reasoning in those cases, and also in light of the reasoning of Dyson LJ in *Garratt v Halton Borough Council* (*supra*) public policy has been clearly explained. Dyson LJ stated there was nothing inherently improbable in a statutory scheme which provided that if the applicable conditions were not satisfied the CFA would be unenforceable, and the solicitor would not be entitled to payment for his services. That could be harsh particularly if the client had not suffered any actual loss. It might produce harsh or surprising results but that alone did not condition the construction of the statute. That construction (see paragraph [30] of *Garratt*) made clear that Parliament had intended that if any of the conditions laid down for CFAs was not satisfied, the CFA (and all of it) would not be enforceable and the solicitor would not be paid. This was tough but not irrational.

110. Against that policy background, in my judgement, the reasoning in *Aratra Potato* cannot stand and must be distinguished, as it was by the Master. To order that sums already paid be retained, would undermine this policy. In the same way, as would the reading that Mr Bacon QC sought to argue concerning the scope of what constitutes "*the agreement*". Doctrines such as unjust enrichment and quantum meruit have no place, in my judgement.

111. The agreement in issue here, is unenforceable; it cannot therefore found a claim which allows for payment received under part of it, to be retained. In my judgement no claim for restitution is necessary as a precursor to recovery of sums paid under the unenforceable agreement. I will turn to that aspect below.

112. I should add, it is impossible in my judgement to construe section 58(2)(a) in the manner advanced by Mr Bacon QC. It provides relevantly:

> "*a. A conditional fee agreement is an agreement … which provides for … fees or expenses or any part of them to be payable only in specified circumstances*".

113. In my judgement the natural reading of this phrase connotes an agreement which contains terms which provide for fees or expenses to be payable, and also contains terms which provide for other matters. The terms governing payment of fees may encompass all payable fees, or only part of the payable fees. The whole agreement falls foul of the legislative regime, unless severance is possible. This construction is the only available construction on the caselaw considered above, in my view.

114. A further aspect of the case reinforces my clear view that the monies are repayable. This derives from the mechanism underlying the case before the Master and the statutory scheme which governs his jurisdiction. Recovery under a solicitor's bill depends upon the statutory framework. The Master's powers arise under the Solicitors Act, as pointed out by Mr Carpenter QC. The Master was charged with carrying out a detailed assessment of the final Statute Bill (see section 69 of the Solicitors Act 1974) in respect of the fees claimed by Volterra, in accordance with section 70 of the 1974 Act. By virtue of section 70(7) the Order for assessment required an assessment of the Bill and the costs of the assessment "*and to certify what is due to or by the solicitor in respect of the bill and in respect of the costs of the assessment*". In light of the conclusions I have reached on the effect of the statute, in the context of the public policy as expressed through the caselaw, the position must be that, in truth, nothing is due on the Bill because the underlying retainer which is said to justify the Bill is unlawful. Accordingly nothing is due on a Bill founded on that unlawful retainer.

115. It is trite, that the basis for charging as between solicitor and client, in this context, is contractual. These provisions arise under Part III of the 1974 Act, under CPR 67.3 the costs judge determines any claim arising under Part III. The Master (or Costs Judge) in any case, therefore, has jurisdiction to order payment of any certified sums due to the client on the Bill: in a case such as the present, the repayment would be achieved, in the usual way by order of the Master or Costs Judge. There can be no doubt (see section 70(3)(c)) that even after payment of a Bill, a detailed assessment may re-assess the position.

116. The fundamental point must be that where the contract is unenforceable nothing can be said to be due on a Bill so as to found assessment other than an assessment at zero. Accordingly, if sums have been paid under the purported retainer, they fall to be repaid and the Master may so order.

117. The effect of the 1974 Act was a matter which arose late in the hearing of this case and supplementary submissions on paper were invited by the court. The essential submission of Mr Bacon QC was that whilst he accepted the court had power to order the return of the sums, the client was required to establish a case in restitution. In my judgement, this ignores the inapplicability of that remedy in a case where the public policy is clearly inimical to any recovery in those circumstances.

118. A further matter which also came late to the court's attention was a case submitted some time after the hearing. *Peter Farrar v David Miller* [2022] EWCA Civ 295 was decided after the close of submissions. The issue in the case was whether, as held by Marcus Smith J, it was not possible for a firm of solicitors who had been acting in litigation under a DBA to take a valid assignment as their client's cause of action. Marcus Smith J had held such an assignment was champertous. He gave permission to appeal. Under the agreement Mr Farrar agreed to pay his solicitors Candey Limited (the Appellants) 50% of the proceeds of his claim against Mr Miller, instead of paying the solicitors fees on an hourly rate basis. The DBA provided that in the event Mr Miller paid Mr Farrar's costs (by order or by agreement) such sum would reduce Mr Farrar's liability to make payments out of his proceeds. Some six years after the DBA was entered a new DBA was entered in September 2019 to replace the old one. There was also a Deed of Assignment of Mr Farrar's claims against Mr Miller. That assignment was separate from the DBA, the judge deduced, although it was not explained, that that course was taken to ensure the claim continued even if Mr Farrar was made bankrupt. In fact he died shortly after the fresh agreement had been entered.

119. The relevant paragraphs of this case for present circumstances are paragraphs [29]-[43] where Arnold LJ with whom Phillips and Simler LJJ agreed set out the public policy rules in respect of champerty. From paragraph [29] Arnold LJ indicates the history and expression of the rule against champerty citing the caselaw including *Sibthorpe*, *Wallersteiner v Moir*, *Giles v Thompson*, *Awwad v Geraghty*. Particular attention was paid to the holding in *Awwad* that there was no scope for the court to hold that the common law permitted CFAs did not confirm to the requirements imposed by section 58, and to the observations of Lord Neuberger in *Sibthorpe* with respect to the particular relationship of solicitor and client.

120. Marcus Smith J had held that lawyer/client transactions were assessed according to an altogether different standard: "*they are either sanctioned by statute or they are not*".

121. On the appeal in *Farrar v Miller* Arnold LJ rejected arguments including one to the effect that public policy had developed since the earlier cases. Arnold LJ held the court was bound by its previous decisions of *Awwad* and *Sibthorpe* (together with *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] EWCA Civ 932, [2003] QB 381). Arnold LJ said that *Awwad* and other authorities cited, were recent decisions of the court and established there had been no recent relevant change of public policy. He also said "*even if it was open to this court to depart from the previous authorities, I would not do so. I consider the reasoning in those cases and in Factortame and Sibthorpe v Southwark to be entirely convincing*".

122. That authority reinforces my conclusion that there is no material policy change to which Mr Bacon QC can point.

CONCLUSION

123. Accordingly, for the reasons given I agree with the Master who gave judgment below on the conclusions that he reached in this case, and indeed, the reasoning by which he reached them. This appeal is dismissed.

124. Master Simon Brown is in full agreement with the reasoning and conclusions contained in this judgment.