

Neutral Citation Number: 2013 EWHC 811 (Ch)

Case No: CH2012/0394
CH2012/0424

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

On Appeal from the Adjudicator to HM Land Registry

Royal Courts of Justice
The Rolls Building, London
Date: 19/04/13

Before :

HHJ DAVID COOKE

Between :

Eric Charles Walker (1) Carole Ann Scott(2)	<u>Appellants</u>
Christopher Balchin (3)	<u>(Case 0394)</u>
- and -	
Peter Charles Burton (1) Susan Anne Burton	<u>Respondents</u>
(formerly Bamford) (2)	<u>(Case 0394)</u>

And Between :

Peter Charles Burton (1) Susan Anne Burton	<u>Appellants</u>
(formerly Bamford) (2)	<u>(Case 0424)</u>
- and -	
Eric Charles Walker (1) Angela Walker (2) Carole	<u>Respondents</u>
Ann Scott (3) The estate of Elizabeth Chamberlin	<u>(Case 0424)</u>
(represented by Carole Ann Scott) (4) Edward	
Mills (5) Christopher Balchin (6)	

Dr Mark Friston (instructed by The Law Partnership Solicitors LLP) for EC Walker and
CA Scott
Jeffrey Littman (Direct Access) for PC and SA Burton

Hearing dates: 27-28 February 2013

Judgment

1. These are cross appeals against the order made on 23 May 2012 by SCCO Deputy Master Hoffman, sitting as a Deputy Adjudicator to HM Land Registry, by which he assessed at a figure of £157,309.97 the costs payable by Mr & Mrs Burton to Mr Walker and others (whom I will refer to as "the villagers", as they have been throughout the proceedings for reasons appearing below). The villagers say that the adjudicator was wrong to apportion their solicitors' total costs for a specified period between those of them who were contractually liable to the solicitors (who acted for them all) and those who were not; the effect of that decision being to cut in half the recoverable amount for base costs. The adjudicator refused permission on that ground, but on the villagers' renewed application I determined at the opening of the appeal that it should be granted. There are cross appeals, both with the permission of the adjudicator, against his decision to allow a success fee of 60% on the villagers' base costs as assessed.

Background

2. The underlying proceedings were bitterly fought and attracted substantial national publicity. I summarise the background very briefly. The dispute related to the lordship of the manor of Ireby, a village in Lancashire, and whether it continued in existence to this day. In 2000 Mr Burton and his then partner Susan Banford (they have since married and for simplicity I refer to them throughout as Mr & Mrs Burton) purchased Over Hall, a large house in Ireby. They did not at that time take any express assignment of the lordship, but in 2003, on their application, were nevertheless registered at HM Land Registry as proprietors of the lordship. The following year they took a confirmatory assignment for a consideration of £1 from the vendors of Over Hall. Immediately to the north of Over Hall lies Ireby Fell, some 300 acres of moorland subject to various rights of common. An enquiry in 1997 had failed to find any owner of the land, but in 2005 Mr & Mrs Burton were registered as first proprietors of the fell, on the basis that it was land of the manor that passed with the lordship title.
3. Disputes arose with the owners of various properties in the village when Mr Burton purported to exercise rights deriving from the lordship to require them to clear up or cease obstructing (eg by parking vehicles) pieces of land near their properties which, he claimed, were waste land of the manor and thus owned by him as lord of the manor. In 2007 Mr Walker and 5 other residents of the village of Ireby, initially acting in person, applied to the Land Registry to close both the lordship and the fell titles. That application was referred to the Adjudicator and eventually determined by Mr Simon Brilliant, sitting as a Deputy Adjudicator, after a 10 day hearing at which historical evidence going back to the Domesday Book was examined in detail. On 10 December 2010 he handed down a comprehensive written judgment of great clarity (from which I have gratefully derived the above summary) in which he upheld the villagers' principal case that the lordship had ceased to exist by virtue of the break-up of the manorial lands by 1605. He determined that the lordship title should be closed accordingly. However although he found that title to the fell had been registered by mistake (ie that Mr & Mrs Burton owned it as lands of the manor) he declined to order closure of the fell title. Mr & Mrs Burton had acquired that title in good faith and come to be in possession of the fell, and the register should not be rectified against them without their consent (Land Registration Act 2002 Sch 4 para 6(2)). Although not relevant to the hearing before me, I note that an appeal against that latter

decision was dismissed by Mr Jeremy Cousins QC, sitting as a Deputy Judge of this court, on 17 April 2012 (*Walker and others v Burton and another*, [2012] EWHC 978 (Ch)). A second appeal has been heard by the Court of Appeal, upon which judgment is awaited.

4. Following further submissions Mr Brilliant made a costs order (as amended on 29 June 2011) under which, inter alia, Mr & Mrs Burton were to pay the villagers' costs of a preliminary issue in full and the other costs of the reference as to 80%, in each case on the standard basis subject to detailed assessment. It is common ground that the reference was governed by The Adjudicator to Her Majesty's Land Registry (Practice and Procedure) Rules 2003 (SI 2003 No 2171; "the 2003 Rules"), which provide by Rule 42 for the Adjudicator to make a costs order and to assess the costs claimed. Thus it was that Deputy Master Hoffman came to assess the villagers' costs, sitting as a Deputy Adjudicator.
5. Although the 6 villagers initially acted in person, from 16 October 2007 they were represented by the solicitors firm of Blakemores in Birmingham, which had relevant expertise in manorial law. The fee earner initially acting was Mr Geoffrey Barrett, a consultant. From 14 May 2008 the matter was handled by Mr Michael Baxendale, then a partner in the firm. There were issues before Deputy Adjudicator Hoffman as to the basis on which the solicitors initially acted and whom they represented.
6. It appears from the correspondence in the bundle that Blakemores were initially approached by Ms Scott in 2005, when she was sent a client care letter, but that she and the other villagers must have decided to commence the closure application themselves and did not give any instructions to Blakemores until 2007. On 3 April 2008 Ms Scott wrote a letter, which appears in the bundle redacted save as to the header which shows that it concerned the lordship and fell titles and the signature which is stated to be on behalf of herself and the other 5 villagers. In subsequent correspondence and attendance notes Ms Scott is treated as the point of contact for "the group" and recorded as saying that she is authorised to agree matters such as fees of counsel on behalf of the group. On 20 June 2008 Blakemores sent an email to Mr Walker saying that they would be sending "...a client care letter ...to every member of the group, as they will all be clients" and on 19 August 2008 Mr Baxendale wrote to Ms Scott referring to the level of costs incurred and saying "at least you are assisted by the fact that you are presumably sharing the costs somehow between yourselves although, for the record, you are all jointly and severally liable to my firm for costs". Blakemores clearly regarded all 6 villagers as their clients, having gone on the record for them, but were sending their bills only to Ms Scott and/or Mr Walker and, it appears, leaving it to them to organise the provision of funds to settle those bills.
7. In a witness statement made for the assessment proceedings, Mr Baxendale described how he had become involved in 2008 and had his instructions to act confirmed at a meeting with all 6 villagers on 17 June 2008, at which they also agreed that he could charge an hourly rate of £300 whereas Mr Barrett had charged £195. Shortly after, he said, he agreed that because of the villagers' financial constraints he would send interim bills at £195 per hour, deferring the balance. The bills were nevertheless substantial because there were active proceedings on a preliminary issue on which Mr & Mrs Burton sought to strike out the application, and so he later proposed a CFA.
8. The CFA was sent on (and dated) 27 April 2009. Mr Baxendale's witness statement said (bundle p246):

“Only Ms Scott, Mr Walker and Mr Balchin were asked to sign the [CFA] agreement. The reason for this was that it was clear by this stage that it was those three clients who were the funders for the action. However their funding was for us to represent them in their case which was a joint case with the other [villagers], none of whom however had the funds to contribute directly themselves... None of the [villagers] ever had cases that were separate or severable from the others so it was natural we should be on the record for all of them and all documents and submissions were joint.”

9. Ms Scott, Mr Walker and Mr Balchin were referred to as "the CFA clients" and the other three as the "non- CFA clients". I observe that the non- CFA clients included Mr Walker's wife and Ms Chamberlain who is referred to in correspondence as Ms Scott's partner (and who has since died, Ms Scott being her representative).
10. The CFA contained a retrospective element; it provided that fees prior to 27 April 2009 would be charged at £195 up to 31 December 2008 and thereafter £225 "if you lose the case" but "if you win costs in the entirety of the period before 27 April 2009 will be at the rate of £300 per hour plus VAT...". For the future "If you win your claim you pay our basic charges, disbursements and a success fee. Our basic charges means our time at the hourly rate of £300 plus VAT. The success fee is an additional 100% on top of the basic charges to represent the risk factors in this case which include the following: ... [six factors are listed]... If you lose you remain liable for the other side's costs as well as Disbursements".
11. The order for costs was in respect of the costs of "the villagers", ie all 6 who were parties to the reference. The bill as submitted for assessment stated that it was the bill of all 6 villagers. References to the CFA did not make clear that only 3 of them were parties to it. A Notice of Funding had been sent to Mr & Mrs Burton (although it is common ground that it was not a prerequisite of recovery of any additional charges to do so) which stated, by way of a box ticked, that "all claims" were being funded by a CFA, without any mention (for which there would have been no provision on the form as printed) that only 3 of the parties represented had entered into that agreement.

Apportionment

12. In their Additional Points of Dispute on the Bill (p165) Mr Littman on behalf of Mr & Mrs Burton made this objection:

“The Bill is not a bill for the costs of the six respondents in the reference. It is for the costs of at most three of them. The other three were either persons whom Blakemores had no authority to represent or who were being represented free of charge yet were receiving the benefit of the work of Miss Scott and perhaps of Mr Walker and Mr Balchin. There can be no question of a joint retainer by all six. *Ellingsen v Det Scandinaviske Compani* [1919] 2 KB 567 applies, apportionment should take place and the paying parties are liable for only a moiety of the costs in the Bill at most”

13. It is relevant to note, in the light of the way matters proceeded before Deputy Adjudicator Hoffman and were argued before me, that it was not contended in the

Points of Dispute that any of the non-CFA clients were or might be liable to the solicitors for any share of the costs. The point being made was that they were not liable, either because they had never instructed Blakemores or because they "were being represented free of charge" and that in consequence, relying on *Ellingsen*, the CFA clients could only recover half the amount claimed.

14. It was the position of Dr Friston, who appeared before Deputy Adjudicator Hoffman as he did before me, that no apportionment was required; the three CFA clients were liable for the whole amount of the bill and it was illogical to seek to apportion part of the bill away to the non- CFA clients who were not liable to pay it, and then hold that part irrecoverable on the basis that although the non-CFA clients had an order for their costs, they were not liable to the solicitors for any part of the costs and so could not recover any because of the indemnity principle.
15. When Mr Littman came to open this issue before the adjudicator he put it on a different basis from that stated above, which was that it must be assumed that the non-CFA clients were, or at least might be, liable as between themselves and the solicitors for part of the costs, but because no documents had been disclosed showing what terms of contract existed between them and the solicitors, it could not be determined what they were liable for, and that inferences would have to be drawn. The adjudicator was, it appears, highly receptive to this argument. I have read through the passages in the transcript in which this issue was addressed and revisited at considerable length. It is fair to say that they show a very difficult hearing, particularly between Dr Friston and the adjudicator. As an illustration, at one point both counsel were required to make written submissions as to the evidence of terms of the contract of retainer between the non-CFA clients and Blakemores. Dr Friston, whose position was that there could be no such evidence because no such contract existed, made submissions to that effect which he described to me as 'blunt'. Mr Littman referred to them as 'insulting to the court'. The adjudicator described them as 'an attack on the court'. Dr Friston maintained before me that the adjudicator had wholly failed to understand the issues involved, made inconsistent and contradictory rulings throughout the hearing and reached a wholly illogical conclusion on the apportionment issue.
16. The course of argument on this point was somewhat convoluted. In large part this comes from the nature of detailed assessment proceedings, which are very interactive between the judge and advocates. Mr Littman submits that what Dr Friston describes as contradictory decisions of the adjudicator are no more than his testing the position put to him in the course of argument. Even allowing for this, it seems to me that there is force in Dr Friston's complaint that the adjudicator appears to have adopted a fixed position at the start that there must have been a contract of retainer under which the non- CFA clients were liable for part of the costs, and then suddenly reversed that position but still held that part of the costs must be apportioned to them. Because there was considerable difference between counsel as to what findings I should conclude that the adjudicator made I will have to recite a number of extracts from the transcript. I have kept these as brief as possible to illustrate the point and reach my conclusions on the appeal. I should say that it was not part of Dr Friston's grounds of appeal that the Deputy Adjudicator's decision was tainted by serious procedural irregularity.
17. I begin at page 306 in the bundle. There are certain points in the transcript where the transcriber has marked passages as "inaudible", or inserted words in brackets which could not be entirely made out. In the following extracts, wording in brackets is

inserted by me as either the transcriber's suggestion or my own which seems to make sense in the context, or in some cases a précis to link two passages:

“ Mr Littman: ... we are helped by [hearing] what my friend's case is because he said yesterday that he is relying on the CFA with its strange, retrospective provisions, as having given rise to 2 retainers in a single document.

... What he meant was that the two retainers to which it gave rise were a pre 27 April 2009 retainer under which the costs of Mr Walker, Miss Scott and Mr Balchin were ... £195, or [later] £225 if they lose and £300 if they win, and a second post 27 April 2009 retainer under which their costs would be £300 ... plus 100% if they win...

What about Mrs Walker, Miss Chamberlain and Mr [Mills]? There has got to be a third retainer, unless there is no retainer at all, which remains one of my possibilities... that must be the third retainer which was in existence and which as far as one can tell would have remained untouched by the CFA coming into existence on [27] April 2009.

... Then there are three retainers, two of which, because they concerned exactly the same body of clients, may be contained in one [agreement] but the third of which unfortunately cannot ... one just does not know what work was covered by it and other items there might be in it.

The Judge: ... I can exclude all the costs relating to Mrs Walker and Mr Mills and Mrs Chamberlain and let them produce their own bills. I mean they have got all of the costs in their favour.

Mr Littman: yes. That would bring us on to the apportionment [issue] ... you have more or less made the argument for me on that one...

The Judge [to Dr Friston]: how do you come to act for Walker Mills and Chamberlain?

Dr Friston: ... this is a conditional fee agreement which, as I say, [creates] two separate retainers and you can see that there are only four [named] parties, the solicitors, Mr Scott, Mr Walker and Mr Balchin. In those circumstances those are the people who are able to [recover] costs under this agreement. There is a retainer, if that is the correct word, with the other three, but that retainer, as things turned out, is a [nil] retainer. It is a retainer under which no costs have been charged...

The Judge: So this bill does not cover Mr Walker Mr Mills and Mrs Chamberlain?

Dr Friston: Yes that is correct... the work has been done for all six clients.

The Judge: Well, then that when we come to the detailed assessment we will exclude those costs that relate to... for example the brief fee of Mr Stafford you [Mr Littman] will no doubt argue that it should be half for the existing clients and half for the [other three]

Mr Littman: That is precisely what I intend to argue, yes.

Dr Friston: But that would be the apportionment point ... I would like the court please to make a ruling as to the principle of apportionment, because I say that [it] is not the case that any costs which are in any way common to the parties are to be apportioned...

The Judge: I do not think I can give you one because I think the answer lies ... in each actual item. We cannot just divide the costs in half [and adopt a] simplistic approach, six clients, only charge for three. You have to examine each item of work and see the value of it to 3 clients compared to the value of it to 6 clients, and I suspect it you will argue on the brief fee that whether Mr Stafford was appearing three clients or six clients the fees are the same... ”

At this point, the adjudicator had not heard any argument from Dr Friston as to why he said it was wrong in principle to apportion costs between the CFA clients and the non-CFA clients. He appears to be proceeding on the basis that in principle an apportionment is required, but says that it would not automatically be a 50-50 apportionment simply because there were two groups of three clients each. One of Dr Friston's complaints is that when the adjudicator came to make the apportionment he did in fact apply a 50-50 division without regard to any matter other than that only three of the six clients were liable for the costs.

18. Counsel then made their respective submissions as to whether there should be an apportionment in principle. Mr Littman argued that where a solicitor had acted for two or more parties on separate retainers, each was entitled to a separate bill. It was impossible to identify any particular costs that related solely to the case of any one or more of the villagers, and so all the costs would have to be apportioned pro rata amongst them all. He relied in particular on the law as summarised by Chadwick J in *Baylis v Kelly* [1997] 2 Costs LR 54. He submitted that all six clients must have been jointly liable before the CFA was entered into, and (p328):

“ the fact that three of the group of six peel off and have a separate CFA does not mean there is a new retainer for the other three. Where does that come from? They initially instructed Blakemores... and they by implication are liable for either a quantum meruit or for a sum which Mr Baxendale in his witness statement says was his charging rate of £300 an hour. ”

Mr Littman also seemed to be hedging his bets in submitting that even if the non- CFA clients were not liable to pay the solicitors, half of the costs should be treated as theirs in any event. At p 314 he said

“ [It] is a very important principle to bear in mind, that something that is equally for the benefit of six respondents has to be apportioned equally between them. They are in two groups, even though only one group will be paying. If the other group is being given a free ride then that half is going to be irrecoverable...”

19. The following extracts illustrate Dr Friston's submissions and the adjudicator's reaction to them. I begin at page 328 of the bundle:

“ The Judge: ... Dr Friston, I think you need to clarify precisely your clients' case in respect of the three defendants who are not a party to the CFA ... what is the professional position [in relation to those] clients?

Dr Friston: ... I should firstly clarify the language. I am going to use the phrase "contract of retainer" to refer to an agreement by which the solicitor's remuneration is governed but when I simply refer to "a retainer" I am referring simply to the professional relationship between the client and the solicitor.

There clearly was a retainer with all these people because Blakemores acted on their behalf. So to that extent they are clients. But in so far as contracts of retainer are concerned the position changed when the conditional fee agreement was made in that position is that there is a conditional fee agreement with some of them and there is no intention to charge for the work carried out for the others...

The Judge: so in respect of the three that are not parties to the CFA Blakemores are [charging] nothing?... Well how can they recover any costs of those three [under the] indemnity principle?

Dr Friston:... the argument that has been advanced... is simply logically flawed.... The authorities that you have been referred to... relate to the situation where you have... two or more items of costs and where there is a reason to allow one but not to allow another... Where that is the case then obviously you need to carry out an exercise of excluding the costs to which there is no entitlement and in those circumstances the starting point-and it is only a starting point, it has been referred to as being a rule of thumb... and subject to the facts and to what is fair and what is just-the starting point is [equal] apportionment... This is an entirely different circumstance... all apportionment is is a mechanism for excluding costs to which somebody is not entitled for whatever reason. Here what we have is my learned friend saying, well there must be some costs because quantum meruit or whatever. There must be some costs, and therefore there must be something that needs to be excluded. Therefore we must carry out the apportionment exercise [and] ... at the end one then says, look [these costs are] going to breach the indemnity principle and therefore they are going to be

disallowed. Well that is just wrong in logic. You are trying to [approve] and reprobate the same concept at the same time and you simply cannot do that...

The Judge: ... is the suggestion then that there is a [nil] retainer with three of six of the clients but that if they lost all six would stump up [if] there was an order against you jointly that all six of you pay the [other side's] costs [?] You say the agreement is... the solicitor is not going to charge you anything, but if you lose you are going to have to share the costs with the three of them... In other words in the event of you losing the three who have not signed a CFA have to pay 50% of the successful party's costs.

Dr Friston: Yes...

The Judge: [You] suggest that three... respondents, covered by the CFA under which they would not have to pay anything agreed with the three that are vulnerable that the three that were vulnerable would stump up half the other side's costs? It is just ... I mean, it is beyond belief. It is absolutely beyond belief, Dr Friston. I mean, to suggest that the solicitor who is acting for six [clients] and in the event of them losing three would pay up and three would get the benefit of the conditional fee agreement. It is something that without evidence I entirely reject as being incredible...

Dr Friston: Well, Master, I think we are being at cross purposes... They would all be liable for the other side's costs. The CFA provides no protection at all.

The Judge: There is no [adverse costs insurance]?

Dr Friston: No. The CFA is a CFA.

The Judge: So if they lost those who instruct you would look to all 6 to pay?

Dr Friston: ... I think we are at cross purposes. Are we talking at the moment about adverse costs? ... The successful party would have looked to ... all six ...

The Judge: Even though only three of them signed the CFA ...?

Dr Friston: The CFA is simply the mechanism by which funding of one's own costs [is provided]. There is no bearing at all on [adverse costs].

The Judge: [That is something] which I also find [incredible]. What you are saying is that [three of them get] for want of a better word, a free ride?

Dr Friston: ... There is nothing remotely wrong with that ...

The Judge: Where is the evidence about the retainer for the other three and, coupled with that, where is the evidence and documentation of the extent to which those instructing you advised the three not covered, or all six if you like, of the consequences of losing?

Dr Friston: Right. Insofar as the latter I am sure we can find something if you would like to see it, but I say it is profoundly irrelevant. It has no bearing at all on the indemnity principle ...

The Judge: Well it may not have relevance on the indemnity principle, but I have got serious doubts about those instructing you's (sic) evidence. I mean they put forward a [bill] that is totally incorrect. I mean, they have made a statement saying that these [respondents] were covered by a CFA. It now transpires on day two of the hearing that only three of them are covered by a CFA. You seek to rely on a deputy adjudicator's order about joint orders as to costs when he was completely in the dark about who was acting for whom. I mean, if the deputy adjudicator had these facts brought to his attention at the time at which the costs order was made what order would have made? I do not know. What I do know is that the bill [is wrong] and it needs to be corrected, and what you need to do is to set out in the bill exactly your clients retainer position and I do not understand it.

Dr Friston: Well, I have explained the retainer position...

The Judge: Not in respect of the first three, the three not covered... Where is the correspondence, the retainer agreements, between those three and your instructing solicitors?

Dr Friston: the position as I am advancing it is that there are no costs being claimed in respect of them, so in those circumstances I do not fully understand exactly what it is the court wants...

The Judge: Well that cannot be right because the bill does not say that... I think we are going to adjourn [for lunch]... Dr Friston let me put the position perfectly frankly to you so that you understand it. I cannot at the moment follow how three out of six of these clients can take advantage of a costs order made in favour of six of them. Now you say the answer to that is that they are not asking for any costs but that is really not a good enough answer... if the answer after the lunch hour adjournment is that this is only a bill for three of them then that may have different consequences. These are all of the costs. These are all of the costs. There are not going to be more bills for the other three. These are all the costs and [I must apply] Chadwick LJ's checklist [from *Baylis v Kelly*]...

[after the adjournment] Dr Friston, I do want to [ascertain] the position of the three non-CFA clients... What is your position on them? Is there a retainer?

Dr Friston: ... there is a retainer, using the phraseology I used earlier on, in that there were instructions, but there was no contract of retainer. So in other words there was no contract under which monies would be payable for the provision of legal services... I will refer to that... as being a nil retainer, ...

The Judge: Right, well I think you had better spell out exactly what the nil retainer consisted of by reference to the documentation that you have.

Dr Friston: Yes. The nil retainer is the absence of a contract. There is no contract at all for the payment of any monies of any sort and in those circumstances obviously there is nothing that I can put forward to prove that point...

The Judge: So these are three people that were joined in this adjudication process without their consent or with their consent?... Are they clients?

Dr Friston: Yes, they are clients. ...

The Judge: ... in June 2008 they became clients... But on what terms? I mean, monthly payment, no payment?

Dr Friston: On terms that there was no payment. So there was never any attempt to enter into a contract of retainer with them,...

The Judge: Were any of them under an obligation to pay?

Dr Friston: The CFA people, yes.

The Judge: Well, that is by virtue of the retrospective operation of the agreement. But at the time this was happening it was not covered by the CFA.

Dr Friston: At the time this was happening the non-CFA people were not being invoiced whereas... the other three were...

The Judge: So basically what we have got is these three clients that there is no letter of engagement and they were never charged anything?

Dr Friston: Well there was no contract of retainer. There was no contract by which they would be required to pay.

The Judge: Were they warned that if they lost the case... they would be liable for the other side's costs?

Dr Friston: Yes they were...

...

The Judge: How can they be clients if they are not paying? How can you [have] a solicitor acting for somebody when he has got no retainer? I just do not understand the concept. How can you have a concept of a solicitor acting without a retainer?

...

Dr Friston: Well, there is no contract whereby all [would be liable to pay]. It is important to distinguish between that which relates to costs and that which relates to professional practice. ... A client is able to instruct a solicitor on [a] basis, which can range from entering an entirely informal basis without any agreement as to payment [and it is still an] instruction [that makes him a] client, through to a conditional fee agreement. ... But Sir, this court is not concerned with the [client relationship]. It is not concerned with authority to act or anything of that nature.

The Judge: No, what this court is concerned with is ... on what basis these three clients retained those instructing you. I must say, Dr Friston, I have never heard the proposition of a solicitor acting but he has not got a retainer. I mean, I just cannot grasp the concept. I do not understand the concept.

Dr Friston: Well, I have said all I can, sir ...

...

The Judge: ... I have not got one shred of evidence that these clients did not think they were going to have to pay costs. I mean, a non-fee paying... what is the definition of client? I mean, the client must be somebody who goes to a solicitor for advice and pays him, whether it is a pro bono way of paying him or whether... Where is the evidence that under no circumstances would these clients ever have to pay?

...

[Y]ou gave no indication in [the notice of funding] that it was only a partial conditional fee agreement, that it was only three out of six and the other three were funding their own.

Dr Friston: That is the point. They are not funding their own. That is the whole point. ”

20. Mr Littman then made a response which was again premised on his contention that the CFA clients could not be regarded as liable to their solicitors for the whole of the bill. He said

“ I take objection to the description of my clients' position as seeking to obtain a windfall arising out of a purely technical point. On the contrary it is unjust to make a paying party,

especially in the circumstances where there is a CFA, pay for costs which are not actually due to the solicitors whose bill has been put in.”

21. The adjudicator then made a ruling as follows (p366):

“ I have to decide a difficult question of apportionment ... as to whether there should be a division of these costs between the ... CFA clients and the non-CFA clients. Dr Friston with great ingenuity sought to persuade me that the rule in *Baylis v Kelly* ... does not apply because there was no actual retainer between the solicitor and the three nonpayers. He says that if I look through the bill I will also find that no claim was made in respect of those three nonpayers.

It seems to me that this has not been borne out. There is clearly a retainer existing between all of the clients paying and nonpaying and if one wanted an example of that one only had to look at the letter of 19 August 2008 in which ...[Blakemores] make it perfectly clear that all are jointly and severally liable. That being all six ...

If there is a suggestion that this was a no retainer position in respect of three and a retainer position in respect of the other three I would have expected to see a full and frank witness statement supported with the appropriate documentation setting out Dr Friston's case. I do not have it. There is an obligation on the receiving party that if they wish to maintain such a position they must [deploy] the appropriate evidence. There is absolutely none. All the evidence points the other way. It points to an agreement between the six of them which was then turned into a conditional fee agreement between the three of them for reasons that we were not told the court has been left completely in the dark as to why the position went from 6 to 3. The court can only draw adverse conclusions from that of evidence.

... This is a straightforward case where the solicitor has acted for a number of defendants to the same action on separate retainers. A retainer for three of them being the retrospective and prospective retainer of the CFA. The other retainer- I have yet to be addressed on the exact nature of the other retainer but it is clear there is another retainer.

There is an alternative [argument] by Dr Friston, which I also [reject] which is there is no claim by the nonpaying clients. That is an extremely late point. It is a point that I'm sure takes both me and those paying by surprise. It seems to me that it is impossible that it is a point that will succeed on detailed examination. On detailed examination it cannot be, for example, where there are instructions to counsel on behalf of the six the three cannot be non-paying... clients. I reject it on

the basis that I have no evidence that there is no claim in respect of the nonpaying clients.

Finally, if I may say this, I do not understand the concept of nonpaying clients. I understand the concept of pro bono work and I also understand the concept of conditional fee agreements I do not understand the concept of a retainer for a client on a nonpaying basis which is then put together with paying clients and the nonpaying clients are allowed to ride on the back of paying clients without being liable for any of the solicitors costs. I'm not saying it is not a possible arrangement. It is probably a possible arrangement [although] bizarre. ... If a nonpaying client is to be added to proceedings [costing] as in this case £800,000 one would have expected very careful letters of explanation from the solicitors to the nonpaying client setting out precisely how this scheme worked. Like so many things in this case in the absence of such evidence I reject the submission that these are, if there be such a creature, a nonpaying client. ”

22. At this point, then, the adjudicator seems to have held that the client relationship, which was not seriously disputed to have existed, between the non-CFA clients and the solicitors must have been on the basis that they were liable for the solicitors costs to some extent, either because he did not accept that there could be such a thing as a client who was not liable to pay his solicitor, or because if such an arrangement were possible he was not satisfied with the evidence of Mr Baxendale that that was the arrangement in this case, and would have expected to see clear documentation in some form to persuade him that such an arrangement had indeed been made.
23. Dr Friston then asked (p369) for clarification of what terms the adjudicator found applied between Blakemores and the non- CFA clients. The adjudicator referred again to the letter stating that all were jointly liable in 2008 (which was before the CFA) but said that the terms of the retainer after the CFA had not been explained. There was a discussion about the hourly rate for which the non- CFA clients would be liable, the adjudicator indicating that it should be £195 per hour. The adjudicator invited Dr Friston to prepare written submissions over the adjournment on the evidence as to the terms of the retainer, on which he would then rule.
24. Those were the submissions that Dr Friston described as "blunt". They appear at page 293 of the bundle and include the following:

“1. A group of villagers found that enjoyment of their village threatened by persons who (wrongly) asserted rights over property that was intimately close to their homes. After having represented themselves for a period of time, solicitors were instructed. Three of them assumed responsibility to those fees and three did not. The exact way in which this came about as a matter for them, but the result was that the conditional fee agreement was made with those who assumed responsibility for fees, and no contract of retainer at all was made with the others (that being, at least, their belief). By this stage there was no intention to charge the nonpaying villagers: this fact has been repeatedly and clearly stated by counsel acting on instructions.

No one was deceived: the conditional fee agreement stated on its face the names of the persons who would pay and, by implication, those that would not pay. ..

2. Things, apparently, are not as simple as this, however. According to this court, there is no such thing as a non-fee-paying client. This court does "not understand" that concept. This court has found that there is a contract of retainer and that the assertions made (through counsel) by a solicitor of the Senior Court that he had not entered into any contract of retainer and that he did not seek payment are to be disbelieved. Apparently, evidence is required of the fact that the solicitors did not seek payment...

5. The Respondents can do no more than express astonishment at the cul-de-sac into which the court has backed itself..."

25. Mr Littman made written submissions in response. The following morning, the adjudicator said this at the opening of the hearing (p390):

" Thank you both for your skeletons. I have read both of them and in my judgment there was clearly no retainer for the non-CFA clients. It was a matter that I have been trying to flush out from Mr Baxendale some days now and I thought it was only appropriate that I gave Mr Baxendale an opportunity of reflecting on his position because the effect of only acting for three of the six can be Draconian. I received those arguments on both sides, for which many thanks, and quite simply there was no fee agreement with the non-CFA clients.

I need to correct one misapprehension in Dr Friston's skeleton at paragraph 2. I said I did not understand the concept. I just want to be perfectly clear. The concept that I do not understand is that a non-fee-paying client is able to recover his costs in breach of the indemnity principle. That is what I do not understand and, indeed, Dr Friston in paragraph 6 says I will have to make findings about something that does not exist. Of course, I am not going to do that. It is perfectly clear from the skeletons that there is no contract of retainer that incurs (sic) the three of the six in fees and they are unable to recover any fees in this assessment from Mr Burton. "

26. Dr Friston referred to this, in my view justifiably, as a volte face on behalf of the adjudicator. Having previously ruled that there must be a retainer under which the non CFA clients continued to be liable for fees and even that the hourly rate for which they were liable must be inferred to be £195, the adjudicator now held, as Dr Friston had argued all along, that they were not liable to pay any fees. I feel bound to observe that although the adjudicator said that what he had said he did not understand was not the idea that a client might not be liable to pay fees but how such a client could recover costs, I find that difficult to reconcile with the points he took in argument with Dr Friston, some of which I have extracted above. Although he referred to Mr Baxendale as "only acting for three" it is clear from the remarks about any non-fee-paying client being unable "to recover his costs in breach of the indemnity

principle", and from the remarks I will quote below, that the adjudicator was not making a finding that the non-CFA clients had ceased to be clients at all after the CFA was executed. Although the adjudicator referred at one point to there being "no retainer" and that another to there being "no contract of retainer" it is clear in the context that what he was referring to was the absence of a contractual obligation on the part of the client to pay any fees to the solicitor. In terms of the distinction that Dr Friston had argued for, there was a "retainer" in the sense of a client relationship with the non-CFA clients but no "contract of retainer" under which those three clients were liable for fees.

27. Any impression that Dr Friston might have had that the argument had moved in his favour was short lived. The hearing then continued as follows:

“ Dr Friston: That then invites the obvious question as to what the effect of that is because you will recall –

The Judge: The effect of it is that there will be an apportionment. I do not know what it is because we cannot get to the assessment because we keep dealing with these preliminary points.

Dr Friston: Master, well, if the apportionment is going to be anything other than 100%, that is a finding that is internally inconsistent because I drew a distinction in my submissions between the client and having a retainer. You will recall ... that I said that the apportionment must be [on a] retainer basis about costs, rather than about clients, and my learned friend when he responded said... it was not asserted that it was just simply going to be an apportionment between the clients. This court has now correctly found that there is no retainer. In those circumstances there should be no apportionment.

The judge: That is absolute nonsense, Dr Friston. We cannot have litigation in which various nonpaying clients hang onto the back of paying clients and then at the end of it say, "I have had a free ride. I do not want any of my costs"... There will be an apportionment. The apportionment may be 50%, it may be less..."

28. There then follows a passage in which Mr Baxendale (who was making submissions at this point because Dr Friston was temporarily indisposed) pursued the argument that any apportionment should be "per retainer" rather than "per client". By this he meant that the liability for costs should only be apportioned between those clients who had entered into a contract of retainer to pay the costs, and not between all the clients irrespective of whether they were liable to pay. The terminology was, as will be apparent, not entirely clear and it may have led to some confusion on the adjudicator's part:

“ Mr Baxendale: So, Master, may I seek clarification? Is that on the basis that the apportionment is per retainer or per client?

The Judge: It does not matter.

Mr Baxendale: Master, it matters a great deal.

The Judge: It is three and three. What is the difference?

Mr Baxendale: The difference is that there is a distinction between a client and a retainer and you have made a finding of fact that there is no retainer, so it makes a huge difference.

The Judge: ... I cannot see the difference ... so I am going to reduce it by 50%. ”

29. Thus the adjudicator arrived at the 50/50 apportionment of costs, purely on the basis that the costs incurred must be treated as being apportioned equally between the three clients who were liable to pay and the three who were not. He did so notwithstanding his earlier indication that the costs would not necessarily be apportioned on such a simple basis, and that he had accepted Dr Friston's submission that to do so would result in a "huge windfall" reduction in Mr and Mrs Burton's liability. In his written reasons for refusing permission to appeal on this point (p461) the adjudicator recorded that he had found that the non CFA clients were not liable to their solicitor for any costs and so could not recover any in breach of the indemnity principle. He said that he had applied *Baylis v Kelly* in making an apportionment of costs to them (giving reasons why the amount apportioned was 50%). Dr Friston submits that this was an error of law.
30. Before turning to *Baylis v Kelly* itself, I think it should be borne in mind that an assessment of costs payable by one party to the other has to deal with issues that can be broadly grouped into two questions:
- i) What costs has the receiving party in fact incurred? These consist of amounts he has actually paid, and amounts for which he is liable to his solicitor (and perhaps others such as counsel). This sets a maximum amount that the paying party may be required to pay (at least so long as the indemnity principle applies).
 - ii) Separately, what part of those costs is the paying party required to pay? This may be less than the full costs incurred for many reasons it is not necessary to seek to set out comprehensively, but familiar grounds for disallowance of costs include those that are found on the assessment to be excessive, disproportionate or unreasonably incurred. The costs claimed in this case were held to be disproportionate and substantially reduced on assessment for many reasons not related to the number of claimants, none of which is challenged on this appeal.
31. In *Baylis v Kelly*, a solicitor had acted for three defendants to an action. One was legally aided. The defendants lost the case and were ordered to pay the plaintiff's costs (subject to costs protection of the legally aided defendant). There was also an order for legal aid assessment of the assisted defendant's costs, and it was an appeal against items in that assessment that came before Chadwick J; specifically in relation to certain items for attendances and conferences that the taxing master had treated as apportioned equally between all three defendants so that only one-third was recoverable as the assisted party's costs from the Legal Aid Board.
32. At page 215 of the report, Chadwick J said this:

“A [legal aid] taxation ... is a taxation ... of a solicitor's bill to his own client (the assisted person) where that Bill is to be paid out of the legal aid fund ... Accordingly, the amount to be allowed to the solicitor on a legal aid taxation ... is the amount ... for which the client would be liable to the solicitor if the client were not an assisted person.

Where a solicitor acts for a number of defendants in the same proceedings liability of each client to the solicitor in respect of those proceedings must depend, first, on the nature of the retainer which the solicitor has from the client. The position was explained by the Court of Appeal in *Ellingsen v Det Scandinaviske Compani and others* [1919] 2KB 567 at 569:

"if there has been a joint contract between the solicitor and his clients, each client is liable for the whole costs, and if they were separate contracts, each will be liable for his own portion of them; and as pointed out by Amphlett B in [*Burridge v Bellew* (1875) 32 IT 807 at 813] the fact that after separate retainers the defence is conducted jointly does not make the liability joint."

The Court of Appeal had previously remitted the matter to the taxing Master to report on the nature of the retainer in that case ... On the matter coming back before then, the court proceeded on the basis that the findings established two separate retainers. The court concluded that, on that basis, it was clear on the authorities that each client was liable to the solicitors for half only of the cost of the joint items of defence, together with the whole costs of any separate items of defence.

In reaching that conclusion the court relied on the decision of the Court of Appeal in Chancery in *In re Colquhoun* (1854) De G M & G 35. The practice of the Court of Chancery at that time was stated in the certificate given by the taxing Master in that case. He certified that the principles applicable to costs as between several defendants employing one solicitor and the other parties in the suit (which he regarded as free from doubt) where applicable, also, to dealings between the solicitor and his clients. The certificate went on in these terms:

"5. But, nevertheless, the extent of that liability of the client may vary according to the circumstances of each case; in other words, according to the retainer of the solicitor of the court.

6. Thus each defendant may, on his own retainer, be liable separately for his own costs only; or all or several may be liable jointly, or one may have made himself liable for his own defence, and also that of one or more of his co-defendant.

7. The solicitor is, however, as I conceive, bound to keep and deliver his accounts with reference both to this liability and to the practice of the court.

8. If, therefore, the liability owed is a several, not a joint, liability, he is to charge against the client all the work he does for him separately and his proportion of the general charges which are applicable to him and others.

9. If, however, the liability be joint the solicitor makes out one joint bill against all the clients, and whether he sues in the law, or proceeds against them in this court under the statute, his proceedings must, I apprehend, be against them jointly."

...

In my view the position, as it appears from the authorities, may be stated as follows:

(i) where a solicitor acts for a number of defendants to the same action on separate retainers, each client is entitled to have a separate bill, and have that Bill taxed as between himself and the solicitor;

(ii) in taxing that Bill the court is to have regard to the overriding principle that the client is to be charged only with the costs properly attributable to the conduct of his defence;

(iii) any costs relating solely to the defence of one client should be charged to him, to the exclusion of the other clients; ...

(v) the general costs of the action-that is to say costs which cannot be attributed to a particular client (or clients) on the basis of separate defences or distinct issues-must be apportioned pro rata; and

(vi) it is irrelevant that the effect of an apportionment may be that the solicitor cannot recover some part of the apportioned costs-because, for example, one or more clients are insolvent.

... Different questions may arise where the solicitor acts on a joint retainer..."

33. *Baylis v Kelly* was, then, a decision on issues relating to the liability of a client to his own solicitor. It was necessary to isolate the costs properly attributable to the case of the legally aided defendant, since the Legal Aid Board was not liable to pay any costs that should properly have been regarded as incurred on behalf of the non- assisted defendants. Insofar as it is relevant to the assessment of costs recoverable from the paying party, the case deals only with the first of the two questions I referred to above. The primary position is that the client's liability is to be determined according to the terms of the retainer, i.e. the contract he has with his solicitor, which must be determined as questions of fact. If there are a number of clients, the solicitor may be

acting under a joint retainer, in which case each of the clients is jointly liable for the whole bill. However if there are separate retainers a method must be found of dividing the total bill between the clients. I do not think it could be doubted that the starting point for that division must be the express terms of the retainer, if any. It is only if the clients and the solicitor have not agreed between themselves how the bill is to be divided that it is necessary to fall back on rules such as the apportionment of costs relating to general matters in the litigation.

34. In the present case, the adjudicator had established that the CFA clients were contractually liable (presumably jointly as between themselves) to Blakemores to pay for the work done at the rates set out in the CFA agreement. He had accepted, eventually, the submission that the non-CFA clients were not liable to pay anything to Blakemores because the arrangement made was that the CFA clients would be responsible for paying Blakemores. There was no need to resort to apportionment to determine what the CFA clients were liable for, and it would have been a nonsense to do so.
35. That is not the end of the matter however, for the second question also needs to be considered. In *Ellingsen* (which Mr Littman relied on in the Points of Dispute) there were two companies which were defendants to the action, one of which, Harsem & Co, was successful and the other was not. It was found that there were separate retainers in relation to each company, rather than a joint retainer on behalf of both, but that Harsem & Co had agreed to pay the solicitors the costs of both defendants. On taxation of Harsem & Co's bill as between it and the paying party, it was allowed all the costs relating specifically to his own defence, but only half of those relating to both defendants jointly. That decision was upheld by the Court of Appeal, citing the remarks of Amphlett B in *Burridge v Bellew* (above) that "As the principle of allowance of costs is that the successful party is to be recompensed the liability he has reasonably incurred in defending himself, if he is only liable to his solicitor for half of certain joint items he cannot be allowed the whole of them, even though by some separate agreement he has made himself liable for the other half, primarily the liability of another and unsuccessful defendant" and *Beaumont v Senior* [1903] 1 K. B. 282, which was also a case in which one defendant out of two was successful but had agreed with the solicitor that he would pay the costs of both.
36. Atkin LJ said in relation to *Beaumont v Senior*:

"This judgment purports to be based on the decision of the Lords Justices in *In re Colquhoun* which in its turn is based on the elaborate certificate of Master Follett on the well-established practice of taxation, which the Lords Justices say may be open to some objections, but is too well established to be disturbed by decisions. The certificate states the practice between party and party thus (head 3): "If one solicitor appears for three defendants, and the bill is dismissed with costs as to one of them, the plaintiff can only be compelled to pay the costs of such proceedings as exclusively relate to that defendant, and one-third of the costs of the proceedings taken jointly for all three defendants.""

He concluded:

“While the principle involved may perhaps in some cases have curious results, it appears to be too well established to be disturbed by decisions of this Court.”

37. These decisions show that a successful defendant may only recover from an unsuccessful claimant the costs properly attributable to his own defence, which will be determined if necessary by an apportionment of joint items in a bill, even if the successful defendant is contractually liable to the solicitor to pay all costs including those of the unsuccessful defendants. It appears that while *Ellingsen* may have been a case in which both clients were in principle liable to the solicitors, but there had been a separate agreement that Harsem & Co would pay the costs of both of them, *Beaumont v Senior* was assumed to be a case in which one of the defendants had no liability for costs at all, the other having agreed from the outset to pay for both of them.
38. Insofar as an apportionment of costs jointly incurred has to be made, there is a rule of thumb that they will be apportioned equally between the successful and the unsuccessful defendants. It is not an inflexible rule however; in *Korner v H Korner & Co* [1951] Ch 10 there were eight defendants, six of whom were successful in their defences. The bulk of the costs of the action had been incurred in dealing with an issue involving the unsuccessful defendant, but which did not arise against the successful defendants. Although the decision turned on the wording of the order itself, in relation to the general principle of equal apportionment of joint costs Singleton LJ said this:

“This rule, a rule of thumb, is, no doubt, convenient in an ordinary case, but I do not think it can be said that it must be applied in every case. Regard must be had to the nature of the case and to the nature of the defences raised to the claim. In the present case, there were three separate defences on the file, though at the trial the defendants were represented by the same solicitors and counsel. The main contest was between the plaintiff and the second defendant. That entailed a lengthy inquiry as to what was the agreement, and in regard to the questions raised by paras 9 to 14 of the defence of the second defendant, in which defences of estoppel, waiver and the like were raised. Neither the defendant company nor any of the other successful defendants raised these matters. Their defences were, as counsel put it, more of a stone-wall in character. Yet, if the claim of the successful defendants is right, they will be each entitled to one-eighth of the fee allowed for instructions for brief and one-eighth of counsel's fees, though they did not raise the matters I have mentioned and though the plaintiff succeeded on them against the defendant who did raise them. This cannot be right. It is not disputed that it would result in injustice against the plaintiff. I do not know of any authority which compels the court to follow the rule in every class of case, even if to follow it would result in injustice. To do so would be to fly in the teeth of the generally accepted principle, as stated ([1919] 2 KB 569) in *Ellingsen's* case, “that the successful party is to be recompensed the liability he has reasonably incurred in defending himself.”

39. No point appears to have been taken that the successful defendants were not liable to the solicitors for any part of the costs relating to the issues that did not involve them. Presumably, therefore, this was a case of a retainer under which each of the defendants was jointly liable for all of the costs, or at least separately liable for an equal part of the whole.
40. Thus, the paying party who has succeeded against one defendant but failed against another is protected from injustice when the second of the two questions is asked, not only by the application of a principle that he is only required to pay an apportioned part of jointly incurred costs, even if the receiving party is liable for the whole amount of those costs, but also that an equal apportionment will not be applied if that would be unjust because the effect would be to require the paying party to meet costs properly attributable to the case of a defendant against whom he has succeeded. Even if the successful defendant is contractually liable to pay an equal part (or the whole) of such costs, that would not be a liability "reasonably incurred in defending himself".
41. Although all these cases were ones in which the receiving parties were defendants, no point was taken that similar apportionments would not be made if it were the costs of claimants in issue, as in the present case. If for instance different claimants acting by the same solicitors bring different claims in the same action (as they may if the claims can conveniently be disposed of together, see CPR Part 7) and one succeeds but others do not, I have no doubt that a paying defendant would be entitled to have the costs apportioned between the claimants so that the defendant paid only those properly attributable to the successful claimant's case.
42. Since the rule will not be applied so as to cause injustice to the paying party, it must equally be the case that it will not be applied if it would cause injustice to the receiving party. If, for instance, it had been the second defendant who had been successful in *Ellingsen* and the others had failed, I cannot conceive that he would have been restricted to recovery of one-eighth of the general costs which, as the court found, must have been predominantly incurred in the issues that affected him only.
43. None of these cases involves a paying party who has been ordered to meet the costs of all the defendants, but seeks to escape from paying part on the basis that only some of them were liable to the solicitors for the costs jointly incurred on behalf of all of them. Chadwick J said, relying on remarks made in *Re Colquhoun*, that the rule would be applied even if it meant that a solicitor was unable to recover some of his costs because for example one of his clients was insolvent. His example presupposes that what is being considered is apportionment as between solicitor and client where the clients are each severally liable for part of the costs. The apportionment cannot be adjusted to make the solvent client pay more than he is liable for, simply because the solicitor would otherwise lose out. It is not a reason for imposing apportionment inter partes so as to deny a party recovery of costs for which he has incurred a liability.
44. In the present case, save for minor matters not relevant to the issues before me, all of the issues were common to all of the claimants, or at least were issues that affected one or all of the CFA claimants. None of the issues depended, for instance, on the individual titles of any of the claimants, save for one argument based on Ms Scott's title, but she is one of the CFA claimants. None of the non-CFA claimants advanced any arguments that were not relied on by the CFA claimants. It was essentially irrelevant to the conduct and success of the action whether there were one, three, six or 100 named claimants. If the CFA claimants had been the only claimants named the issues would have been no different and their costs would have been no less. There

was never any question of the claim being successful on behalf of some of the claimants but not others. There may have been very minor respects in which it might be said that particular elements of costs could be attributed to a specific claimant (for example where separate letters were written to more than one of them) but it was accepted in the course of the assessment that nothing turns on this. In substance, therefore, the costs incurred would have been the same however many claimants there were.

45. If for some reason one of the non-CFA clients had been awarded his costs but all of the others, including those who had signed the CFA, were not, then no doubt it would be argued that since he has no liability for any costs, none were recoverable under the indemnity principle. But that is not what has happened here. All of the claimants have been awarded their costs. There is no injustice to the defendants in their being required to pay the whole of the costs without any apportionment; it does not result in their paying costs that have been increased by the unnecessary addition of the non-CFA clients as parties, or in paying any element of costs that can be said to be properly attributable to parties against whom, or issues upon which, the defendants succeeded in the action (the defendants did of course succeed on the issue of the fell title, but that was reflected in the order for payment of a percentage of the claimants' costs and has no bearing on issues as to apportionment).
46. In contrast, the apportionment made in my judgment results in a considerable injustice to the CFA claimants. The adjudicator's order meant that the CFA clients failed to recover a significant element of the costs that they have incurred (and for which, as Mr Littman informed me, they are being sued by Blakemores at the present time) over and above amounts disallowed for reasons of proportionality and the like, simply because other individuals lent their names to the action on the basis, as the adjudicator accepted, that they did not incur liability for Blakemores' costs. The adjudicator seemed to think that there was something wrong or undesirable in this, that the non-CFA clients were getting "a free ride" which the court should in some way not countenance. I agree with Dr Friston's submissions here and below that there is nothing at all wrong with any such arrangement; and there is no reason for the court to go out of its way to impose penal consequences on those parties who, like the CFA clients, are willing to take responsibility for the costs of pursuing what is essentially a community interest. Of course all those who join as parties must be advised about their possible exposure to adverse costs orders, but that is a matter between them and their solicitor and no concern of the opposing party or of the court on assessment between the parties.
47. In my judgment, the adjudicator was wrong to make any apportionment of the claimants' costs. In so far as he thought he was required to do so pursuant to *Baylis v Kelly* in order to determine the amount for which the CFA clients were liable to the solicitor, that was wrong because he had already made findings the effect of which was that they were liable for the whole amount, from which it follows that there is no breach of the indemnity principle in their being able to recover that amount. In so far as he thought it was required to do so to give effect to the principle in *Ellingsen*, that too was wrong in my judgment since for the reasons given above the apportionment was not necessary to identify the costs properly incurred by the party in whose favour the costs order had been made in pursuit of his successful claim, and resulted in injustice to the CFA clients.

48. It follows that the costs order must be set aside insofar as it allowed only an apportioned part of the costs incurred. For completeness I refer to a number of subsidiary arguments raised. Mr Littman in his skeleton argument submitted that the adjudicator had not accepted the villagers' case as to the nature of the retainer, but he had had accepted an admission against their interest "that Blakemores had become bound not to recover the costs of the non-CFA clients". In other words, his submission was that the non-CFA clients were in principle liable to pay Blakemores, but Blakemores had agreed to waive recovery of any costs from them. Mr Littman accepted in the course of the hearing that this would only support his case if the adjudicator had also accepted that Blakemores had agreed not to recover from the CFA clients the share of the costs that they had waived the right to recover from the non-CFA clients. It is however in my view clear from the passages I have quoted above that the adjudicator did not proceed on the basis of a waiver of liability incurred, but that the terms on which Blakemores acted for the non-CFA clients were that they were never liable for any costs, and there is nothing to indicate that the adjudicator concluded that Blakemores had agreed to charge the CFA clients less than the amount set out in the CFA agreement. Nor was there any evidential basis that would have supported such a conclusion.
49. Mr Littman also criticised the lack of clarity of the documentation and evidence as to the terms on which Blakemores acted for the non-CFA clients. He characterised the villagers case as being that "the Deputy Adjudicator was bound to take the uncorroborated word of a solicitor who had already been found unreliable, where the retainers in question were on any showing unusual and where he did not produce any of the expected documents which should exist if his case were correct". These criticisms were made on the premise that the adjudicator had not made a finding that the non-CFA clients were not contractually liable to pay any costs. But, as appears from the passages quoted above, the adjudicator did make that finding and Mr & Mrs Burton have not appealed against it, so that questions of the sufficiency of the evidence to support it do not arise.
50. Lastly, Mr Littman raised at the end of the hearing that the adjudicator's finding as to non-liability of the CFA clients for costs was only in respect of the period before the CFA was made. This was based on the adjudicator having said, just before the adjournment during which Dr Friston prepared his written submissions as to the terms of a contract of retainer with the non- CFA clients (p383):

"Apart from the pre-CFA client issue which Dr Friston is going to try and assist us with over the adjournment is there anything else that either party wants and I need to give a ruling on?"

51. However, this must have been a slip of the tongue or a mistranscription. There is nothing earlier to indicate that Dr Friston was being asked to make submissions limited to the pre CFA period, his submissions were not so limited and there is nothing to suggest the adjudicator approached them as if they were. The apportionment was made in respect of costs incurred after the date of the CFA and not before, which would have been inconsistent with the finding Mr Littman argued for.

The success fee: Recoverability in principle

52. I move on to issues relating to the success fee. First, Mr Littman argued that nothing should be allowed at all because the costs order made by Deputy Adjudicator Brilliant did not expressly order payment of additional liabilities. Sections 58 and 58A Courts

and Legal Services Act 1990, as in force at the time of the costs order, provided as follows:

“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 ...

58A Conditional fee agreements: supplementary

...

(6) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which includes a success fee.

(7) Rules of Court may make provision with respect to the assessment of any costs which include fees payable under a conditional fee agreement.”

53. S58 thus provides for the enforceability of CFAs. Previously any fee agreement in which all or part of the lawyer's remuneration depended on the outcome of litigation would have been unenforceable as constituting maintenance of the proceedings, contrary to public policy. In the case of an agreement such as the CFA entered into in this case, nothing would have been payable by the losing party on assessment, because of the indemnity principle.

54. The argument was over the meaning and effect of s58A(6) as then in force (it has since been amended by the Legal Aid Sentencing and Punishment of Offenders Act 2012 in enacting the Jackson reforms and now provides that one party may *not* be ordered to pay success fees incurred by another). Mr Littman's submission was that it made a success fee recoverable if, but only if, the costs order provided for it to be paid. The problems that might arise if such a provision were omitted were mitigated, he says, in proceedings covered by the CPR, because the Costs Practice Direction, para 2.1 provided that:

“Where the court makes an order for costs and the receiving party has entered into a funding arrangement as defined in Rule 43.2 [ie a conditional fee agreement] the costs payable by the paying party include any additional liability... unless the court orders otherwise.”

This he argues is a deeming provision, having the effect that a costs order is deemed to include an order for payment of additional liabilities unless it expressly provides otherwise.

55. It is accepted that proceedings before the Adjudicator and in other tribunals are "proceedings" for the purposes of ss 58 and 58A, so that a costs order was permitted to make provision for additional liabilities. Other tribunals, Mr Littman submits, make deeming provisions in their rules similar to costs PD para 2.1, or incorporate that provision by cross reference to the CPR. But proceedings before the Adjudicator are (or were then) governed by the 2003 Rules, r42 of which is the only provision dealing with costs and contains no reference to additional liabilities or the CPR. In the absence of an express order for payment of additional liabilities (or an order which is deemed to include such a provision) it cannot be reasonable to allow payment of more than the rate that the court assesses as the appropriate base rate for the work done.
56. Mr Littman acknowledged that in *Abbott v Keeley*, 18 June 2009 REF/2008/0305 Mr Martin Dray sitting as a deputy adjudicator and determining issues of costs following a reference held that a success fee was recoverable. At para 3 of his judgment Mr Dray (having referred to ss 58 and 58A) said:

“Further, so far as jurisdiction is concerned section 58[A](6) of the 1990 Act provides that a costs order made in any proceedings may...include provision requiring the payment of any fees payable under a conditional fee agreement which provides for payment of a success fee. Thus the starting point is that success fees are recoverable in principle unless a specific procedural rule displaces this prima facie entitlement.”

57. This decision, Mr Littman argues, is either incorrect or can be explained because Mr Dray was determining both the principle of which party should be entitled to costs and the assessment of the amount of those costs at the same time. He was thus making a costs order within the meaning of s 58A(6) which provided for recovery of additional liabilities. In the present case, the costs order was made by Deputy Adjudicator Brilliant, and Deputy Adjudicator Hoffman performed only the assessment of the amount so ordered. As would be the case with a costs judge assessing costs in proceedings before a court, he had no power to vary the effect of the costs order already made, but only to apply it by determining the amount payable.
58. The Adjudicator dealt with this point briefly. He said (p457):

“ The fact that some tribunals have made the rules does not mean that others who have not cannot have CFAs in their jurisdiction, and the fact that there is no enabling mechanism does not, in my judgment, deprive this tribunal of the capacity to award conditional fees. Parliament has introduced this legislation in the broadest terms, and, in my judgment, the CFA applied in this jurisdiction and (if necessary) I adopt the

reasoning of the Learned Deputy Adjudicator Dray in the case to which I have been referred. ”

59. In my judgment, Mr Littman's argument is based on a false premise. It assumes that, but for section 58A(6) a success fee could not be recovered between parties and the receiving party would always have been limited to recovering the base costs assessed by the court to have been the reasonable charge by a solicitor to a client who had not entered into a CFA and so was liable to pay such costs irrespective of the outcome of the litigation. But the reason why success fees could not be recovered prior to 1990 was not because an agreement to pay anything over the normal base rate was by definition unreasonable but because the CFA could not be enforced at all, being deemed to be contrary to public policy. If any attempt were made to enter into a CFA it would not have been just the success fee that was irrecoverable; the solicitor would not have been able to uncover any remuneration at all from his client. By virtue of the indemnity principle, the opposing party would not be liable to pay anything at all.
60. Once the CFA is made enforceable as between solicitor and client, that difficulty falls away, and an order for payment of the costs of that client by another party starts from the position that all the costs for which the client is liable are potentially recoverable inter partes. An order for costs on the standard basis requires the paying party to pay such costs in so far as they are reasonable and proportionate (in this respect the provisions of the 2003 Rules are the same as those of the CPR). The question therefore is whether the totality of the amount for which the client is liable to his solicitor has been reasonably and proportionately incurred. This cannot be answered simply by pointing to the hourly rate that would be reasonable as between a solicitor and client who has not agreed a CFA, because in the circumstances in which the solicitor has entered into a CFA he has incurred the risk of not achieving success in the proceedings, for which he is properly to be compensated by payment of a success fee. It is answered by a combination of the considerations routinely addressed in the course of assessment; what were the alternatives available to the client for funding the litigation, what is the reasonable base costs rate to allow and what is a reasonable success fee to allow to compensate for the risk of failure?
61. Mr Littman made the point that if this is so, there was no need to enact section 58A(6) at all. In that, he may be correct; it is not necessary for me to decide the point, but it does not seem to me that it is particularly unlikely that Parliament would have wished to enact a provision "for the avoidance of doubt" when making provision for a new regime of funding so radically different from that which had previously operated. Similarly, Costs PD para 2.1 is in my judgment declaratory of the position that would obtain in any event, and does not have the deeming effect that Mr Littman contended for.
62. On this point, then, in my judgment the adjudicator's decision was correct and Mr and Mrs Burton's appeal fails.

The success fee: Quantification

63. Finally, there are cross appeals against the Adjudicator's decision to allow a success fee by way of an uplift of 60% over the base costs allowed, rather than the 100% provided for in the CFA or the 40% which Mr Littman had argued was the maximum reasonable amount. Dr Friston on behalf of the villagers argued that given the cumulative effect of the risk factors identified in the CFA, the only reasonable conclusion was that the prospects of success were never greater than 50%, so that the

success fee required to compensate the solicitors for incurring that risk was at least the maximum 100% allowable.

64. The CFA identified six risk factors as follows:

- “1. The lack of documentation before 1800.
2. The existence of court reports from the 1500s and documents from 1598.
3. The fact that it appears that for many years parties behaved on the basis that a Lordship existed.
4. The possibility of a Crown Grant.
5. The difficulty of the law on many points.
6. The possibility of a Prescriptive Grant.”

65. These, Dr Friston argued, were all independent risks. He did not seek to put a particular percentage on the risk of failure because of any one of them, but produced a table showing that even if it were assumed that the separate risk of each one of them occurring was quite low, say 10%, any of them would have caused the failure of the action and applying basic probability theory the overall probability of failure as a result of the occurrence of any one or more of a number of independent events was to be determined by multiplying together the individual probabilities of each of them occurring, which quickly produced a combined probability of failure exceeding 50%. The Adjudicator could not, he said, reasonably have concluded that the risk of failure through each of these causes was less than 10%, and so could not reasonably have concluded that the overall risk of failure was less than 50%.

66. Further, he said that the Adjudicator was wrong to take account of the fact that by reason of the definition of "success" in the CFA, the solicitors had not been subject to the risk that the villagers might fail (as that ultimately did) in their application to close the title to the Fell. This the Adjudicator referred to as "the riskiest risk". In his decision on the amount of the success fee to be allowed he said (p458):

“... once you exclude the riskiest risk in litigation you then have to have a look at the other risks. I have listened carefully to both sides' submissions, and I accept that if this matter is to go further it may well be that a much more intense look will need to be taken as to the exact position on the day that the CFA was entered into.

However, on the basis of the submissions that I have received, and also on the basis that before the CFA was entered into the litigants in person had expended some 700 hours on this matter, and Blakemores had also spent something approaching 100 to 150 hours on this matter, I cannot accept that by 27th April 2009 all these issues were at the risk of 100%. However, I have to balance that with the fact that this case took 10 days to hear. Even if one excludes two days of it for the ownership of the Fell, the Freehold title ownership, and also maybe some other time on dwelling on the Knights of St John, which may or

may not have been relevant, it seems to me that a 100% success fee in a matter of this nature is too high. 40% has been offered. That is too low. I have set the success fee at 60%. ”

67. Mr Littman submitted that the correct approach was set out in the judgment of Lord Neuberger MR in *Motto and others v Trafigura Ltd and another*, [2011] EWCA Civ 1150, encapsulated in the following passages:

“123. Of course, in order to arrive at an appropriate success fee, it is necessary to attribute quantitative risk assessments to the potential problems, and, at any rate at first sight, it appears sound logic in principle to multiply out those risk assessments in order to arrive at the overall risk. However, in the context of legal proceedings, such an approach is open to attack in principle, as may be appreciated from the rather compressed discussion in paras 23.5-9 in *Chalk on Risk Assessment in Litigation* (2001). Not only is the precision accorded to the prospects somewhat artificial, but the implicit assumption that each of the risks is entirely self-contained, or insulated from all the other risks, is plainly very questionable. Further, as Mance LJ recognised in *Hanif v Middleweeks* (unreported, 19 July 2000), para 41, a judge trying a case "might, even if only subconsciously, [be] predisposed towards a more favourable overall conclusion on the technical issues if and when he had concluded that the hurdle involved on the [substantive causation issue] could be overcome [by the claimant]"...

127. When it comes to determining the prospects of a claim succeeding, there is, for the sort of reasons just discussed, a risk of becoming beguiled by the apparent accuracy of an assessment which is expressed in figures and appears to be logically based. In the end, however, the determination is a matter of judgment, which involves arriving at an overall assessment by weighing up various factors, which are inherently difficult to quantify, not least because the quantification will be a matter of opinion on which reasonable people could differ (sometimes quite substantially), and because the factors are not as independent of each other as might first appear.

132. The question for the Judge when considering the reasonable figure or figures for uplift was ultimately a value judgment, based on his retrospective assessment of the risk of failure at the date the uplift was determined. Although the risk must be precisely quantified in order to arrive at a specific success fee, the exercise is inevitably one which involves the costs judge evaluating and weighing the various weaknesses and strengths of the claimants' case, and reviewing in particular the contemporaneous assessments. In this case, the Judge considered the various competing factors and evidence and arrived at a success fee varying between 100% and 47%,

depending on when a claimant entered into a CFA, and on average 58%.

133. The role of this court, on an appeal from that assessment, is not whether we would have decided that a reasonable success fee was between 100% and 47%, averaging around 58%, but whether the Senior Costs Judge, when assessing that figure as a reasonable success fee, ignored or misunderstood relevant evidence, took irrelevant evidence into account, went wrong on any point of law, arithmetic or principle, or reached a conclusion which was plainly wrong. In the light of the factors I have identified and discussed, it seems to me that he committed none of these errors..."

68. In my judgment, the Adjudicator was obviously right to recognise that the way in which "success" was defined in the CFA had to be taken into account. Dr Friston submitted that this was in some way treated as automatically meaning that the percentage success fee should be reduced, but that is clearly not what the Adjudicator did. He said that he would have to "look at the other risks", that is to say he evaluated the risks that the solicitor was running, taking no account of the one that he was not running. That is plainly the correct approach.
69. Thereafter, he made a broad overall assessment of the total risk borne by the solicitor. That in my judgment is what he was required to do. It is true that he did not indulge in any detailed analysis of the individual risks or how they related to each other. But it is difficult to see how he could have arrived at any meaningful conclusion by seeking to be more precise as to the individual components of the risk. There is force in the submission that although six factors were set out, they cannot be said to be truly independent risks. At least three of them (points 1,2 and 4) boiled down to the same thing, namely that despite extensive research there were gaps in the documentary record and something else might emerge. The risk of a finding of a "Prescriptive Grant" was closely similar to considerations based on the fact that parties had acted as if a Lordship had existed. None of these matters was capable of any objectively ascertainable individual quantification, and nor was the general factor that the relevant law was difficult. Any attempt to attribute individual percentages, or to assess the degree to which any one of the factors was dependent on any of the others, would in my view have only lead to a wholly spurious impression of precision.
70. It was in my judgment undoubtedly relevant that by the time the CFA came to be signed huge amounts of time had been spent by people with a direct interest on both sides in researching the historical and legal position. That was bound to affect the likelihood that new documents, or new arguments, would come up. The possibility remained, but it was right to regard it as much reduced.
71. The role of this court on appeal is as set out by Lord Neuberger in the passage cited above. It is not to make and to substitute its own assessment. The Adjudicator did not in my judgment can make any of the legal errors referred to, and the assessment that he made could not be said to be below the range which was available to him.
72. Somewhat ironically in view of the argument relied on above, Mr and Mrs Burton also appeal against the 60% figure on the basis that it was unreasonably high. Mr Littman argued that in fact the cumulative risks of failure were so low that no success fee should have been allowed over the 40% which had been offered by his clients

before the Adjudicator. He referred to correspondence between Mr Baxendale and Mr Mrs Burton in which Mr Baxendale had drawn attention to the fact that a CFA had been entered into and said that this was because of the strength of prospects of success that he considered the villagers had. Further, he had obtained a copy of the defence of the villagers in the claim now being made against them by Blakemores for recovery of fees, in which the villagers pleaded that they had been advised by Mr Baxendale at a meeting in April 2009 that there were "strong prospects of the villagers being successful in at least setting aside the registration of [Mr and Mrs Burton] as Lord of the Manor". He also produced a copy of a witness statement by Mr Baxendale in support of the villagers in the fees action, in which he says that he recommended to a senior partner that the firm should agree to enter into a CFA in order to ensure that the villagers case was pursued and protect the firm against the possibility of a negligence action in respect of advice by his predecessor.

73. This appeal in my judgment must fail for the same reasons. The Adjudicator had seen the correspondence between Mr Baxendale and Mr Mrs Burton, which could not sensibly be considered as anything more than a solicitor talking up the prospects of his own client's case in order to put pressure on the opponent. He had not of course seen the material from the later proceedings, and for me to consider it is now it would have to be admitted as new evidence. But it would not be right to do so, in my judgment, because nothing in it would be likely to have affected the result. Plainly, Mr Baxendale and his firm must have considered the prospect of success sufficiently strong to make it financially worth the firm's while accepting the risk and entering into a CFA. Neither the fact that they may have been described as "strong" nor the fact that the firm might have had additional motivations for entry into a CFA could affect the essential task that the Adjudicator had to perform of making a broad assessment of the degree of risk involved, nor in my judgment could they lead to the conclusion that he could not reasonably have arrived at the figure he did.
74. I anticipate from what was said at the hearing that it is likely that a further hearing will be required to deal with matters arising from this judgment. I invite the parties to agree and submit a time estimate for that hearing.