Neutral Citation Number: [2022] EWCA Civ 1387

Appeal No: CA-2021-000398
(C1/2021/0161)
Case No: E90SE056

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
Mr Justice Lavender [2020] EWHC 2755 (QB)
ON APPEAL FROM SHEFFIELD DISTRICT REGISTRY
DISTRICT JUDGE BELLAMY

Royal Courts of Justice, Strand
London WC2A 2LL

Date: 27/10/2022

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
and
LORD JUSTICE NUGEE

B E T W E E N

DARYA BELSNER

Claimant/Respondent

and

CAM LEGAL SERVICES LIMITED

Defendant/Appellant

and

THE LAW SOCIETY

Intervener

PJ Kirby KC and **Robin Dunne** (instructed by **Clear Legal Limited t/a checkmylegalfees.com**) for the **Claimant/Respondent** (the Client)
Benjamin Williams KC and **George McDonald** (instructed by **Kain Knight Costs Lawyers**) for the **Defendant/Appellants** (the Solicitors)
David Holland KC and **Rupert Cohen** (instructed by **The Law Society Legal Services Department**) for **The Law Society**

Hearing dates: 22 and 23 February and 4-6 October 2022

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JUDGMENT

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. This case raises important questions concerning the way in which solicitors charge their clients for bringing small road traffic accident claims (RTA claims) on their behalf.

2. The law governing the way in which RTA claims can be brought has changed considerably in recent years. Most are now initiated on one of two pre-action online portals.

3. The pre-action protocol for low value personal injury claims in road traffic accidents (the RTA portal) was established in 2010 with the objectives of enabling: (a) defendants to pay damages and costs without the need for proceedings, (b) claimants to be paid within a reasonable time, (c) claimants' lawyers to receive fixed costs at each appropriate stage. The RTA portal is mostly used by clients represented by solicitors. At its height, more than 600,000 cases per annum were brought through the RTA portal.

4. Following the Civil Liability Act 2018, which introduced tariff damages for RTA claims, the Official Injury Claim Service (the Whiplash portal) was developed by the Motor Insurers' Bureau. The Whiplash portal began on 31 May 2021, and is governed by the pre-action protocol for personal injury claims below the small claims limit in road traffic accidents (now £5,000). The Whiplash portal is accessible both by litigants in person and by those that are represented. No costs are recoverable for the period prior to the issue of court proceedings. Claims are now being brought within the Whiplash portal at the rate of about 300,000 per year.

5. The Solicitors in this case were instructed by the Client to bring her claim on the RTA portal. The claim was settled at stage 2 after the provision of medical reports, as is common, with the defendant's insurer paying damages of £1,916.98 plus fixed costs of £500 plus disbursements (ignoring VAT). The Solicitors retained the fixed costs and paid the Client the damages less a success fee of £321.25 (capped at 25% of the recovered damages – see [28] below). The Client later instructed new solicitors trading as *checkmylegalfees.com* to query the Solicitors' charging. The Solicitors point out that the Client did not appeal DJ Bellamy's assessment that they could reasonably have charged £1,392 (11.6 hours at £120 per hour) for their work (plus a success fee of £208.80), instead of the £321.25 plus £500 fixed costs (£821.25) which they actually asked for and were paid.

6. On the first appeal, Mr Justice Lavender (the judge), allowed the Client's appeal, permitting the Solicitors to charge only the £500 fixed costs plus a £75 success fee (assessed at 15% of those fixed costs, again ignoring VAT). The judge approached the case on the basis that the Solicitors owed the Client fiduciary duties when their retainer was being negotiated. He held that an agreement for the purposes of CPR Part 46.9(2) had to be a valid and enforceable agreement. An agreement "whose performance would involve a breach of fiduciary duty" would not be valid and enforceable, and "[t]o that extent, therefore, CPR 46.9(2) [required] informed consent". As will appear, this short passage in the judge's judgment at [69] requires some unpacking.

7. The core question in the appeal is actually whether the judge was right to assume, as he did, that section 74(3) of the Solicitors Act 1974 (section 74(3)) and CPR Part 46.9(2)

(Part 46.9(2)) applied to cases brought through the RTA portal, where no county court proceedings are actually issued. The Solicitors say now (though they did not make the submission before the judge) that the judge was wrong on this fundamental point, but the Client submits he was right. That issue turns broadly on whether the claims made within the pre-action portals are properly to be regarded as "non-contentious business" (as the Solicitors contend), or as "contentious business" (as the Client contends). That distinction has been entrenched in statute for many decades.

8. Section 74(3) concerns the proportionality of the amount claimed by solicitors in respect of their costs. It provides that: "[t]he amount which may be allowed on the assessment of any costs … in respect of any item relating to proceedings in the county court shall not, except in so far as rules of court may otherwise provide, exceed the amount which could have been allowed in respect of that item as between party and party in those proceedings, having regard to the nature of the proceedings and the amount of the claim and … counterclaim".

9. Part 46.9(2) provides a long-standing exception to that statutory provision as follows: "[s]ection 74(3) of the Solicitors Act 1974 applies unless the solicitor and client have entered into a written agreement which expressly permits payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings".

10. If, as the Solicitors contend, section 74(3) and Part 46.9(2) have no application to cases settled within the RTA portal without the issue of proceedings, the case has mostly proceeded up to now on a false foundation. But even then, a question arises that has been raised by the Client's respondent's notice, namely whether the terms in the Conditional Fee Agreement (the CFA) that the Client entered into with the Solicitors, allowing the Solicitors to charge the Client more than the costs recoverable from the defendant to the RTA claim, were unfair either under the Consumer Rights Act 2015 (the CRA 2015) or otherwise.

11. The Client points to a fundamental unfairness in respect of what she was told about the personal injury claim she wanted to bring. She accepts that she freely signed a retainer agreement with the Solicitors under which she agreed to pay personally any shortfall in the Solicitors' costs recovered from the negligent defendant. She accepts that she was told that the Solicitors estimated their base costs (net of VAT and disbursements) at £2,500, on the assumption that most such claims would settle within the RTA portal after production of medical evidence and financial losses. She also accepts that she was told that the Solicitors estimated her damages entitlement at £2,000. But she complains that she was not told that, on the basis of the Solicitors' own assumptions about when her claim might settle, the fixed costs that would be recovered from the defendant would have been only £500, five times less than she would have to pay (and that that was before any success fee was applied).

12. Conversely, the Solicitors submit that this case is unreasonable satellite litigation brought in the High Court over very small sums and without economic risk to the Client. They complain that the Client has provided no evidence in support of her claim. The reforms introduced pursuant to Sir Rupert Jackson's reports were never intended to regulate the assessment of costs as between solicitor and client. Sir Rupert said expressly at [1.4] in his Review of Civil Litigation Costs: Supplemental Report: "[g]iven the multifarious kinds of litigation it is not feasible to preordain how much

clients must pay to their lawyers in every individual case. Also, that would be an unacceptable interference with freedom of contract. The best that we can do is to restrict the recoverable costs".

13. Against that background, the key questions that will require determination are: (i) whether section 74(3) and Part 46.9(2) apply at all to claims brought through the RTA portal without county court proceedings actually being issued, (ii) whether the Solicitors are required to obtain informed consent from the Client in the negotiation and agreement of the CFA, either due to the fiduciary nature of the solicitor-client relationship or through the language of Part 46.9(2), (iii) if informed consent was required, whether the Client gave informed consent to the terms of the CFA relating to the Solicitors' fees, (iv) whether, in any event, what can be regarded as the term in the Solicitors' retainer allowing the Solicitors to charge the Client more than the costs recoverable from the defendant to the RTA claim was unfair under the CRA 2015, and (v) what are the consequences of the determination of these issues on the assessment in this case.

14. For the reasons that appear in this judgment, I have decided in summary that (i) section 74(3) and Part 46.9(2) do not apply at all to claims brought through the RTA portal without county court proceedings actually being issued, (ii) the judge was wrong to say that the Solicitors owed the Client fiduciary duties in the negotiation of their retainer, (iii) although the Solicitors were not obliged to obtain the Client's informed consent to the terms of the CFA on the grounds decided by the judge, the Solicitors did not comply with the SRA Code of Conduct for Solicitors (the Code) in that they neither ensured that the Client received the best possible information about the likely overall cost of the case, nor did they ensure that the Client was in a position to make an informed decision about the case, (iv) the term in the Solicitors' retainer allowing them to charge the Client more than the costs recoverable from the defendant was not unfair within the meaning of the CRA 2015, and (v) the court can and should reconsider the assessment on the correct basis, which is under paragraph 3 of the Solicitors' (Non-Contentious Business) Remuneration Order 2009 (the 2009 Order), which requires the Solicitors' costs to be "fair and reasonable having regard to all the circumstances of the case". The costs actually charged to the Client in this case were fair and reasonable.

15. As will also appear, however, I have concluded that the current position is unsatisfactory in a number of respects. First, the distinction between contentious and non-contentious costs is outdated and illogical. It is in urgent need of legislative attention. Secondly, there is no logical reason why section 74(3) and Part 46.9(2) should now apply to cases where proceedings are issued in the County Court and not to cases pursued through the pre-action portals. Thirdly, it is unsatisfactory that, in RTA claims pursued through the RTA portal (and perhaps the Whiplash portal), solicitors seem to be signing up their clients to a costs regime that allows them to charge significantly more than the claim is known in advance to be likely to be worth. The unsatisfactory nature of these arrangements is not appropriately alleviated by solicitors deciding, at their own discretion, to charge their clients whatever lesser (and more reasonable) sum they may choose with the benefit of hindsight. Fourthly, it is illogical that, whilst the distinction between contentious and non-contentious business survives, the CPR should make mandatory costs and other (e.g. Part 36 and PD8B) provisions for pre-action online portals, but otherwise deal only with proceedings once issued. Section 24 of the Judicial Review and Courts Act 2022 will allow the new Online Procedure Rules

Committee (OPRC), in due course, to make rules that affect claims made in the online pre-action portal space. It would obviously be more coherent for the OPRC to make all the rules for the online pre-action portals and for claims progressed online. Finally, it is also unsatisfactory that solicitors like *checkmylegalfees.com* can adopt a business model that allows them to bring expensive High Court litigation to assess modest solicitors' bills in cases of this kind. The Legal Ombudsman scheme would be a cheaper and more effective method of querying solicitors' bills in these circumstances, but the whole court process of assessment of solicitors' bills in contentious and non-contentious business requires careful review and significant reform.

16. Before dealing with the issues I have enumerated, I will summarise the relevant statutory material, the basic factual background, and deal in a little more detail with what the judge decided on the first appeal from District Judge Bellamy.

The statutory materials

17. Part III of the Solicitors Act 1974 (sections 56-75) is headed "Remuneration of Solicitors". It is divided into three sections headed respectively "Non-contentious business" (sections 56-58), "Contentious business" (sections 59-66), and "Remuneration – general" (sections 67-75).

18. Section 70(1) of the Solicitors Act 1974 (the 1974 Act) provides that "[w]here before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be assessed and that no action be commenced on the bill until the assessment is completed".

19. Section 74 of the 1974 Act (section 74) is entitled "Special provisions as to contentious business done in county courts" and provides:

> (1) The remuneration of a solicitor in respect of contentious business done by him in the county court shall be regulated in accordance with sections 59 to 73, and for that purpose those sections shall have effect subject to the following provisions of this section.
>
> (3) The amount which may be allowed on the assessment of any costs or bill of costs in respect of any item relating to proceedings in the county court shall not, except in so far as rules of court may otherwise provide, exceed the amount which could have been allowed in respect of that item as between party and party in those proceedings, having regard to the nature of the proceedings and the amount of the claim and of any counterclaim.

20. Part 46.9 is entitled "Basis of detailed assessment of solicitor and client costs" and provides:

> (1) This rule applies to every assessment of a solicitor's bill to a client except a bill which is to be paid out of the Community Legal Service Fund under the Legal Aid Act 1988 or the Access to Justice Act 1999 or by the Lord Chancellor under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

(2) Section 74(3) of the Solicitors Act 1974 applies unless the solicitor and client have entered into a written agreement which expressly permits payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings.

(3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –

(a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;

(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;

(c) to have been unreasonably incurred if –

(i) they are of an unusual nature or amount; and

(ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.

(4) Where the court is considering a percentage increase on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied.

21. Section 62 of the CRA 2015 is entitled "Requirement for contract terms and notices to be fair" and provides:

(1) An unfair term of a consumer contract is not binding on the consumer.

…

(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

(5) Whether a term is fair is to be determined—

(a) taking into account the nature of the subject matter of the contract, and

(b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of by any other contract on which it depends.

22. Section 64 of the CRA 2015 is entitled "Exclusion from assessment of fairness" and provides:

(1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—

(a) it specifies the main subject matter of the contract, or

(b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.

(2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.

(3) A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.

(4) A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.

(5) In subsection (4) "average consumer" means a consumer who is reasonably well-informed, observant and circumspect.

23. In addition to the central provisions recorded above, there are several provisions of the 1974 Act that are relevant to non-contentious business. Section 56 of the 1974 Act allows a committee of various office holders including the Lord Chancellor, the Lord Chief Justice and the Master of the Rolls to make general orders prescribing the general principles to be applied "when determining the remuneration of solicitors in respect of non-contentious business". Section 57 of the 1974 Act allows solicitors and clients to make signed non-contentious business agreements, and the court to enquire into the facts relating to them.

24. Paragraph 3 of the 2009 Order, made under section 56 of the 1974 Act, provides that "[a] solicitor's costs must be fair and reasonable having regard to all the circumstances of the case" and then sets out a series of particular factors related mostly to proportionality including complexity, specialised knowledge, and the value involved. Our attention was drawn to the last of those factors at [3(i)] which was "the approval (express or implied) of the entitled person … to (i) the solicitor undertaking all or any part of the work giving rise to the costs; or (ii) the amount of the costs".

The essential factual background

25. The judge set out the factual background in detail at [7]-[31] of his judgment. Reference should be made to those paragraphs. What follows is only a brief summary of the judge's exposition.

26. On 5 February 2016, the Client was knocked off the motorcycle on which she was a pillion passenger by a car driven by Mrs Angela Barford. The Client sustained minor injuries. The Client contacted her insurance brokers, who put her in touch with the Solicitors (then practising under a different name). On 7 March 2016, the Solicitors sent the Client a client care letter, their terms and conditions of business, and the CFA. It was common ground that the Client orally instructed the Solicitors to act for her in relation to her RTA claim on 7 March 2016. The Client later signed the CFA on 12 April 2016.

27. The client care letter explained at [7] that the Solicitors' charges were based on the time they spent dealing with the case, at [9] that if the Client won her case, she would be

liable to pay the Solicitors' basic charges and a success fee as set out in the CFA, and at [10] that, if the Client's claim was above the small claims limit, she could claim from the defendant to her claim "part or all of our basic charges and disbursements". The client care letter explained the details of the success fee and made clear at [18] that the amount of the Solicitors' basic charges payable by the defendant to the claim was fixed by the provisions of the Civil Procedure Rules, but at [19] that the Solicitors reserved the right to charge the Client the actual costs. It estimated at £2,500 (excluding VAT and disbursements) the basic charges for the work necessary to reach the stage at which most personal injury claims settled. At [26], the client care letter reiterated that it was "important that you understand that you will be responsible for paying any bills. However, assuming you win your claim I expect to recover some of our charges and expenses from your opponent".

28. The terms and conditions said at [17] that the Solicitors' agreed charges "may exceed the costs recoverable from another party". That was explained by saying that "[t]his means that in practice there may be a proportion of your costs which you will have to bear yourself irrespective of any order for costs which may be made against the opposing party".

29. The CFA made clear that if the Client won her claim, she would: "pay our basic charges, our expenses and disbursements and a success fee together with the premium for any insurance you take out. You are entitled to seek recovery from your opponent of part or all of our basic charges and our expenses and disbursements, but not the success fee or any insurance premium".

30. The CFA explained that the Solicitors' basic charges were calculated for each hour engaged, and hourly rates were given. The success fee was stated to be 100% of the basic charges, subject to the cap imposed by section 58(4B) of the Courts and Legal Services Act 1990 and Article 5 of the Conditional Fee Agreements Order 2013 of 25% of the total amount of any general damages for pain, suffering and loss of amenity and damages for pecuniary loss, other than future pecuniary loss.

31. The CFA attached the Law Society's Conditions (the Conditions), which provided that the Solicitors were obliged to give the Client the best information possible about the likely costs of her claim for damages, and reiterated that, if she won, normally she could "claim part or all of our basic charges and our expenses and disbursements from your opponent", but not the success fee or insurance premium. The Conditions also provided that the Client agreed to let the Solicitors "take the balance of the basic charges, success fee, insurance premium, our remaining expenses and disbursements, and VAT" from the monies recovered. The Conditions also said, importantly for our purposes, that the parties agreed that the agreement was not a Contentious Business Agreement within the terms of the 1974 Act.

32. The Solicitors pursued the claim through the RTA portal. Liability was admitted and the Insurers paid the stage 1 fixed costs of £200 plus VAT under [6.18] of the Protocol. The Solicitors obtained medical reports and sent a stage 2 settlement pack to insurers, who accepted the Client's offer and paid £1,916.98 in damages plus the stage 2 fixed costs of £300 plus VAT and disbursements. The total amount paid by insurers for fixed costs and disbursements was £1,783.19 including VAT.

33. The Solicitors paid £1,541.48 (damages of £1,916.98 less £385.50) to the Client.

34. On 10 May 2018, the Client issued a claim form in the Senior Courts Costs Office asking the Solicitors to deliver their so-called "statute bill" (though I prefer the more grammatical term: "statutory bill"). The Solicitors duly delivered their statutory bill on 24 May 2018. It referred to basic charges of £2,171.90 plus VAT, a success fee of 100% of those basic charges capped at £385.50 plus VAT (the figure in fact included VAT, so was an error), and medical report fees totalling £1,031 plus VAT, totalling £4,306.07 (£3,588.40 plus VAT). The bill made clear that the Solicitors only sought to recover from the Client the amounts received from insurers in respect of costs, plus £385.50, which was what she had already been charged and paid and represented the capped success fee of £385.50.

35. On 4 July 2018, the Client issued a further claim form in the Sheffield District Registry seeking an assessment of the Solicitors' Bill in respect only of the profit costs and the success fee. No challenge was made to the amount of the disbursements.

36. On 6 February 2019, DJ Bellamy provisionally assessed the bill holding that informed consent to the basic charges was required by Part 46.9(2) and had not been given so that the basic costs were limited to £500 plus VAT (the stage 1 and stage 2 costs paid by insurers). He also reduced the success fee from 100% of the basic charges to 15%.

37. On 2 July 2019 at a further hearing, DJ Bellamy changed his mind in relation to the need for informed consent under Part 46.9(2). He said this at [6]:

> The next issue … is what do the words "written agreement" mean in 46.9(2) and whether the court should import … that there must be sufficient information given to the [Client] in order to make an informed decision … It is said on behalf of the [Client] that … the client in order to give express permission must have enough information in order to … have knowledge of the likely liability, for example, between fixed costs that might be recoverable as against the estimate of costs. I think that is setting the bar too high and I think it is trying to read in to 46.9(2) something that is not there. I think the court is entitled to look at the agreement, to make sure that it contains sufficient certainty and sufficient clarity so that the [Client] entering into the agreement knows full well that there is a potential liability for further costs over and above those which are recovered by the solicitors from the other side.

38. The **effect** of DJ Bellamy's decision was that the Solicitors were entitled to charge the only sum which they had ever claimed from the Client, namely the success fee of £385.50 (including VAT), although that was not, of course, the way DJ Bellamy worked it out. He allowed £1,392 plus VAT in respect of base costs and a success fee of 15% of that sum. The Solicitors had voluntarily capped their claim, so what was actually charged was a success fee of £208.80 plus VAT (15% of £1,392 plus VAT), plus unrecovered base costs of £112.45 plus VAT, totalling the £385.50 which the Solicitors had actually deducted from the Client's damages.

39. The Client appealed DJ Bellamy's decision to the judge, who overturned it and allowed base costs of £500 plus VAT (being the fixed costs) plus a success fee of £75 plus VAT (being 15% of the recovered base costs). He therefore ordered the Solicitors to repay £295.50 (being the £385.50 success fee allowed by DJ Bellamy less the £75 plus VAT success fee permitted by the judge).

40. The judge proceeded on the assumed basis that section 74(3) applied to RTA portal cases, noting at [42] that it was not disputed that the section applied except insofar as Part 46.9(2) might otherwise provide. A major issue before him was whether the phrase "expressly permits" in Part 46.9(2) meant that a client's informed consent was required in order to disapply section 74(3).

41. The judge said at [34] that "[t]he relationship between solicitor and client is a fiduciary one. As a fiduciary, a solicitor may not receive a profit from his client without his client's fully informed consent". At [68], he said this

> I do not consider that this appeal can be determined by a simple comparison between the wording of [Part 46.9(2) and (3)]. The requirement for informed consent which applies in cases under [Part 46.9(3)] does not arise because of the use of the word "approval" rather than the word "agreement". The requirement for informed consent arises because of the fiduciary nature of the relationship.

42. He then held at [69] that when interpreting Part 46.9(2):

> It goes without saying that an agreement for the purposes of [Part 46.9(2)] must be a valid and enforceable agreement. It follows, for example, that an agreement procured by fraud or misrepresentation would not suffice. Nor, obviously, would an agreement whose performance would involve a breach of fiduciary duty. To that extent, therefore, [Part 46.9(2)] requires informed consent.

43. On the basis that Part 46.9(2) required informed consent, he found that the Client had not provided informed consent to pay fees in excess of those recoverable from her opponent. Section 74(3) applied and the Solicitors were limited to charging fixed costs of £500 plus VAT in addition to the (reduced) success fee.

44. The Solicitors' Notice of Appeal challenged [1] and [2] of Lavender J's order, which provided that the appeal from DJ Bellamy was allowed, and that the Solicitors repay to the Client the sum of £295.50.

<u>Issue 1: Do section 74(3) and Part 46.9(2) apply to claims brought through the RTA portal without county court proceedings actually being issued?</u>

45. Section 74 is entitled: "Special provisions as to contentious business done in county courts". It provides in subsection (3), as I have said, that "[t]he amount which may be allowed on the assessment of any costs … in respect of any item relating to proceedings in the county court" shall not "exceed the amount which could have been allowed in respect of that item as between party and party in those proceedings".

The submissions

46. The Solicitors submit that section 74(3) does not apply to claims made within the RTA portal unless county court proceedings have been issued. First, they say that such claims are not contentious business, which is what the heading to section 74 says that it covers, and secondly, that the assessment does not relate to "any costs … in respect of any item relating to proceedings in the county court".

47. The Client relied on the words "unless the context otherwise requires" in the definitions in section 87 of the 1974 Act (see below). She said that section 61(6) of the 1974 Act

gave an indication that a contentious business agreement could be entered into in relation to business where no proceedings were issued in any court.

48. The Client then made a number of submissions aimed at showing that, applying an updating construction, claims made within the portal should be regarded as "proceedings in the county court" within the meaning of section 74(3). The Client relied on Lord Sumption's statement at [19] in *Plevin v. Paragon Personal Finance Ltd (No.2)* [2017] UKSC 23 (*Plevin*) that the term "proceedings" is not a term of art under the general law. She pointed to (a) section 51 of the Senior Courts Act 1981 which allowed rules of court to "make provision for regulating matters relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives", and (b) section 1 of the Civil Procedure Act 1997 which provided for "rules of court … governing the practice and procedure to be followed in … the County Court". The Client also relied on the fact that the rules of court actually made provision for fixed costs and other matters within the RTA portal. Hughes J had said at [19] in *Lynch v. Paul Davidson* [2004] 1 WLR 1753 (*Lynch*) *obiter* and in a different context that section 74(3) not only survived but was still intended to bite wherever there were fixed costs. Of course, there were fixed costs in the RTA portal, and the only way out of the RTA portal was the County Court if the claim was not abandoned or settled.

49. For all these reasons, the Client submitted that an updating construction of the words "proceedings in the county court" should be applied so as to include the RTA portal. Any other result would give solicitors a conflict of interest when advising clients as to whether to settle or to proceed to the issue of proceedings at stage 3 (because more costs would be payable to them in cases settling before stage 3). Finally, the Client argued that Wynn-Parry J had been wrong in *In re Simpkin Marshall Ltd* [1959] Ch 229 (*Simpkin Marshall*) to hold that business was only to be regarded as contentious if proceedings had in fact been begun.

Discussion

50. The distinction between contentious and non-contentious business is fundamental to the costs regime established by the 1974 Act. Section 87 defines the terms as follows:

> … except where the context otherwise requires … 'contentious business' means business done, whether as solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator …, not being business which falls within the definition of non-contentious or common form probate business contained in section 128 of the Senior Courts Act 1981 …
>
> 'non-contentious business' means any business done as a solicitor which is not contentious business as defined by this subjection.

The definition of contentious business was amended to be made more specific in 1957. Only then were the words "in or for the purposes of proceedings begun before a court or before an arbitrator" added.

51. In *Bott & Co Solicitors Ltd v. Ryanair DAC* [2022] UKSC 8, [2022] 2 WLR 634 (*Bott*), in dealing with an equitable lien, Lord Leggatt and Lady Rose said this, in their

dissenting judgment at [52], about the distinction between contentious and non-contentious business:

> There is similarly no basis for using the concept of "contentious business" to define the boundary of the lien. Whether business done by a solicitor is classified as "contentious" or "non-contentious" affects which statutory rules regulate the remuneration of solicitors by their clients - although, according to Cook on Costs (2021), para 8.1, recent developments in the law have reduced the relevance of the distinction to the point where there is little practical difference between the two in most circumstances. Under the definitions of these terms in section 87 of the Solicitors Act 1974, whether business done by a solicitor is "contentious" or "non-contentious" depends on whether it was done "in or for the purposes of proceedings *begun* before a court or before an arbitrator" (emphasis added). This ties the distinction to whether formal court or arbitration proceedings are commenced. As stated in Cook on Costs (2021), para 8.2: "Work done in anticipation of court proceedings is non-contentious unless and until court proceedings are actually commenced. When that happens, the work converts to becoming contentious business retrospectively."

52. The majority (Lord Burrows, Lady Arden and Lord Briggs) all seem to have agreed with this paragraph (see [152] of Lord Briggs). This is so, despite Lord Briggs making clear at [145] in *Bott* that it had been taken for granted in *Gavin Edmondson Solicitors Ltd v. Haven Insurance Company Ltd* [2018] UKSC 21, [2018] 1 WLR 2052 that an equitable lien was a "litigation lien" using the term "litigation" in the broad general sense of pursuing a legal claim, rather than in the specific sense of the conduct of proceedings in court. Lord Briggs thought, therefore that "the pursuit by solicitors of a claim for compensation for personal injuries by means of the RTA Portal was litigation, even though no court proceedings were issued".

53. The thrust of the passages I have mentioned in *Bott* accords with Wynn-Parry J's words in *Simpkin Marshall* at page 235:

> There is now a clear and, I should have thought, logical division between contentious and non-contentious business. All business is now to be regarded as contentious which is done before proceedings are begun provided that the business is done with a view to the proceedings being begun, and they are in fact begun, and also all business done in the course of the proceedings. All other business is non-contentious.

54. I can see no basis for the Client's argument that Wynn-Parry J was wrong. The decision of Denning LJ in the earlier case of *In re a Solicitor* [1955] 2 WLR 1058 related to earlier legislation and a completely different definition of "contentious business". Section 81 of the Solicitors Act 1932 said that contentious business **included** business in court.

55. Whatever may have been said by way of criticism of the statutory definitions, it seems to me that it is now too late to hold, in advance of reforming legislation, that business is contentious if court proceedings are not actually issued. That is after all what the definition of "contentious business" contemplates, and it is how successive generations of textbooks have understood the position. The caveat in section 87 saying that the definition only applies "except where the context otherwise requires" does not help the Client; there is no context in section 74(3) that requires it to be applied to costs that are

not "in respect of any item relating to proceedings in the county court". It is notable also that employment tribunal cases are also regarded as non-contentious business (see *Tel-Ka Talk Limited v. HMRC* [2010] EWHC 90175 (Costs)). Contrary to what was suggested by the Client, nothing in section 61 of the 1974 Act allows a contentious business agreement to cover cases where no proceedings are issued in any court.

56. In these circumstances, it is not possible for this court to hold that section 74(3) applies to claims brought through the RTA portal without county court proceedings actually having been issued.

57. None of the Client's arguments come close, in my judgment, to changing that stark conclusion as a matter of statutory construction. An updating or "always speaking" construction of a statute does not permit the court to ignore the statutory language used in order to include within its meaning something that is expressly excluded (see *HMRC v. News Corp UK* [2021] EWCA Civ 91, Simler LJ at [59]-[64]).

58. I do not accept that any of the Client's 8 points actually support the proposition that, applying an updating construction, claims made within the RTA portal should be regarded as "proceedings in the county court" within the meaning of section 74(3). It is true that the RTA portal is an official process introduced by the Ministry of Justice, but that does not make claims within it into proceedings in the county court. Lord Sumption's statement in *Plevin* that the word "proceedings" is not a term of art under the general law cannot allow "proceedings in the county court" to include claims that are never going to be in the County Court. Section 51(2) of the Senior Courts Act 1981 does, of course, allow rules to prescribe scales of costs to be paid to legal representatives, but that cannot change the proper meaning of either section 74(3) or Part 46.9(2). The fact that rules of court make various provisions for cases brought within the RTA portal may be illogical (as I have already said), but it does not convert portal claims into county court claims. Hughes J's statement in *Lynch* that section 74(3) was still intended to bite wherever there were fixed costs was only referring to the county court proceedings to which the subsection applied.

59. In short, Part 46.9(2) cannot enlarge the meaning of section 74(3), however convenient that might be. An updating construction of section 74(3) cannot make a section that applies specifically and only to contentious business (which is defined as being "business done … in or for the purposes of proceedings begun before a court") apply to claims made within an online pre-action portal. That is made even clearer by the expressed objective of the protocol establishing the RTA portal that provides in [3.1] that "[t]he aim of this Protocol is to ensure that … the defendant pays damages and costs using the process set out in the Protocol without the need for the claimant to start proceedings". None of the reasoning set out above can be affected by the potential conflict created by the fact that solicitors may have more to gain in terms of recoverable costs by advising clients to settle at stage 2 rather than to issue proceedings to have their damages assessed at stage 3.

60. Accordingly, in my judgment, section 74(3) and Part 46.9(2) do not apply at all to claims brought through the RTA portal without county court proceedings actually being issued.

61. These conclusions do not mean that the distinction between contentious and non-contentious costs is a meaningful or logical one now that the pre-action online portals

form a significant part of the litigation environment. I have no doubt that the 1974 Act is in urgent need of legislative attention. Moreover, these conclusions do not mean that it is logical for section 74(3) and Part 46.9(2) to apply to cases where proceedings are issued in the County Court and not to cases pursued through pre-action portals.

Issue 2: Were the Solicitors required to obtain informed consent from the Client in the negotiation and agreement of the CFA, either due to the fiduciary nature of the solicitor-client relationship or through the language of CPR 46.9(2)?

62. A number of arguments were included under this heading. The Client supported the judge's conclusion that the Solicitors were obliged to obtain her informed consent to the level of fees they were charging. As already explained, the judge derived this duty in the way he explained at [68]-[69] from **both** Part 46.9(2) and the Solicitors' fiduciary duties. The basic problem with the judge's reasoning was that, as I have now held, neither section 74(3) nor Part 46.9(2) applied to the non-contentious business involved in this case, unless and until proceedings were issued.

63. Accordingly, the Client had somewhat to change tack in oral argument. Mr P J Kirby KC, counsel for the Client, put in a short note describing how the alleged duty arose. He relied on the Solicitors' common law and professional, as well as fiduciary, duties. I have already mentioned the professional duties under the Code. The common law duty was said to be a duty of care when advising on the terms of the retainer (see Kennedy J in *Crossan v. Ward Bracewell & Co* (1986) 5 PN 103). In *Davies v. London and Provincial Marine Insurance Co Davies v. London & Provincial* (1878) 8 CHD 469, Fry J said this at page 474:

> Where parties are contracting with one another, each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say that there was a duty to disclose, to shew that the duty existed. Now undoubtedly that duty does in many cases exist. In the first place, if there be a pre-existing relationship between the parties, such as that of agent and principal, solicitor and client, guardian and ward, trustee and *cestui que trust*, then, if the parties can contract at all, they can only contract after the most ample disclosure of everything by the agent, by the solicitor, by the guardian, or by the trustee. The pre-existing relationship involves the duty of entire disclosure. In the next place, there are certain contracts which have been called contracts *uberrimae fidei* where, from their nature, the Court requires disclosure from one of the contracting parties.

64. Of course, this is not a case where the Client seeks damages for breach of a common law duty or equitable compensation for breach of fiduciary duty. The question is simply whether the judge was right to say that the Solicitors were required to obtain the Client's informed consent to the CFA. It is said they failed to do so, because they did not inform the client that the costs she would recover within the RTA portal would be much less than the Solicitors were proposing to charge.

65. Reliance has also been placed by the Client on the duty (given statutory force by section 176 of the Legal Services Act 2007) in [8.7] of the SRA Code of Conduct for Solicitors (the Code) which provides that solicitors should ensure that "clients receive the best possible information about how their matter will be priced and, both at the time of

engagement and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred".

66. Against this background, it seems sensible to deal with Part 46.9(2) first and then to deal with the alleged fiduciary and common law duties together.

Did Part 46.9(2) give rise to a duty to obtain the client's fully informed consent?

67. I have already held that Part 46.9(2) does not apply to non-contentious business. In those circumstances, it cannot give rise to a duty to obtain the client's fully informed consent to the terms of the CFA. Part 46.9(3) does, however, make specific provisions and impose presumptions that are applicable to the assessment of costs in both contentious and non-contentious business. The Court of Appeal approved a concession by counsel in *Herbert v. HH Law Limited* [2019] EWCA Civ 527 (*Herbert*) that the term "approval" in Part 46.9(3) meant approval following a full and fair explanation to the client: i.e. informed consent.

68. The argument here was that the requirement in Part 46.9(2) for "a written agreement which expressly permits payment to the solicitor" of sums disallowed by section 74(3) was identical to the requirement for express or implied approval in Part 46.9(3). Since the Court of Appeal had held in *Herbert* that "approval" in Part 46.9(3) meant giving informed consent, the Client argued that the "agreement" in Part 46.9(2) must mean the same. To be clear, Part 46.9(2) applies only to an agreement to disapply section 74(3). There was no agreement here to disapply section 74(3), because that section does not apply to business done in the RTA portal unless and until county court proceedings are issued. No such proceedings were issued here.

69. Accordingly, in my judgment the judge was wrong to think that the Client's informed consent was required in this case because of the wording of Part 46.9(2). Part 46.9(2) is and was irrelevant to the formation of the CFA in this case.

70. This conclusion may seem strange because, in theory, section 74(3) and Part 46.9(2) could have applied to this CFA, had county court proceedings been issued. It might have been said that, since the parties could not have known when they entered into the CFA whether, in future, proceedings would be issued, the conclusion is illogical. That, in my view, is just one unsatisfactory consequence of the fact that the current legislation takes no proper account of the fact that many claims are pursued in online pre-action portals without proceedings being issued. It cannot mean that statutory provisions applicable only to contentious business can be applied to non-contentious business.

71. Moreover, my conclusion on Part 46.9(2) does not answer the question of whether the Solicitors owed the Client a duty to seek her fully informed consent to the level of their fees.

Did the fiduciary nature of the solicitor/client relationship or the solicitors' duty of care give rise to a fiduciary duty to obtain the client's fully informed consent?

72. The Client argues that the key question for the purposes of determining when a fiduciary duty arises is when the solicitor undertook to act on behalf of the client, not when the written agreement is signed (see Millett LJ in *Bristol & West Building Society v Mothew* [1998] Ch 1 (*Mothew*) at page 18). This is, of course, correct but ignores the

relevant question for the purposes of this case. There is no doubt that solicitors acting for a client in relation to a RTA Portal claim owe that client fiduciary duties from the moment they start to act, whether or not a conditional fee agreement has been signed at that stage. Those fiduciary duties are owed in relation to the steps that the solicitors take with regard to the RTA portal claim. The question is whether they are also owed in relation to the negotiations between the solicitors and the client for the conditional fee agreement or the terms of the solicitors' retainer. One must ask, in effect, whether in suggesting the CFA to the Client and in negotiating its terms (had that happened), the Solicitors owed the Client a duty of loyalty. As Millett LJ explained in a classic passage in *Mothew* at page 18, it is because the person is subject to duties of loyalty that he is a fiduciary, not the other way around. Millett LJ said this:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work *Fiduciary Obligations* (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

73. The Client ultimately accepted that the fiduciary duty that she was relying on was the duty on the Solicitors not to act for their own benefit without her informed consent. Undoubtedly, the Solicitors owed that duty to the Client at the time of the CFA (because they were already acting in relation to the RTA portal claim), but did that duty apply to the negotiation for their own retainer? In *Hurstanger Ltd v. Wilson* [2007] 1 WLR 2351 (*Hurstanger*), the Court of Appeal held that an agent's duty not to take a secret commission had arisen when the loan documentation was signed. *Hurstanger* demonstrates that an agent cannot take a secret commission even during the negotiations or at the point at which it assumes its agency. That does not, however, mean that an agent cannot negotiate the terms of its agency in its own interests.

74. The reason for this conclusion is that when solicitors and a client are negotiating the terms of the solicitors' retainer, the client does not have any reasonable expectation that the solicitors will not be acting in the negotiation in their own interests. Two passages from Lady Arden's judgment in *Children's Investment Fund Foundation (UK) v. Attorney General* [2020] UKSC 33, [2020] 3 WLR 461 make this clear:

> 47. The Court of Appeal adopted the following test put forward by Finn J, sitting in the Federal Court of Australia, in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 287 ALR 22, para 177: "… a person will be in a fiduciary relationship with another when and in so far as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest …"

> 48. This formulation introduces the additional concept of reasonable expectation of abnegation of self-interest. Reasonable expectation may not be appropriate in every case, but it is, with that qualification, consistent with the duty of single-minded loyalty.
>
> …
>
> 51. A person can be a fiduciary in relation to another party with whom he has a contractual relationship in respect of some only of his contractual obligations: see, for example, *F & C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)* [2012] Ch 613, especially at paras 212-216 and 223 per Sales J (as he then was). This is only one of the situations in which a fiduciary duty may arise. It is important to examine the very specific context in which it is said that a fiduciary duty arises. This point was made by Sales J (para 223): "The touchstone is to ask what obligations of a fiduciary character may reasonably be expected to apply *in the particular context*, where the contract between the parties will usually provide the major part of the contextual framework in which that question arises." (Emphasis added)

75. In the particular context of solicitors negotiating a CFA, the client cannot reasonably be entitled to expect the solicitors to act in the client's sole interest to the exclusion of their own interests. This principle applies even if the solicitor does owe the very same fiduciary duty in acting for that client in the RTA portal claim.

76. My conclusion is also supported by two other decisions. In *Motto v. Trafigura* [2012] 1 WLR 657 (*Motto*) at [108]-[110], solicitors were held to be acting for themselves, not for the potential claimant, until the CFA was signed, at least in so far as the negotiations for that CFA were concerned. Lord Neuberger said in *Motto* that "[u]ntil the CFA is signed, the potential claimant is not merely not a claimant: he is not a client. When advising a potential claimant on the terms and effect of the CFA, the solicitors are acting for themselves, not for the potential claimant: the solicitors are negotiating with him as a prospective client, not for him as an actual client".

77. In *Kelly v. Cooper* [1993] AC 205, the Privy Council explained why an estate agent did not owe a fiduciary duty to a client to tell him that he had agreed a sale of his neighbouring property to the same buyer even though that might have affected the price that the client could obtain. Lord Browne-Wilkinson said this at page 215:

> Thus, in the present case, the scope of the fiduciary duties owed by the defendants to the plaintiff (and in particular the alleged duty not to put themselves in a position where their duty and their interest conflicted) are to be defined by the terms of the contract of agency. Applying those considerations to the present case, their Lordships are of the view that since the plaintiff was well aware that the defendants would be acting also for other vendors of comparable properties and in so doing would receive confidential information from those other vendors, the agency contract between the plaintiff and the defendants cannot have included either (a) a term requiring the defendants to disclose such confidential information to the plaintiff or (b) a term precluding the defendants acting for rival vendors or (c) a term precluding the defendants from seeking to earn commission on the sale of the property of a rival vendor.

78. In *Kelly v. Cooper*, the client was to be taken as having known that the estate agent might act for other vendors and have obtained relevant confidential information from them. In this case, the client is to be taken to understand that, when negotiating their fees, solicitors will be acting in their own interests.

79. The Client relied, as I have said, also on *Davies*. In this case, there is no claim for damages for breach of the Solicitors' duty of care. The contract between a solicitor and his client is not one of utmost good faith requiring special levels of disclosure. The Solicitors owe fiduciary duties in relation to any work done on their retainer, but still have the freedom to negotiate the new retainer in their own interests. That does not mean that the negotiations can be conducted in breach of any other duties the solicitor owes professionally or by statute. But, as Lord Neuberger made clear in *Motto*, solicitors act for themselves in negotiating a new fee arrangement. They could not act with undivided loyalty for the client in that regard without an irreconcilable conflict of interest. Again, that situation does not absolve them from their statutory and professional duties to the potential, future or even existing client. Nor, as *Hurstanger* decided, does it mean that a solicitor can lawfully take a secret commission from a third party as a result of entering into a fee agreement.

80. The duty to ensure that clients receive the best possible information about pricing and the likely overall cost of the case may have similarities to fiduciary duties of loyalty, but they are not such duties. They are professional duties, and the consequences of the breach of a professional duty, even one given effect by statute, are different from the consequences of breaches of fiduciary duties.

81. The judge was, therefore, wrong to say that the Solicitors owed the Client fiduciary duties in the negotiation of their retainer.

Issue 3: Did the Client give her informed consent to the terms of the CFA relating to the Solicitors' fees?

82. It is clear from what I have already said that I do not think that, as a matter of law, the Solicitors were obliged to obtain the Client's informed consent to the terms of the CFA on the grounds decided by the judge.

83. It is, nonetheless, appropriate in this test case to explain what the Solicitors in this position ought to have done in order to comply with their professional duties. As I have said, [8.7] of the Code provides that solicitors should ensure that clients receive the best possible information about pricing and the likely overall cost of the matter. [8.6] of the Code provides that solicitors should give clients information in a way they can understand, and ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available.

84. In this case, the Client was given most of the information she needed to make those decisions, with the exception of one vital matter, namely the fixed recoverable costs that the defendant's insurers would pay within the RTA portal. It would have been straightforward for the Solicitors to inform the Client of the level of the fixed recoverable costs that could be recovered at stages 1 and 2. The Client was told that the Solicitors estimated their base costs at £2,500 (net of VAT and disbursements), and that many such claims would settle within the RTA portal after production of medical evidence and financial losses. She was also given an estimate of £2,000 for her

damages. Had she also been told of the level of the fixed recoverable costs, she would have been able to compare the likely recoverable costs with the amount she was being asked to agree to pay the Solicitors. As the Client submitted to us, she would then have known that she was assuming a liability to pay the Solicitors five times the costs she would be getting back from the defendant. I do not think that the Solicitors can be said to have complied with either [8.7] or [8.6] of the Code without providing that information.

85. For these reasons, the Solicitors neither ensured that the Client received the best possible information about the likely overall cost of the case, nor did they ensure that she was in a position to make an informed decision about whether she needed the service they were offering on the terms they were suggesting.

86. In my judgment, it is wholly unsatisfactory for solicitors generally, and these Solicitors in particular, routinely to suggest that their clients agree to a costs regime that allows them to charge significantly more than the claim is known in advance to be likely to be worth. Solicitors do not resolve this unsatisfactory state of affairs by allowing a discretionary reduction of their charges after the case is settled. It would, in theory, be possible for there to be an order made under section 56 of the 1974 Act to deal with this problem, and perhaps some of the others I have identified in relation to current practice, by the establishment of reformed general principles applicable to the determination of the proper remuneration of solicitors in respect of non-contentious business within the pre-action online portals.

Issue 4: Was the term in the Solicitors' retainer allowing the Solicitors to charge the Client more than the costs recoverable from the defendant to the RTA claim unfair under the CRA 2015?

87. Section 62(4) of the CRA 2015 makes a term of a consumer contract unfair, and therefore, not binding on the consumer, if "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer".

88. It is important to understand clearly the nature of the Clients' argument under the CRA 2015. [170] of the Client's skeleton explains the argument as follows:

> The term as to recovery of costs over and above fixed costs creates a significant imbalance to the client's detriment, because it results in (a) a liability for base costs of a sum greatly in excess of the fixed maximum that would be allowed pursuant to s.74(3) Solicitors Act 1974, and (b) consequent use of such base costs figure as the multiplicand in calculation of the success fee, in both cases without mentioning either (i) the fact of the statutory protection provided by s.74(3) or its purported disapplication, (ii) how that statutory protection would have operated and how its disapplication is to the detriment of the client, or (iii) the likely maximum in this particular case.

89. The Client, therefore, submits that the term in her retainer of the Solicitors "as to recovery of costs over and above fixed costs" is what creates a significant imbalance to the client's detriment and is, therefore, unfair. The term is said to be unfair because it results in a liability for base costs much in excess of "the fixed maximum that would be allowed pursuant to section 74(3)".

90. Since I have decided that section 74(3) does not apply to pre-action online portals such as the RTA portal, the foundation of the Client's claim under the CRA 2015 in her respondent's notice is not available to her. Indeed, Mr Kirby accepted in oral argument that, if section 74(3) did not apply, then the CRA 2015 did not add anything to the Client's case.

91. The respondent's notice itself concentrates on demonstrating that the term relating to the ability of the solicitor to recover sums over and above the fixed costs can be assessed for fairness because it does not fall within the core exemption under section 64(1) of the CRA 2015. In that respect too, the Client relies on the allegation that the term purports "to remove a statutory protection that would have stood but for the term". That too is a reliance on section 74(3) and Part 46.9(2) applying to the retainer, which they do not. The alternative argument to the effect that the term is not "transparent and prominent" under section 64(2) of the CRA 2015 does not arise.

92. In these circumstances, I would hold, for the reasons I have given, that the term in the Solicitors' retainer allowing the Solicitors to charge the Client more than the costs recoverable from the defendant to the RTA claim is not unfair under the CRA 2015.

Issue 5: The consequences of these determinations on the assessment in this case

93. It was agreed in the course of oral argument that, if we decided that this was non-contentious business, there would be a need for the assessment to be conducted again. DJ Bellamy, as I have said, proceeded on the basis that he was assessing contentious costs. The Client argued that the costs needed to be assessed on the basis of whether they were "fair and reasonable" under paragraph 3 of the 2009 Order, which applies only to non-contentious costs.

94. One option would have been to remit the case to the Regional Costs Judge to decide that question. In the light, however, of the small sums at issue, that would be a disproportionate course to adopt. I see no reason why this court cannot assess these costs on the correct principles, having heard four days of argument.

95. Both sides asked us to consider the statutory bill, which I have already described at [34] above. The Client submitted that it was not fair for the Client to be required to pay more, by way of base costs, than those recovered from the defendant to her claim, when she was not in fact told how much would be paid by way of costs at stages 1 and 2. The Client also submitted that she should not be required to pay more than the success fee determined by DJ Bellamy, which was 15% of base costs. Accordingly, the Client asked us to determine that Lavender J had been right as to his assessment and that the Client should keep the £295.50 that he ordered the Solicitors to return to her. The Solicitors submitted that the Supreme Court had said in *Bott* at [52] that there was little difference between contentious and non-contentious costs in most circumstances. The Solicitors urged us to restore the order made by DJ Bellamy, since the Client understood she would have to pay the success fee and her points of dispute said that she had a "reasonable expectation that the third party would be required to pay most, if not all, of the base costs". That is what happened, and all she was asked to pay was a success fee of £385.50 capped, in accordance with the statutory requirements, at 25% of recovered damages of £1541.98.

96. The ultimate question on an assessment of non-contentious costs, taking into account the factors stated in the 2009 Order, is: what overall amount would it be fair and reasonable for the client to pay? As Morgan J said in *Mastercigars v. Withers* [2009] 1 WLR 881 at [102]:

> Even if the solicitor has spent a reasonable time on reasonable items of work and the charging rate is reasonable, the resulting figure may exceed what it is reasonable in all the circumstances to expect the client to pay and, to the extent that the figure does exceed what is reasonable to expect the client to pay, the excess is not recoverable.

97. I agree with the Client that, in all the circumstances, she ought as a matter of good professional practice to have been told the level of fixed costs that she would recover if the case settled within the RTA portal. But that does not necessarily mean that the Solicitors' Bill was unfair. The question is only whether it was fair and reasonable in all the circumstances, having regard to the factors in the 2009 Order for the Client to pay an additional £385.50 on top of what was recovered from the third party. I see no reason why she should not be required to do so. She has filed no evidence suggesting that she is not a reasonably sophisticated client. She accepted in her points of dispute that she expected that she might have to pay some of her base costs. DJ Bellamy assessed the Solicitors' reasonable base costs at some £1,392 plus VAT, which exceeded the £500 plus VAT recovered from the third party. She has never suggested that she did not understand that she would have to pay a success fee on top of some of her base costs. The success fee charged fee was capped by statute at 25% of recovered damages. Lavender J admittedly applied the success fee (of 15% of base costs) assessed by DJ Bellamy to the base costs of £500 recovered from the third party, but he thought the Solicitors had a legal duty to obtain the Client's fully informed consent to charging more by way of base costs than was recovered from the third party. He was wrong about that.

98. The Client in this case has never had any real or economic interest in the pursuit of this costly litigation. Only *checkmylegalfees.com* have such an interest. The Solicitors capped their fees voluntarily at a fair and reasonable level after the event, even if they ought to have told the Client what she would recover by way of fixed costs in the RTA portal, and even if they ought to have agreed in advance when they entered into the CFA to the cap they later applied voluntarily. Mr Ben Williams KC, counsel for the Solicitors, told us in argument that the Solicitors would not have "dreamed" of doing anything other than making a proportionate deduction from the damages as opposed to charging the Client their full base costs and the maximum possible success fee. In future, I hope that solicitors will not suggest CFA or other fee arrangements to their clients that allow for fees that they would not dream of actually charging.

99. The Client, in effect, argued that the full ramifications of the fully informed consent requirement found by the judge (but not upheld by me) should be read back in to the assessment through the requirement of fairness in the 2009 Order. I do not agree. I think the overall Bill was fair and reasonable. I would, therefore, re-assess the total base costs and success fee payable as being £821.25 plus VAT (£500 + £321.25, the latter figure being £385.50 less VAT). I am conscious that, on one analysis, this assessment could be construed as allowing base costs in excess of £500, since a success fee of 15% of base costs was fixed by DJ Bellamy and not appealed thereafter. In the extremely unusual circumstances of this case, I am reassessing the Bill from scratch because the

costs are non-contentious ones which were assessed as contentious ones. For the reasons I have given, I have not found it helpful to do so in the traditional way of assessing base costs and then the success fee. Nothing I have done in that regard will be relevant to future cases. I have simply applied Morgan J's *dictum* and an overall approach to fairness and reasonableness in the convoluted circumstances of the three stages of this case.

100. For the reasons that I have given in *Karatysz v SGI Legal* [2022] EWCA Civ 1388, which was heard immediately following this case, the question to ask in order to determine "the amount of the bill" under section 70(9) of the 1974 Act is "what is the total sum that the bill is demanding be paid to the Solicitors, whether or not all or part of that total sum has actually been paid". Accordingly, in this case, the amount of the Bill was £821.25 plus VAT, and the Client achieved no reduction from that Bill as a result of seeking an assessment for the purposes of section 70(9) either before DJ Bellamy or in this court. The *prima facie* position would, therefore, be that the Client should pay all the costs unless there are special circumstances under section 70(10) of the 1974 Act. I am conscious that there may be other arguments as to costs in the complex circumstances of this case, so will leave the parties to agree the costs here and below, and we can determine them on paper if necessary.

Conclusion

101. For the reasons I have given, I would allow this appeal, and order that the base costs and the success fee payable by the Client in this case should be assessed in the total sum of £821.25 plus VAT. The sum of £295.50 must be repaid by the Client to the Solicitors.

Sir Julian Flaux, Chancellor of the High Court:

102. I agree.

Lord Justice Nugee:

103. I also agree.