



Neutral Citation Number: [2018] EWHC 3556 (QB)

Case No: HQ15X04908

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2018

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

Between :

THE LORD CHANCELLOR

Claimant

- and -

(1) BLAVO & CO. SOLICITORS LIMITED
(IN LIQUIDATION)
(2) JOHN BLAVO

Defendants

Rachel Sleeman and Gita Chakravarty (instructed by **Michelmores LLP**) for the **Claimant**
There being no appearance by the First Defendant
Robert Bourne (instructed by **Radcliffes le Brasseur**) for the **Second Defendant**

Hearing dates: 3, 4, 5, 8, 10, 11 & 12 October 2018

Approved Judgment

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

.....

MR JUSTICE PEPPERALL:

1. By this action, the Lord Chancellor seeks to recover over £22 million of public funds that were paid to Blavo & Co. Solicitors Limited by way of legal aid for mental health cases. The shocking allegation at the heart of this case is that Blavo & Co. made dishonest claims for payment on the legal aid fund for thousands of cases where it was not entitled to any fee.
2. The law firm (as I shall call it in this judgment despite its incorporation) is now in liquidation and has taken no part in these proceedings. The claim is therefore pursued against John Blavo, a former director of the law firm, pursuant to a deed of guarantee and indemnity. The Defence pleaded but failed to particularise a set-off. In the event, it was not pursued at trial.
3. In this judgment, I shall first consider the central questions of fact in this case. I shall then consider the contractual issues as between the Lord Chancellor and the law firm. Thereafter, I shall consider the question of Mr Blavo's liability under the deed of guarantee and indemnity.
4. On 18 July 2018, His Honour Judge Bidder QC ordered that any parts of the trial that might involve consideration of any sensitive personal data belonging to former clients, or purported former clients, of the law firm should be heard in private. Sitting in private is of course a derogation from the important principle of open justice. In the event, I decided that Judge Bidder's quite proper concerns about confidentiality could be addressed simply by anonymising all references to clients or purported former clients. Accordingly, I was able at all times to sit in public. I have equally anonymised references to clients and purported clients in this public judgment.

THE LEGAL AID SCHEME

5. First, it is necessary to describe the operation of the legal aid scheme in mental health cases. Until 1 April 2013, the legal aid scheme was administered by the Legal Services Commission ("the LSC"). By paragraph 7 of Schedule 4 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the property, rights, powers, duties and liabilities of the LSC were, from that date, transferred to the Lord Chancellor. By s.2(2)(c) of the Act, the Lord Chancellor established the Legal Aid Agency ("the LAA") to provide, or facilitate the provision of, legal aid services. While solicitors provide legal aid services to their clients pursuant to contracts with the Lord Chancellor, the LAA administers the legal aid scheme on his behalf.
6. Advice and assistance in respect of mental health law and representation before a mental health tribunal are classed as "controlled work." Such work is undertaken pursuant to a contract with the Lord Chancellor and remunerated in accordance with a graduated fee scheme. In 2015, fees were payable on the following scale for mental health work:

Approved Judgment

Level	Work	Fee	Cumulative fee
1	Advice & assistance	£129	£129
2	Preparation for a tribunal	£321	£450
3	Attendance at a tribunal	£294	£744

7. Exceptionally, firms are sometimes able to claim fees in excess of these fixed rates. These “escape fee” cases require justification and individual assessment of the files.
8. Approved firms undertaking mental health work are required to complete the Controlled Work form, known as form CW1&2, together with their clients in order to be eligible to claim a fee. No means assessment is required where the client seeks Controlled Legal Representation before a Mental Health Tribunal. Advice or assistance short of representation can also be given, but legal aid for such clients is means tested.
9. Firms claim their fees from the LAA by making a monthly on-line claim using the agency’s Contracted Work & Administration (“CWA”) portal. Since there is no need to assess the fees in cases falling within the graduated fee scheme, firms are not required to submit any supporting files to the LAA except when they are seeking an escape fee. Compliance with contractual quality standards and the risk of fraud inherent in this self-certification system are addressed by periodic audits of sample files. In addition, each firm’s contract with the Lord Chancellor is closely managed by a designated Contract Manager.
10. While there is no need for mental health clients to apply for legal aid certificates in order to access publicly funded advice and representation, the Lord Chancellor’s total exposure is controlled by contractual limits on the number of “new matter starts.”

THE EVIDENCE

BLAVO & CO. SOLICITORS LIMITED

11. John Blavo is a solicitor. He was admitted to the roll in 1997 and was formerly the Senior Partner of Blavo & Co. The firm was incorporated on 29 June 2011 as Blavo & Co. Limited. Mr Blavo was the sole shareholder and a director of the incorporated practice. He was also recorded on the Solicitors Regulation Authority’s (“the SRA”) website as the law firm’s Managing Partner.
12. The law firm practised under the trading name Blavo & Co. both before and after incorporation. It specialised in mental health law, but also practised in criminal, clinical negligence, housing, immigration, family and general civil law. The firm grew rapidly and, by 2015, operated from 18 offices throughout England and Wales.

Approved Judgment

13. In November 2010, Blavo & Co. entered into a contract for civil legal aid work with the LSC. The contract came into effect on 15 November 2010. Although originally disputed, it is now common ground that the 2010 contract was novated in favour of the newly incorporated company with effect from 1 December 2011. The incorporated practice entered into a further contract for civil legal aid work with the Lord Chancellor on 1 August 2014.
14. Both Ms Sleeman, who appeared for the Lord Chancellor with Ms Chakravarty, and Mr Bourne, who appeared for Mr Blavo, assured me that there were no material differences between the 2010 and 2014 contracts. In any event, I note that clause 1.27 of the 2014 contract provided that it was to operate as a “seamless continuation” of the 2010 contract. Accordingly, counsel made their submissions and I have considered this judgment by reference to the terms of the 2014 contract. The contract incorporated the LAA’s standard terms and the 2014 Standard Civil Contract Specification.
15. At least 80% of the law firm’s income was derived from the legal aid scheme and, at its height, it was the second or third largest legal aid firm in England and Wales.

CONTRACT MANAGEMENT

16. The Lord Chancellor relied on evidence from five witnesses from the agency’s Contract Management team:
 - 16.1 Tamsin Fendley was the firm’s Contract Manager between November 2013 and September 2015.
 - 16.2 Kevin Giles was an Area Contract Manager. From 2014, he managed Ms Fendley.
 - 16.3 Paul Davies is a National Contract Manager. Although primarily responsible for Wales and the west and south-west of England, his remit was expanded to include central and west London from January 2015. Accordingly, Mr Giles then reported to him.
 - 16.4 In addition, the Lord Chancellor relied on the written evidence of two further witnesses:
 - a) Zarah Hornett was the firm’s Contract Manager until September 2012. Her evidence was agreed and accordingly Ms Hornett was not required to attend the trial.
 - b) John Sirodcar is employed by the LAA as the Head of Contract Management. Dr Davies reported to Mr Sirodcar. Unfortunately, Mr Sirodcar underwent quadruple heart bypass surgery shortly before trial and was accordingly not fit to give evidence. While not agreed, his evidence was therefore admitted as hearsay.
17. Ms Hornett gave formal evidence of the novation of the LSC’s contract upon the law firm’s incorporation. She did not appear to have any particular concerns about the firm. In her time, the LSC’s focus was on immigration work. She said that most of her day-to-day contact was with Mr Blavo’s brother, Frederic. She had the sense that Frederic Blavo managed everything on a daily basis while John Blavo took the important decisions.

Approved Judgment

18. Ms Hornett was succeeded by Rodney Addy. Ms Fendley told me that on taking over management of the Blavo contract in November 2013, she learnt from Mr Addy that there were historical issues with the firm's overuse of new matter starts in mental health work. Mr Addy attributed this to the firm's rapid expansion. Further, she was told that they often needed chasing to comply with deadlines and that there had been some issues with duplication of claims.
19. Where a provider opens files in excess of its contractual limit then, unless such files are covered by an agreed extension to the contract, it is not entitled to payment for any work done on the unauthorised matters. Any payments made for such unauthorised work are therefore liable to be repaid.
20. In January 2014, Ms Fendley sought to recover the sum of £204,225 which had been assessed as repayable following an earlier investigation of the firm's overuse of new matter starts. Throughout 2014, she also addressed the firm's continuing overuse of new matter starts and agreed some increases in its allocation of mental health work. When asked why they were regularly exceeding the contractual limits, the firm repeatedly claimed that it had merged with or acquired other practices thereby taking on additional allocations of work. Ms Fendley challenged this position both upon the facts and the proper operation of the contract. By her letter of 15 October 2014, Ms Fendley asserted that the law firm had overclaimed a sum in excess of £2 million by reason of its overuse of new matter starts and sought its proposals for repayment.
21. The firm's liability was marginally reduced by further retrospective increases in its allocation of new matter starts. By her e-mail of 22 January 2015, Ms Fendley indicated the LAA's intention to start recouping monies from payments due to the law firm. Still no repayment proposals were made and on 13 February 2015 Ms Fendley gave notice of the LAA's intention to recoup over £2 million, being the LAA's then calculation of the claims paid in excess of the authorised new matter start limits, over the following 12 months.
22. Subsequently the claim was reduced to just over £1.5 million in April 2015 following further retrospective increases in the firm's allocation for mental health work. Errors in that calculation were identified and, by Ms Fendley's letter of 5 June 2015, the LAA asserted a claim for repayment of £1,814,894.72.
23. Meanwhile, Ms Fendley had been seeking to audit some sample mental health files. The audit was routine but appears to have been prompted by the concern in respect of new matter starts and the law firm's failure to provide all of the files requested upon earlier reviews of its immigration files. Accordingly, Ms Fendley gave notice that she would like to inspect twelve mental health files when visiting the firm's offices on 5 March 2014. Six files were produced and anomalies were identified. Ms Fendley then sought more files by early April 2014. Again, they were not all provided and there were anomalies on several of the files that were provided.
24. As a result of the firm's failure to provide all of the requested files and Ms Fendley's findings on the files that were produced, she assessed that some 55% of the value of these files

Approved Judgment

(£18,034 out of £32,656) needed to be recouped. This was plainly no more than a small snapshot, but added to Ms Fendley's growing concerns about Blavo & Co. Therefore, on 22 May 2014, she formally requested her Operational Assurance colleagues to carry out a contract compliance audit. Pressure of other work meant that the audit was not started until 11 May 2015.

25. Meanwhile, the firm was selected for discussion by the senior management team at an attestation meeting. At the meeting on 9 June 2015, Ms Fendley and Mr Giles presented their report. In view of their findings, Mr Sirodcar decided that the firm required further investigation and a referral was then made to the Counter Fraud team.
26. On 12 June 2015, Mr Blavo expressed concern that the proposed recoupment might put the firm out of business leaving hundreds of staff out of work and thousands of vulnerable clients without representation. He added that the need to go through thousands of archived files from 18 branches when the firm's difficulties with its archive and IT systems were "well documented" was, as he put it, "so unreasonable as to be correctly characterised as Wednesbury unreasonableness." In cross-examination, Ms Fendley accepted that that was one view but said that her job was to protect the public purse.
27. On 15 June 2015, the LAA imposed a "vendor hold" upon Blavo & Co. in view of its failure to agree repayment terms in respect of the monies owed by reason of overuse of the new matter starts. The effect of a vendor hold is to put a stop on payments to a firm. In addition, the LAA required the firm to self-assess a list of all files claimed over the previous 12 months and confirm that all files were available for audit by 18 September 2015.
28. By his reply of 17 June 2015, Mr Blavo accepted that the firm would self-review all of the affected files and report back to the LAA by 8 September 2015. Further, he offered a repayment schedule and that the firm would provide additional financial evidence. This correspondence led to a meeting on 29 June 2015. On 1 July 2015, the LAA agreed with Mr Blavo that the vendor hold would be lifted upon terms that the firm would make repayments in accordance with an agreed schedule and provide full financial disclosure by 24 July 2015. Mr Giles told me that the vendor hold was therefore lifted before any payments had been affected. Further, he explained that before agreeing terms, the agency undertook an analysis of the firm's accounts in order to assess what level of repayment might be made by the firm while still allowing it to continue in trade. In doing so, it took some care to seek and consider cashflow forecasts and discussed the firm's financial position with the Blavo brothers and the firm's external accountants.
29. Asked whether the LAA was playing "hardball", Ms Fendley said that while you could look at it that way, the agency had been discussing this overpayment for almost a year without achieving a repayment schedule. Even then the agency was accepting repayment over a further twelve, and not the usual six, months. She conceded that they were, however, exacting rigorous terms and that, twelve months on, the position was then that the agency's terms were "pretty much" non-negotiable.

Approved Judgment

30. Despite agreeing to monthly payments of between £150,000 and £200,000 on 1 July 2015, Mr Blavo wrote three weeks later with a modified proposal to pay just £25,000 per month. This correspondence was overtaken by other events and, as I shall relate below, the vendor hold was re-imposed in August 2015.
31. In an e-mail sent to Mr Giles on 26 May 2015, Ms Fendley referred to a number of issues concerning the firm and then added:
- “Firm are very positive and professional when dealing with LAA and very receptive to involvement in any LAA or MoJ pilots and initiatives. They want to be a leading player in the legal aid market.
- It’s also clear that the advice given on their files is of a high standard. They are very experienced in mental health and are prepared to go the extra mile for the large client base they have built up in this area.”
32. In cross-examination, she stood by that assessment but said that it had nothing to do with the findings of the operational assurance audit into the firm’s file management.
33. Mr Sirodcar explained in his statement that, as Head of Contract Management, he only had direct contact with providers identified by the agency as high risk. He was aware from 2011 of an issue with Blavo & Co. claiming fees on significantly more new matter starts than its contractual allocation. When the issue persisted, Mr Sirodcar became more directly involved. He joined a telephone conference with the law firm in January 2014 but left Ms Fendley and her Area Manager to take matters forward.
34. Mr Sirodcar was next involved with the law firm in June 2015. He explained that, at the attestation meeting on 9 June 2015, he and Dr Davies expressed concern that what the Contract Management team appeared to accept as poor administration might actually be the result of a much bigger problem. Specifically, he said that the firm might be making claims on the fund for non-existent cases which might, in turn, explain why the firm struggled to provide files for audit. Dr Davies made an immediate referral to the Counter Fraud team. A plan was then formulated for managing the risk to the fund while investigating and auditing the firm’s files.

THE INITIAL FRAUD INVESTIGATION

35. Three witnesses from Operational Assurance gave evidence in respect of the fraud investigation:
- 35.1 Mark Stewart is an investigator employed in the agency’s Counter Fraud team. He was involved in the 2015 investigation into the law firm’s claims for payment and was the principal witness relied on by the Lord Chancellor.
- 35.2 David Cooper is as an Operational Assurance Analyst in the agency’s Reconciliation Team. His team calculated the payments due to providers for controlled work. He helpfully explained the operation of the CWA portal and formally put in evidence the agency’s records in respect of the law firm’s claims for payment.

Approved Judgment

- 35.3 In 2015, Amana Humayun was a Deputy Director of the LAA and Head of its Assurance Team. She was ultimately responsible for the agency's Corporate Assurance and Operational Assurance teams.
36. The Lord Chancellor also called evidence from Karen Early who was employed by Her Majesty's Courts and Tribunals Service ("HMCTS") as an Operations Manager at Arnhem House in Leicester. She gave evidence as to HMCTS's records of mental health tribunal cases involving the law firm. In addition, I heard from Paul Henson, the LAA's Deputy Director of Finance, who produced some payment data.
37. Following the referral from Contract Management, John Armstrong, an intelligence analyst from the LAA's Counter Fraud team, took delivery of the 49 files that had been provided for the purpose of the contract compliance audit. His first step was to compare the data entered on to the agency's CWA portal by the law firm with the data held by HMCTS in respect of hearings before a mental health tribunal.
38. Karen Early's office is responsible for dealing with all mental health applications heard by the first-tier tribunal in England. She explained that all applications and referrals are logged on to the tribunal's computer system known as MARTHA. Since Ms Early's team dealt only with English tribunals, MARTHA did not cover hearings in either Wales or Scotland. Ms Early told me that the LAA asked her team to check the 49 files. They found that in 42 cases there was no record of any hearing on MARTHA.
39. The Counter Fraud team therefore set about looking more closely at the 42 files. Specifically, they looked at medical reports and covering letters that were purportedly created by NHS Trusts and HMCTS records such as tribunal reports. They contacted both HMCTS and the NHS Trusts involved. On doing so, the investigators were told by both HMCTS and the relevant trusts that none of the documents purporting to be HMCTS and NHS documents on any of the 42 files were created by them.
40. Mr Stewart assisted Mr Armstrong in the initial investigation. I have considered both Mr Stewart's evidence on these cases and the underlying documents in his exhibits MS3 and MS4. In his first statement, Mr Stewart referred to four cases by way of example:
- 40.1 DA: The firm produced a file for a male client, DA, that included medical, social circumstances and nursing reports showing that he was a patient at Alpha Hospital in Woking, a notice of a hearing fixed for 15 October 2014, a decision of a tribunal consisting of a judge sitting with Dr Crouch and Mr Armson on 15 October 2014 and a letter from HMCTS dated 7 December 2013. Investigation showed that:
- a) the Alpha Hospital has no record of a patient called DA;
 - b) HMCTS has no record of a tribunal having taken place on 15 October 2014 in respect of DA;
 - c) the HMCTS case reference number related to a female patient in Derbyshire, but there was no tribunal hearing on 15 October 2014 in her case either;
 - d) the tribunal reference number was wrong;

Approved Judgment

- e) HMCTS has no record of either Dr Crouch or Mr Armson sitting on 15 October 2014; and
 - f) the file was not opened until 28 August 2014.
- 40.2 AV: The firm produced a file for a female client, AV, that included three reports from Edgware Community Hospital: a psychiatric report, a nursing report by Akpabio Uwa and a social circumstances report by Volker Hagedorn. The file also included notice from HMCTS of a hearing on 6 May 2014 at the hospital, a case notification letter (a “CNL1”) from the tribunal giving directions and the application form showing that AV was a patient at Edgware Hospital. Investigation showed that:
- a) Barnet Primary Care Trust had no record of AV being a patient at Edgware Community Hospital;
 - b) the Trust had no record of a nurse called Akpabio Uwa;
 - c) the Trust had no record of a social worker called Volker Hagedorn;
 - d) HMCTS had no record of AV;
 - e) specifically, HMCTS had no record of a tribunal hearing for AV at Edgware Community Hospital on 6 May 2014; and
 - f) the forms CNL1 and HQ1 would not be used for a case under s.2 of the Mental Health Act 1983.
- 40.3 AM: The firm produced a file for a male client, AM, that included nursing, psychiatric and social circumstances reports from St Andrew’s Healthcare, a letter from HMCTS dated 9 December 2013 and a tribunal decision following a hearing on 18 December 2013 before Miss Foster, Dr Lambert and Mr Gantley. Investigation showed that:
- a) the Central London Community Healthcare NHS Trust had no record of a patient called AM;
 - b) the psychiatric and social circumstances reports both mix the use of male and female pronouns;
 - c) the postal address of the HMCTS office is incorrect;
 - d) the HMCTS website is wrongly given;
 - e) the only tribunal hearing at St Andrew’s Hospital on 18 December 2013 was in respect of a female patient, JH;
 - f) Miss Foster was not sitting as a mental health tribunal judge on 18 December 2013;
 - g) Dr Lambert was not a judicial office holder until 2014;
 - h) Mr Gantley was not available to sit on 18 December 2013; and
 - i) the tribunal reference number was for a female patient in Lincolnshire.
- 40.4 SP: The file provided for a female client, SP, included a medical report from Cygnet Hospital, a social circumstances report, a letter from HMCTS dated 8 August 2014 in respect of a hearing at Cygnet Lodge in Beckton and form CNL1. Investigation showed that:
- a) both the medical and the social circumstances reports contain the same unusual typographical error in that “her” is mistyped as “sher”;
 - b) large sections of text in both reports are identical;

Approved Judgment

- c) both the postal and website addresses given for HMCTS were out of date;
- d) Cygnet Lodge (as opposed to Cygnet Hospital) in Beckton is not a hospital on HMCTS's records;
- e) HMCTS only has records of one tribunal hearing listed on 14 August 2014, but it did not proceed and involved a different patient; and
- f) the CNL1 and HQ1 forms were again incorrect and inappropriate for a s.2 case.

41. It is clear from the underlying material exhibited to Mr Stewart's statement that these four cases were broadly representative of the types of issues on many of the 42 files.

42. The results of the analysis of the 49 files caused the Counter Fraud Team to investigate matters further. Ms Early extracted from the MARTHA system an Excel spreadsheet containing all mental health applications in which the representative was recorded as Blavo Solicitors, or some variant including the word "Blavo". The results of that work are tabulated below:

Year	Applications
2012/3	965
2013/4	1,096
2014/5	1,131

43. The LAA team then identified 24,658 cases in which the law firm had claimed fees on the CWA portal in respect of representation before a mental health tribunal between 1 April 2012 and 31 March 2015. Ms Early's team considered these cases and found evidence on MARTHA that a tribunal hearing had been held in just 1,485 cases.

44. While catching all files with the word "Blavo" in the representative field, Ms Early accepted in cross-examination that her team had not searched for anagrams of "Blavo", nor indeed for the potentially obvious misspelling "Bravo." This was not, therefore, what is known as a "fuzzy" search. That said, it transpired in the course of closing submissions that the entire electronic MARTHA database was present in court. Counsel undertook a joint analysis of MARTHA and were able to present me with the agreed fact that there was no record of a "Bravo" or indeed of any other name starting with a "B" that was so similar that it might have been confused with "Blavo."

45. Mr Stewart explained that from 10 July 2015, he was involved in a series of meetings as senior employees within the LAA's Operational Assurance and Contract Management Teams discussed the Counter Fraud Team's initial findings. Louise Maxwell, Head of Counter Fraud, and Amana Humayun, Deputy Director of Operational Assurance, formally decided to open an Official Investigation. Mr Stewart told me that he did not immediately suspect fraud. Indeed, his first reaction was that this level of discrepancy could be due to errors in the data held by either HMCTS or the LAA. He was, as he said, in cross-

examination, incredulous that there could be such a large disparity. As a seasoned investigator, he did not, at that stage, rule out any possibilities.

THE OFFICIAL INVESTIGATION

46. At 9.45 a.m. on 10 August 2015, members of the LAA’s Counter Fraud, Audit and Contract Management teams attended at the law firm’s head office. They presented Ms Humayun’s letter of 10 August 2015 to Mr Blavo formally notifying the firm that the LAA was opening an Official Investigation. The letter explained that the agency had made enquiries with HMCTS and set out the following discrepancies between the records held by the LAA and HMCTS:

Year	Claims to LAA by Blavo & Co. (tribunal claims only)	Number of tribunals recorded by HMCTS	Value of claims not supported
2012/3	6,959	566	£6,540,712
2013/4	8,769	738	£8,149,270
2014/5	8,930	745	£8,053,204
Total	24,658	2,049	£22,743,186

47. In fact, Mr Stewart explained to me that the 2,049 cases included some cases where there had been no claim for payment from the LAA. Accordingly, he told me, the true number of tribunals hearings recorded by MARTHA among the 24,658 claims for payment made by the law firm was, as already stated, 1,485 meaning that the adjusted discrepancy was 23,173 cases.
48. The letter continued that such deficit was of “grave concern” and that an Official Investigation was necessary in order to determine the facts. The letter recited that the 49 files submitted for the contract compliance audit had been compared to HMCTS data and that there was no record of a tribunal hearing or indeed an application in 42 cases. The aims of the Official Investigation were set out as follows:
- “The [Official Investigation] aims to determine the following:
- Whether claims for Mental Health Tribunals have been made accurately
 - If claims have not been made accurately, to determine the circumstances which have led to claims not being accurately made and explanation of these circumstances
 - To determine whether files listed in Annex A exist and to obtain them if they do (you must take all steps to satisfy the investigators that the files exist)
 - To determine whether other periods of time are affected by the problem and to what extent”
49. There were four annexes to the letter. The three most important were annexes A, B and D.

Approved Judgment

- 49.1 Annex A: Most significantly, there was a list of the 23,173 cases in which the law firm had claimed payment but which could not be reconciled with the MARTHA data. Annex A was provided in hard copy. The paper copy in the trial bundle was sorted by submission month and, for each month, was then arranged alphabetically by surname. It is inevitably somewhat unwieldy and runs to some 464 pages. In addition, the firm was provided with an electronic copy of Annex A in Excel format.
- 49.2 Annex B: The other core attachment was a list of requests for further information which originally ran to twenty questions over five pages.
- 49.3 Annex D: This was a list of the 42 files submitted for the purposes of audit where there was no record of a tribunal having taken place.
50. The letter reminded the firm of its contractual obligations to co-operate with the investigation under clauses 9.1 to 9.6 of the 2014 contract and specifically warned that a material breach of such obligations might amount to a fundamental breach under clause 9.7.
51. Mr Stewart explained that the Annex A data was based directly on the data input by the law firm into CWA. Save that the agency had sorted the data by billing month and then surname, the CWA data was not, he said, otherwise manipulated. Accordingly, Mr Stewart was unable to explain why such data did not accord with the law firm's own records.
52. A number of staff were interviewed on 10 August 2015. Mr Stewart interviewed, among others, Frederic Blavo and Katie Fathers, his personal assistant. Ms Fathers told Mr Stewart that fee earners sent files to the firm's Head Office once the work was completed. Administrative staff completed a paper Consolidated Matter Report Form which was then supplied, together with the file, to Frederic Blavo in order that he could upload the claim on to the LAA's portal.
53. Frederic Blavo told Mr Stewart that only he had access to the CWA platform. Such information was consistent with the LAA's own records that showed that all submissions on to the CWA portal for mental health claims were made using Frederic Blavo's user name. Asked to explain the discrepancy between the data held by the LAA and HMCTS, he responded that he was not a case worker.
54. As to file storage, Ms Fathers explained:
- “completed files would be boxed up and a list of all the files attached to the front of the box. The boxes are then archived in the basement of John Street for up to a month whilst the billing is being processed and submitted. The boxes are then archived off site. Each box is category specific so that Mental Health files will only be stored in a Mental Health box. A spreadsheet is maintained which tracks which box a file is stored in and where that particular box is, either in John Street, or off-site archive.”
55. She added that the firm had used a storage company called Moving Homes until about four months earlier, but that it now had its own storage facility in St Albans. As to access, both Frederic Blavo and Ms Fathers estimated that it would take about two days to retrieve a file from storage.

Approved Judgment

56. Mr Armstrong and Dr Davies explained to Mr Blavo that the agency would be imposing a further vendor hold. In his oral evidence, Dr Davies stressed that the vendor hold was not imposed until after the August 2015 payment had been made. He did, however, acknowledge that its effect would be to starve the firm of cashflow until the hold was lifted. Mr Stewart told me that Mr Blavo and his brother were specifically asked for their observations upon the agency's proposed timeline under Annex B. Mr Blavo then accepted the timeline without objection.
57. The core information sought under Annex B was in relation to the files. Requests A1-3 and D16 and 18 read as follows:

No.	Request	Required by
A1	You must take all steps necessary to satisfy the investigators of the existence of these files. This may include such steps as showing the investigators the files in situation so that they can be 'dip sampled' and checked against the list under your supervision. It is your responsibility to inform the investigators as to how you plan to satisfy them of the files (sic) existence.	11/08/2015
A2	Provide access as soon as possible to the first 30 files on annex A. Please also print your records to show where these files are stored.	11/08/2015
A3	Provide the remainder of the files in Annex A for review in the order which they appear on Annex A. The timetable for this is open to negotiation – however due to the volume of files the LAA expects a minimum of 1,000 files a week to be presented for review.	17/08/2015
D16	Provide a written explanation as to why HMCTS has no record of the claims listed in Annex A.	11/08/2015
D18	Provide a written explanation as to why HMCTS has no record of the tribunals / applications listed in Annex D.	11/08/2015

58. In its answer to D18, the law firm said:

“We do not know why the HMCTS have no records of these files. The LAA has provided Blavo with a set of statistics. These statistics are from the HMCTS, not the

Approved Judgment

LAA. We have no idea how this data was compiled, what procedures the HMCTS has of recording data, how can we cross reference this data? ...

We need time to verify the data that you have provided. We are conducting our own private checks as to how this data was compiled. The LAA is using third party data and assuming it to be robust and correct. We cannot assume that this data is correct as data can be corrupted or misreported

If it turns out that the data is correct than (sic) the only explanation would be that the files have been claimed incorrectly. This does not mean that the clients do not exist or that they were not clients of Blavo. Perhaps a claims correction will be required but the firm contests that this would mean a block nil assessment for these files as ... the firm has provided advice to these clients.”

59. On 17 August 2015, Moving Homes delivered 976 files to the agency. Ms Fendley told me that the files were not properly labelled and were delivered up dirty complete with cobwebs. Not only were these files slightly short of the requested 1,000, but none of them were among the first 1,000 files. Further, initial analysis suggested that they were not even Annex A files.
60. Meanwhile Mr Blavo explained that he was having difficulties with Moving Homes due to the director having suffered a brain haemorrhage and finding it difficult to remember information.
61. Having identified that none of the 976 files were listed on Annex A, the agency wrote to Mr Blavo on 19 August 2015 together with an updated version of Annex B. The firm provided partial responses to Annex B on 24 August 2015. As to the delivery of the files, the firm stated that it took an average of 14 days to retrieve files but that the period could be longer for old files. The Annex B response and the covering letter variously suggested that the files could be provided to the agency in batches of 100 or 250-300 files.
62. By a letter dated 20 August 2015, the LAA imposed a further contract sanction suspending the law firm from taking on any new mental health cases.
63. By her further letter of 28 August 2015, Ms Humayun accepted that the firm could provide the first 1,000 files in batches of between 100-300 files and that such files could be delivered in any order. On 4 September 2015, Mr Blavo e-mailed a letter to Ms Humayun requesting confirmation that the agency would accept 150 files on both 4 and 7 September. These files were not, however, delivered.
64. On 8 September 2015, Mr Blavo wrote that 200 boxes of files had been received in the previous week but that they were still being catalogued. He indicated that the firm could provide 21 files immediately, and added that the firm had suffered a “break-in, theft, extensive vandalism and deliberate flooding” on Saturday 29 August that was impacting on its ability to provide the information in Annex B. Of the 21 files listed, only four were among the first 1,000 files listed on Annex A.

Approved Judgment

65. Louise Maxwell responded by e-mail on 9 September seeking immediate delivery of the four files and asking what had happened to the 300 files promised for delivery in Mr Blavo's letter of 4 September. Ms Maxwell extended time for delivery up of the first 1,000 files to 14 September 2015 and warned that, if the files were not received by that deadline, the agency would have no option but to nil assess the files.
66. On 15 September 2015, Gillian Blavo (a partner in the law firm who is no relation of Mr Blavo) informed Mr Stewart by e-mail that the firm could provide four files from the first 1,000 together with a further 35 files. Mr Stewart responded on 17 September seeking delivery of the four files and asking that the remaining 35 files be retained pending further instructions.
67. The agency received the four files later on 17 September. It now accepts that these were genuine files. In three cases, the files did not show up in the MARTHA data because the hearings were between 13 May 2011 and 9 March 2012 and therefore outside the search parameters used by HMCTS. In the remaining case, the client was also known under an alias.
68. By 23 September 2015, no further files had been produced. By a letter of that date, the agency purported to use its contractual powers to nil assess the remaining 996 of the first thousand files. By a letter of the same date, the agency also set a timeframe for the delivery up of the remaining files:
- 68.1 files 1,001-6,000 by 7 October 2015;
 - 68.2 files 6,001-11,000 by 21 October 2015;
 - 68.3 files 11,001-16,000 by 4 November 2015; and
 - 68.4 files 16,001-21,173 by 18 November 2015.

There appears to be have been a typographical error. Presumably, the last batch of files should have read "16,001-23,173." By the letter, Mr Stewart also set out the deficiencies in the information provided in answer to the Annex B requests.

69. A number of witnesses were asked whether it was reasonable to expect files to be delivered at the rate envisaged by Annex B:
- 69.1 Mr Giles said that an organisation should be able to comply with such a request. He said that firms should be able to locate any file quickly. Asked if 1,000 files in seven days was a "tall order", Mr Giles replied:

"I think there may be difficulty in providing all of those files, but I think it would not be unreasonable to expect the vast majority of them to be located and provided within seven days."
 - 69.2 Mr Stewart pointed out that, by a letter of 17 June 2015, the firm had already agreed to undertake a self-review of all files from 1 June 2014 to 31 May 2015 by 8 September 2015. Accordingly, such files should already have been to hand. Further, he stressed that the agency had made plain that it was willing to negotiate as to the timeframe. One thousand files per week was, he accepted, higher than the agency usually requested, but was reasonable and proportionate to the size of the potential losses. The fraud investigation had, he observed, identified a very significant discrepancy

Approved Judgment

involving over £22 million of public funds and the agency's own timetable envisaged its waiting for almost 6 months to receive all 23,173 files. Mr Stewart also remarked that the structure of Annex A should have been helpful to the firm since it was organised around the dates when files were closed and therefore claims made for payment, and that, given the importance of the Official Investigation and the consequences of the vendor hold, he expected the firm to deploy sufficient resources to proving the existence of the Annex A files.

- 69.3 Mr Stewart conceded that the first 1,000 files were the oldest files and that they were the most likely to have been closed and the least likely to be stored in the law firm's offices. He added, however, that a request for the most recent files was more likely to have been problematic since there was a greater risk of recently closed files being re-opened.
- 69.4 Asked about the difficulty of producing 1,000 files in strict order, Mr Stewart responded that the LAA were seeking the first thousand files but that they could be organised in any order. He said that 1,000 files were required to give the LAA a statistically robust sample. When asked the same question, Ms Fendley explained that the agency was concerned that the process might be manipulated if the firm were able to pick and choose which files to send.
- 69.5 Mr Stewart said that he did not have previous experience of requesting 1,000, let alone over 23,000, files. A large case would ordinarily involve a few hundred suspect files.
- 69.6 Asked specifically about the request to deliver up 30 files within 24 hours, Mr Stewart said that he thought that this was reasonable. He had experience of other firms providing significantly more files within a few hours in other cases. He accepted, however, that in view of Ms Fathers' indication that it would take two days to recover files, he no longer seriously supposed that the law firm could comply with this particular request. He added that the LAA was amenable to considering an alternative timeframe and that it simply wanted these files as soon as possible.
70. No further files were provided and on 6 November 2015 the LAA wrote to the law firm to inform it that files 1,001-16,000 had been nil assessed. The agency added that if the remaining files were not provided by 18 November then they too would be nil assessed. Finally, on 24 November 2015, the LAA formally nil assessed the final batch of files. By that letter, the LAA asserted that the firm was liable to repay £22,731,521.38.

SUBSEQUENT INVESTIGATIONS

71. After issue, the LAA undertook further analysis both of the 976 files delivered up on 17 August 2015 and the MARTHA data:
- 71.1 First, the LAA identified that ten of the 976 files were in fact Annex A files. This had not been initially picked up because in nine cases the tribunal hearing had been before 1 April 2012 and therefore outside the original search parameters. As to the tenth file, there was an inconsistency in spelling of the surname between the CWA and MARTHA databases.
- 71.2 Secondly, in view of the experience with the four files provided from the first thousand, the agency subsequently carried out a further search of MARTHA using an expanded date range back to April 2011. This process identified 33 further cases in which there was some evidence of a tribunal hearing. Of these, twelve were found

Approved Judgment

within the batch of 976 files delivered up on 17 August. These files were then considered as part of a further review of the 976 files.

- 71.3 Thirdly, Mr Stewart analysed the 976 files further to establish whether any might match Annex A by name and at least partial case reference number. This exercise identified 27 files which were then reviewed manually by Michelmores, the Claimant's solicitors. The solicitors' findings were set out at Exhibit MS5. Potential matches were found in four cases. On further investigation, these were each cases in which there had been a tribunal hearing before April 2012. They were therefore identified as genuine by the exercise of widening the search period. In most of the other 23 cases, the hard copy file indicated that there was no tribunal hearing. In others, there was a discrepancy between the unique file number recorded on the hard copy files and those entered by the firm into CWA.

FILES DISCLOSED IN THESE PROCEEDINGS

72. In the course of these proceedings, Mr Blavo gave disclosure of some documents in relation to 367 cases. The LAA examined these documents. Mr Stewart specifically drew attention to discrepancies relating to a male client, MD, who was included on Annex A. Mr Blavo had disclosed a first-tier tribunal decision in respect of MD, yet further investigation showed a number of oddities:
- 72.1 First, the body of the decision did not refer to MD by name.
- 72.2 Secondly, there was instead a reference to MB.
- 72.3 Thirdly, the case reference number shown on the decision matched HMCTS records for MB, and not MD. MB was represented by Blavo & Co. and had a hearing at Broadmoor Hospital on 28 February 2013.
- 72.4 Fourthly, HMCTS has no record of a tribunal hearing for MD at any hospital in England with any firm of solicitors at any time between 1 April 2011 and 31 March 2014.
- 72.5 Fifthly, MD was apparently born on the same date as MB.
73. In December 2017, the SRA disclosed a list of the Blavo & Co. files that it held. Analysis of the SRA list identified 1,044 potential matches with Annex A. Accordingly, a third-party disclosure order was obtained by consent against the SRA on 20 July 2018. Under the terms of that order, the SRA was ordered to disclose those files among the 1,044 where:
- 73.1 the file related to mental health work;
- 73.2 there was a retainer or closing letter confirming that it was a legal aid case; and
- 73.3 there was some information on the file matching a claim on the CWA portal.
74. By this process, the SRA disclosed 617 files on 7 August 2018. Michelmores analysed these files and found that 81 matched Annex A claims. Of these, 69 are now conceded. In addition, partial concessions are made in a further twelve cases where, although there is no evidence of a tribunal hearing, the Lord Chancellor concedes that a lower fee was nevertheless payable. Notwithstanding these concessions, it is instructive to consider how these cases ended up on Annex A. I have therefore considered schedule 8 to Mr Stewart's second statement which tabulates the findings in these 81 cases (although, in the text, he referred to

Approved Judgment

80 cases). The following matters are apparent from analysis of an Excel version of schedule 8:

Reason	No. of files
Different names on HMCTS records	13
No tribunal hearing on the HMCTS records, but entitled to a lower fee	12
Different spellings on MARTHA	11
Hearing date outside original search parameters	11
Unexplained	11
Different representatives recorded on MARTHA	10
HMCTS data shows patient unrepresented	6
Hearing date outside both the original and extended search parameters	4
Welsh tribunal	3

75. Michelmores concluded that the remaining cases did not match Annex A claims. The reasons for such conclusion were tabulated in schedule 7 to Mr Stewart’s second statement. I have analysed an Excel version of that schedule. It can be summarised as follows:

Reason	No. of files
File relates to a different CWA claim	216
Claim pre-dates September 2007	204
File relates to a different person	104
No name match on the file with Annex A	4
No CW1&2 form	2
No means assessment completed on the CW1&2 form	2
No tribunal hearing on the HMCTS records	2

76. The two cases where there was no record of a tribunal hearing concerned a female client, MC, and a male client, PL. The Social Circumstance Reports on their respective files showed disturbing similarities:

Approved Judgment

- 76.1 Both patients had tribunal hearings on Thursday 12 September; in 2013 in PL's case, which was indeed a Thursday, but in 2012 in MC's case despite the 12th being a Wednesday in that year.
- 76.2 Both were said to be the same age, although in each case their ages were also restated inconsistently in numerals.
- 76.3 Both were born in London and were the second eldest of seven siblings with a brother living in Ireland, a sister in Tasmania and two further sisters in South Africa, a sister in Cheltenham and a brother in Stroud.
- 76.4 Both had moved to St Albans in 1965 (despite in PL's case his date of birth being given as November 1967), where they lived for 12 years before moving to Durban in South Africa for the next ten years. Both returned to England in 1997 where they lived for two years in Oxford before moving to their current addresses.
- 76.5 Both regularly attended their local Trinity Methodist churches.
- 76.6 Both married in 1977, got divorced in 1980, remarried in 1991 before separating in 1995.
- 76.7 Both had one daughter and one son. Their daughters were the same age, share the same names and each lived in South Africa but were planning to move to Australia. Both daughters had flown into England on the day after their parents overdosed, staying for two weeks but without ever discussing the overdose.
- 76.8 Both had 12-year-old sons who had been born in South Africa but came to live in England at the age of 6.
- 76.9 Both underwent back surgery in 2002 at the Royal National Orthopaedic Hospital in Stanmore. Both were prescribed amitriptyline at a dosage of 75mg for evening pain relief and insomnia.
- 76.10 Both were diagnosed in 2002 with type 2 diabetes. In both cases, their condition had since deteriorated to type 1 diabetes and both suffered leg ulcers by reason of their diabetes.
- 76.11 Both had also suffered a deterioration in their vision in their right eyes and were waiting for laser eye treatment when they overdosed. In each case, their laser treatment was postponed.
- 76.12 Both were experiencing their first contact with mental health services and waiting for the allocation of new care co-ordinators.
- 76.13 Both gave their brothers, who shared the same name, as their nearest relatives. Both brothers had lived in Basildon but were then living with their sisters after having separated about a year-and-a-half earlier.
- 76.14 Both patients had lost their hair 20 months earlier. As a result, they had lost confidence.
- 76.15 Both held the same qualifications and had worked for the same number of years in the same job in South Africa. At the time of the reports, both then worked 30 hours per week for the same small business, save that it was said to be in different towns. Both had been with that business for 8 years.
- 76.16 Both were avid travellers, having visited twenty countries in the previous 15 years and enjoyed using their bus passes to visit little villages around the same English county.

Approved Judgment

- 76.17 Both had precisely the same level of savings and debts and were being encouraged to apply for benefits to which they might have been entitled.
- 76.18 Both took overdoses of precisely the same three drugs on 13 April, precisely one year apart.
- 76.19 Despite hailing from different towns, both were seen on the 19th of a month by the same mental health professional.
- 76.20 Both were teetotal.
- 76.21 Care notes taken on 17th of two different months were in precisely the same terms.
- 76.22 Both were seen by the same counselling psychologist, despite being in different hospitals in different towns.

THE ACCURACY OF THE MARTHA DATA

77. In cross-examination, Mr Stewart confirmed that the Lord Chancellor's claim assumed that the MARTHA data was accurate. Asked what had been done to verify its accuracy, Mr Stewart relied on three things:
- 77.1 First, and most fundamentally, the whole purpose of the LAA's requests for delivery up of the files was to verify whether there were errors in the MARTHA data.
- 77.2 Secondly, Mr Stewart pointed to the further investigative work undertaken by the LAA in taking a randomly generated sample of 144 cases in which the law firm had claimed payment for detailed investigation. This was done to test the validity of the MARTHA data. In just four cases (3%), the files could be evidenced from HMCTS records. Mr Stewart then contacted the NHS Trusts in order to verify that the HMCTS records were complete. He received responses in 101 cases. Of those:
- a) the relevant Trusts were able to confirm that in two cases there was a patient in hospital at the time of the firm's claim for payment;
 - b) in one other case, the patient existed and was attended by a representative from the law firm some six months after the claim for payment;
 - c) in the remaining 98 cases, there was no record of such patients;
 - d) in one of those cases, the Trust stated that it had no mental health facilities at the relevant time; and
 - e) in another of those cases, the mental health facility at which the tribunal hearing was purportedly held had closed in 2008 and subsequently burned down in 2010.
- 77.3 Thirdly, Mr Stewart said that the agency compared the MARTHA and CWA data for other firms of a similar size and work profile. Such analysis did not reveal any significant discrepancies.

THE ESCAPE FEE CASES

78. Finally, there are 67 escape fee cases on Annex A. Mr Stewart initially sought to justify their inclusion in the Lord Chancellor's claim observing that, while firms are required to submit their files for assessment in support of their claims for escape fees, the Claim Amendment Team would take HMCTS and NHS documents at face value. These 67 cases were therefore

Approved Judgment

included in Annex A on the basis that HMCTS had no record of any tribunal hearings in these cases.

79. Michelmores analysed these files further and identified that the files were only provided for assessment in 42 cases. Many of these cases had already been conceded following analysis of the files, but there remained 24 Annex A cases. On further investigation, the Lord Chancellor conceded 23 of these cases on the basis that there was in fact a record of a tribunal hearing and partially conceded a further case where, although the matter had not proceeded to a hearing, there was an entitlement to a lesser fee.
80. I have considered why 23 of these cases were included in Annex A notwithstanding the fact that it is now conceded that there was a tribunal hearing. To this end, I have carefully considered schedule 6 to Mr Stewart's second statement. The reasons for the failure to reconcile the law firm's claims for payment on CWA with the MARTHA data in these 23 cases can be summarised as follows:
- 80.1 In 13 cases, there was a discrepancy in the spelling of the patients' names.
- 80.2 In 11 cases, the hearing had taken place before April 2012. In two of these cases, there was also a discrepancy as to the spelling.
- 80.3 In one case, MARTHA had no record that Blavo & Co. had represented the patient.

TERMINATION OF THE LEGAL AID CONTRACTS

81. By a letter dated 30 September 2015, Mr Sirodcar wrote to the law firm on behalf of the LAA giving formal written notice of termination of the firm's legal aid contracts with effect from 1 October 2015. In giving notice, he relied on the Lord Chancellor's powers pursuant to clauses 25.4(a) and (c) of the contract.

THE DEMISE OF THE LAW FIRM

82. On 14 October 2015, the SRA formally intervened in the law firm on the grounds of suspected dishonesty. Thereafter, the SRA's intervention agents effectively controlled the law firm. On 30 November 2015, the company was compulsorily wound-up.
83. Mr Stewart accepted that after the intervention, the law firm could not supply files to the LAA other than with the co-operation of the SRA's intervention agents.

THE DEFENCE CASE

84. Mr Blavo served statements from eight witnesses including himself and his brother, Frederic. In the event, he only called two witnesses to give evidence at trial:
- 84.1 Lee-Ann Frampton-Anderson was a solicitor and director of Blavo & Co. Limited. She was head of the mental health team at the firm's St Albans' office. Mrs Frampton-Anderson was helpful in describing in general terms mental health work and the firm's procedures for opening, closing, billing, archiving and retrieving files. She also had some relevant evidence to give in respect of the law firm's search for files in September and October 2015.

Approved Judgment

84.2 Julian Goldie was an external accountant. He gave relatively limited evidence as to the law firm's audited accounts.

Lee-Ann Frampton-Anderson

85. Mrs Frampton-Anderson said that the file opening, billing, file closing and storage procedures were managed centrally. Her team would complete the file-closing forms and place the files in a box for delivery to the John Street head office for billing. As a fee earner, she was not involved in billing. Fee earners would be entitled to a bonus upon billing three times their salary. Consequently, fee earners would raise queries if the central billing information did not match their own calculations.
86. Mrs Frampton-Anderson spoke warmly of Mr Blavo. She said that he did not have any personal involvement in billing and recalled that she had had to explain what the CWA system was to him.
87. She told me of particular difficulties with file management. Specifically, that files were often opened in the name given by the hospital which would later turn out to misspelt or not the name to which the patient answered. She said that some clients in this field use several aliases, while others give police a false name and are then admitted under the wrong name. Another problem was that files would often be opened, closed when the patient chose not to pursue an application to the tribunal, billed, archived, retrieved and then re-opened some time later in order to pursue a subsequent application. Re-archived files were not, she said, properly tracked.
88. On the name issue, Mrs Frampton-Anderson gave the example from her own experience of a client who would only answer to the name "God Almighty". In such a case, she agreed that the firm's file, just as the records maintained by the hospital and tribunal, would use the person's proper name, even if the professionals had to address the client as God Almighty.
89. The firm used Moving Homes for file storage but, in Mrs Frampton-Anderson's view, somewhat outgrew their service. Difficulties were experienced in retrieving files.
90. On 29 August 2015, Mrs Frampton-Anderson received calls from two directors to say that there had been a break-in at the John Street office. She attended to find the police still on site. She said:

"The office was a mess. There had been a significant flood and there seemed to be a lot of damage. The carpets throughout the office were soaked with water, files were thrown all over the floors, contents of shelves and cabinet drawers had been emptied onto the floor and shredders emptied and scattered."

She confirmed that two servers had been removed.
91. Between early September and 14 October 2015, Mrs Frampton-Anderson was deployed to head office in what she described as "crisis management" in dealing with the LAA requests and following the theft of the John Street servers over the August Bank Holiday weekend.

Approved Judgment

She said that she was only made aware of the LAA's request for files on 3 September 2015. She was asked to look through 30-40 boxes, each containing about 5-8 files that had been retrieved from storage, and to identify whether they were Annex A files.

92. Working with Gillian Blavo, Mrs Frampton-Anderson identified approximately 37 Annex A files by 15 September, of which four were among the first 1,000 files on Annex A. She said that she found many matters on Annex A which did not correspond with the firm's own record of cases submitted to the LAA on a list that she obtained from Frederic Blavo. In cross-examination, she said that she had only been provided with a hard copy of Annex A. She had not therefore been able to interrogate the Excel file by simply searching for surname but agreed that had she been given the soft copy of Annex A then it would have been significantly easier to identify whether any particular file was or was not on Annex A.
93. Even if working from the hard copy, the files were organised by billing month and then, within each month, alphabetically by surname. Therefore, as Ms Sleeman demonstrated, on identifying that the file was billed in April 2012, one could go directly to the 11½ pages comprising a list of 529 files that were billed in that month. Since, however, they were organised alphabetically, one could quickly find whether any particular file marked "April 2012" was on Annex A or not. Unfortunately, this was not the methodology adopted.
94. Mrs Frampton-Anderson said that she would find it "difficult" to believe that the firm had claimed for attending thousands of tribunal hearings that had never taken place. Her own work in September and early October 2015 led her to the conclusion that Annex A was not reliable. She added that she was aware from her own experience that HMCTS had "some problems with its systems" in mental health work, but that at a specialist conference at some point between 2013 and 2015 she recalled being told that HMCTS had replaced or upgraded its systems.
95. Mrs Frampton-Anderson added:

"I am also aware anecdotally of extensive problems experienced by firms in using the LAA's CWA reporting systems as these were widely reported in the legal press."
96. In cross-examination, she confirmed that she had no personal knowledge of problems with the CWA database but read about problems logging on to the system in the legal press. It was clear from her evidence that she was not referring to problems with the integrity of the CWA data.
97. Equally, she identified problems with the firm's own IT systems.
98. In cross-examination, Mrs Frampton-Anderson was plainly not aware of the earlier audits. She also knew nothing of the self-audit promised by Mr Blavo of all mental health files for the period from June 2014 to June 2015.

Julian Goldie

Approved Judgment

99. Julian Goldie was employed by the law firm’s auditor, DTE Business Advisory Services Limited. He gave evidence because the firm’s relationship partner had sadly died. He produced the audited accounts for the initial post-incorporation trading period ended 31 March 2013 and then for the year ended 31 March 2014. His firm did not prepare accounts for the year to 31 March 2015 in view of the company’s liquidation.
100. The accounts showed turnover of £10 million in the 16 months to 31 March 2013 and of £11 million in the year to 31 March 2014. The total turnover for the 28 months to 31 March 2014 was therefore £21,160,758, which Mr Goldie contrasted with the pleaded claim of £22.7 million in respect of the three-year period from April 2012 to April 2015. After accounting for the differences in time periods, Mr Goldie said that “as a very broad indication”, the Lord Chancellor’s claim amounted to 60 to 80% of the law firm’s total turnover during the relevant period.
101. In cross-examination, Mr Goldie accepted that such assessment had not allowed for VAT. As is standard practice, the audited accounts stated turnover net of VAT whereas the payments made by the law firm would include VAT. Focusing therefore on the respective figures for the 12 months to 31 March 2014 where one can compare directly the turnover in the audited accounts with the pleaded claim, the claim before the modest re-amendments at the start of the trial appears to represent about 61% of the law firm’s turnover:

Turnover as per the accounts	£11,115,551
Grossed up to include VAT at 20%	£13,338,661
Pleaded claim	£ 8,149,271
Percentage	61%

APPROACH TO THE EVIDENCE

STANDARD OF PROOF

102. This case is not pleaded in fraud. Nevertheless, the central allegation is that this law firm has claimed millions of pounds of public funds to which it was not entitled. In the vast majority of cases, it is said that the client simply did not exist.
103. Mr Bourne does not shrink from the seriousness of these allegations; indeed, he submits that the case involves the shocking allegation that an enormous percentage of the law firm’s turnover was dishonestly obtained. Such allegation, he argues, is inherently implausible and should be treated sceptically by the court. He argues therefore that the court should approach the evidence as if this were a fraud case.
104. This question was considered by the House of Lords in Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 and in Re B (Children) (Care Proceedings: Standard of Proof) [2009] AC 11. Lord Nicholls said in Re H, at 586:

Approved Judgment

“When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”

105. In Re B, Lord Hoffmann added, at [15]:

“There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.”

106. Applying these principles in Braganza v. BP Shipping Ltd [2015] UKSC 17, [2015] 1 W.L.R. 1661, Lady Hale said, at [35]:

“Some things are inherently a great deal less likely than others. The more unlikely something is, the more cogent must be the evidence required to persuade the decision-maker that it has indeed happened ...

Thus, for example, most parents do not sexually abuse their children. Cogent evidence is therefore required to establish that sexual abuse is more likely than not to have happened. But once it is clear that such abuse has happened, the threshold of incredulity has been surmounted ...”

107. Here, I readily accept that most law firms do not make dishonest claims for payment, or maintain files containing forged documents in respect of non-existent clients falsely evidencing that the firm has done work. Such allegations are, as Mr Bourne rightly submitted, shocking; particularly so where, as here, it is suggested that the majority of the claims made for mental health work were false. Indeed, I said as much in the opening paragraph of this judgment. I accept that such extreme conduct is inherently unlikely.

108. Accordingly, I consider that Mr Bourne is right to submit that I should approach the evidence with great care. Specifically, I should require cogent evidence before accepting on the balance of probabilities that this law firm has been party to fraud.

MR BLAVO’S FAILURE TO CALL AVAILABLE EVIDENCE

109. Had Mr Blavo given evidence at trial, I should therefore have started from the position that I should give significant weight to any apparently credible explanations that he might have been able to give for the discrepancies in this case. However, on the morning of Monday 8 October 2018, Mr Bourne told me that he would not be calling Mr Blavo, his brother Frederic Blavo, Rodney Addy, Koshi Barna, Emmanuel Osaе or Leslie Kissei. Consequently, the only defence witnesses called at trial were Mrs Frampton-Anderson and Mr Goldie.

110. Plainly, the principal effect of Mr Blavo’s failure to give evidence himself or to call all of his witnesses is that on a number of important factual issues the Lord Chancellor’s evidence is

Approved Judgment

unchallenged. In addition, however, Ms Sleeman invites the court to draw adverse inferences.

111. In Wisniewski v. Central Manchester Health Authority [1998] PIQR P324, Brooke LJ said at page 340:

- “1. In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
2. If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
3. There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
4. If the reason for the witness’s absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.”

112. Applying this guidance in Jaffray v. Society of Lloyd’s [2002] EWCA Civ 1101, Waller LJ said, at [406]:

“on aspects where the evidence points in a direction against Lloyd’s in an area which could have been dealt with by Mr Randall the judge should have drawn an adverse inference from Lloyd’s failure to call Mr Randall to deal with it. This does not mean that any allegation that the names make against Mr Randall must be accepted because he did not give evidence. It simply means that where the evidence points in a certain direction, an adverse inference can be drawn from a failure to call a witness to deal with it.”

113. In his closing submissions, Mr Bourne argued that Mr Blavo had little or nothing to add to the facts of the case. I do not accept that analysis. I am satisfied that Mr Blavo and his brother Frederic could reasonably have been expected to have relevant evidence to give on a number of important issues of fact:

113.1 Mr Blavo was the Managing Director and sole shareholder of Blavo & Co. Solicitors Limited. His witness statement described him as the firm’s COLP (Compliance Officer for Legal Practice) and COFA (Compliance Officer for Finance & Administration). He made a 42-page statement in which he dealt with, among other matters:

- a) the incorporation and growth of the law firm;
- b) the issue of new matter starts;
- c) the storage and retrieval of files;
- d) the Official Investigation;
- e) the alleged impossibility of the deadlines set by the LAA;

Approved Judgment

- f) the steps taken by the law firm to answer the LAA's requests and to co-operate with the LAA and SRA investigations;
- g) the effects of the vendor hold;
- h) the alleged break-in;
- i) the termination of the legal aid contracts; and
- j) the SRA intervention and the ultimate winding-up of the company.

113.2 Importantly, if called, Mr Blavo was going to assert that he did not believe that any "improper" claims had been made and that "given the time and opportunity [he believed] that a proper examination of all the files would reveal that all claims actually made by the Company had been properly made."

113.3 Frederic Blavo was the firm's Practice Manager and responsible for inputting the firm's claims for payment on to the CWA portal. He made a statement dealing with, among other matters:

- a) procedures for opening and closing files;
- b) the billing of files and the operation of the CWA portal;
- c) the storage and retrieval of files;
- d) the Official Investigation;
- e) the alleged impossibility of the deadlines set by the LAA; and
- f) the alleged break-in.

113.4 If called, Frederic Blavo was going to state that he had "no reason" to doubt the validity of the claims entered on CWA and that all claims came directly from instructions given by fee earners. He would also have confirmed in general terms the levels of mental health work carried out by the firm.

114. While it would not be reasonable to have expected the Blavo brothers to have knowledge of each and every file in a busy firm, they could, in my judgment, be expected to have relevant evidence to give as to the central proposition in the Lord Chancellor's case, namely that the true level of mental health tribunal hearings undertaken by the firm was of the order of 1,000 cases per annum and nowhere near the almost 9,000 cases for which it claimed payment from the LAA. Or put in financial terms, that the true level of fees payable to the firm for mental health tribunal hearings was of the order of £750,000 and not over £8 million per annum.

115. Further, one would expect Mr Blavo and his brother to have something to say about the serious irregularities identified in a number of files; specifically:

115.1 the startling similarities between the files of MC and PL where, although Mr Blavo was not the fee earner, he was recorded in the client care letters as the supervising partner; and

115.2 the LAA's findings upon detailed investigation of the 42 files (referred to at paragraphs 38-41 above) and why it might be that claims for payment have been made in respect of alleged clients where not only does HMCTS have no record of their cases, but the relevant NHS Trusts equally had no record and where, in some cases, the tribunal

members could simply not have sat on the dates and at the venues indicated on the firm's files.

116. Even if they could not have dealt with specifics, one would expect the brothers to have wanted to give evidence to deny their knowledge of or involvement in any fraud upon the legal aid fund.
117. As will become clear below, I am satisfied that there was a case to answer on these issues and that no good reason has been offered for Mr Bourne's decision not to call Mr Blavo or his brother. In my judgment, I am therefore entitled to, and do, draw the adverse inference that the Blavo brothers did not give evidence because they had no satisfactory explanation to give. I do not, however, decide this case either solely or mainly upon such inference.
118. I do not draw any inferences from the failure to call Mr Blavo's other witnesses.

HEARSAY EVIDENCE

119. John Sirodcar would plainly have been an important witness at trial. Unfortunately, he is not well and has recently undergone quadruple heart bypass surgery. On learning that Mr Sirodcar would not be available to give evidence, the Lord Chancellor served a notice pursuant to s.2 of the Civil Evidence Act 1995 of his intention to rely on Mr Sirodcar's statement as hearsay.
120. Notice under the 1995 Act should ordinarily be given by the date on which the parties are required to exchange witness statements: r.33.2 of the Civil Procedure Rules 1998. Late notice does not affect admissibility but may be taken into account as a matter adversely affecting weight: ss.2(4)(b) and 4 of the Civil Evidence Act 1995. Plainly, the Lord Chancellor fully intended to rely on Mr Sirodcar's evidence but for his recent illness and the fact of late notice has no proper bearing on weight in this case. In assessing weight, it is, however, important to take into account the fact that Mr Sirodcar's evidence was not tested by cross-examination. I have therefore given particular consideration to matters that might have been properly put to Mr Sirodcar in cross-examination and to the extent to which his evidence is either corroborated or contradicted by other evidence in this case.

FINDINGS OF FACT

121. I am satisfied that the witnesses who gave oral evidence before me were both honest and reasonably reliable. While Mr Bourne challenges the reasonableness of the agency's actions, there was no significant dispute of fact.
122. The LAA's investigation identified a very significant discrepancy between the claims made by the law firm on the CWA portal and the cases recorded on HMCTS's MARTHA database. As Mr Bourne observes, the Lord Chancellor's case depends upon the accuracy of the MARTHA and CWA databases.

Approved Judgment

123. As to the CWA data:
- 123.1 The evidence before me is that the agency did not process the CWA data other than by applying filters to it. Accordingly, any errors in the CWA data were, on the balance of probabilities, caused by inputting errors by Frederic Blavo.
- 123.2 Mr Bourne asserts that the agency's CWA data was not even consistent with the law firm's own CWA database. Again, that might indicate some data input errors at the law firm, but no evidence was in fact called of any such discrepancy.
124. Cross-checks were made as to the reliability of the MARTHA data by undertaking the same comparison with the CWA data for other firms. Such checks did not reveal anything like the same level of discrepancies. Furthermore, the detailed analysis carried out by the LAA upon the 49 sample files that were provided for audit earlier in 2015 and, more recently, the random sample of 144 files, indicate that there is more to this case than simply data input errors.
125. In any event, the point of the Official Investigation was to review the files listed on Annex A in order to reconcile the firm's claims for payment.
126. Mr Bourne argues that the timescales imposed by the LAA for delivering up the files were unreasonable. Specifically, he criticised the request to deliver up the first 1,000 files within a week. He relies on Mrs Frampton-Anderson's evidence as to the complexity of the task. Further, he points to the limitations imposed by the vendor hold and the effects of the burglary and intervention.
127. In response, Ms Sleeman and Ms Chakravarty argue that the timescales allowed were reasonable. They make seven points:
- 127.1 First, the agency's standard practice was to ask for files within 5 working days.
- 127.2 Secondly, they pointed to the Lord Chancellor's duty to investigate promptly the possible loss of public funds in order to avoid further loss. Here delivery up of 1,000 files per week envisaged allowing the law firm almost six months to deliver up all of the requested files.
- 127.3 Thirdly, clauses 9.1 and 9.4 of the contract required the law firm "promptly" to make accessible to the Lord Chancellor any files that were held by a third party.
- 127.4 Fourthly, they relied on Frederic Blavo and Katie Fathers' statements on 10 August 2015 that it would normally take a couple of days to retrieve files.
- 127.5 Fifthly, they pointed to the fact that Mr Blavo had already committed to undertaking a full file review of 12 months' files by 8 September 2015. Such work should have meant that at least these files were to hand.
- 127.6 Sixthly, the agency granted the law firm a number of extensions of time.
- 127.7 Seventhly, one might have expected that, confronted with such a large discrepancy between the claims made for legal aid and the MARTHA records, that Mr Blavo would have prioritised the provision of the missing files. This was not a small law firm; it operated from 18 offices and employed many staff. Notwithstanding the obvious importance of this matter and the contract sanctions that had been imposed, the firm

Approved Judgment

had allocated very limited resources to the task. Indeed, Mrs Frampton-Anderson was only informed that the LAA had requested files at the beginning of September and was not aware of the earlier commitment to review files by 8 September 2015.

128. I accept the Lord Chancellor's submissions.
129. In my judgment, the vendor hold had no bearing on the law firm's ability to provide files. The August 2015 payment was made as normal and cashflow was only impacted from September. While the vendor hold would then start to bite, it was reasonable to prioritise the protection of public funds where initial investigation identified such a large discrepancy and the law firm's response had failed to do anything to allay the agency's concerns. Indeed, one would have thought that the vendor hold and suspension of the firm's contract for mental health work would have made the firm redouble its efforts to comply with the requests to deliver up files.
130. As to the alleged burglary and flood, plainly none of the LAA's witnesses could themselves confirm the burglary. They were, in my judgment, scrupulously fair in making clear that they had no reason to doubt the firm's account.
131. Ms Sleeman remarked in her closing submissions that it was a somewhat unusual burglary in which the criminals had targeted the law firm's client files but left valuable computer equipment untouched.
132. John and Frederic Blavo were to give evidence about the burglary. Such evidence was not, however, called and the only direct evidence of the burglary comes from Mrs Frampton-Anderson. She confirmed that she visited the head office after the Bank Holiday weekend and described the scene in terms that would be consistent with the office having been burgled. I accept that her evidence was honestly given and am prepared to assume, despite the incomplete evidence, that the firm did suffer both a burglary and flood damage over the August Bank Holiday weekend and that it lost two computer servers.
133. In any event, as Ms Sleeman observes, the loss of the servers ought not to have affected the law firm's ability to deliver up files. Certainly, if the files were not properly catalogued (as Mr Bourne argues they were not), the servers were unlikely to have assisted in locating the manual files. Further, and in any event, the law firm was under a contractual obligation to make and retain daily back-ups of its IT system.
134. Accordingly, I find that the alleged burglary and flood had no substantial impact on the firm's ability to provide files.
135. In my judgment, the LAA was entitled to expect the law firm to be able to access and retrieve its files expeditiously. Indeed, the law firm was under a contractual obligation to do so. The initial investigation had revealed a discrepancy of 23,173 files involving over £22 million of public funds. The situation was very serious and it would have been wholly complacent faced

Approved Judgment

with such evidence if the LAA had not sought to impose deadlines for the provision of the files. The firm had over seven weeks from 10 August 2015 before the contract was terminated and a further fortnight before the SRA intervention.

136. Whatever the position before 14 October 2015, Mr Bourne argues that the SRA's intervention thereafter prevented the law firm from complying with the agency's demands to deliver up files. I accept that intervention might well have made it difficult for the law firm to obtain and deliver up files. Intervention does not, however, explain the law firm's failure to deliver up files over the nine weeks between 10 August and 14 October 2015. That was, in my judgment, ample time for the missing files to have been provided to the LAA.
137. Further, there was nothing to prevent the law firm from working with the SRA in order to provide files to the LAA with a view to explaining the apparent discrepancy and ensuring that business could resume as normal. Indeed, the relevant SRA files have now been reviewed and the Lord Chancellor has made consequential concessions in respect of a relatively small number of files from Annex A. Such review did not, however, provide evidence to justify the law firm's claims to payment in the vast majority of instances.
138. Why then was the law firm unable to provide more than a handful of the missing files? Mr Bourne cautions against making findings of fraud in the absence of any evidence from the fee earners concerned. Citing MRH Solicitors Ltd v. The County Court sitting at Manchester [2015] EWHC 1795 (Admin), he submits that this was a matter of basic fairness and that natural justice prevented the court from making serious findings without giving the fee earners an opportunity to be heard.
139. In MRH, a recorder sitting in the County Court had dismissed a personal injury claim in trenchant terms. He found that the accident had been staged and the claims were fraudulent. The judge went further and found that the claimant's solicitors (MRH) and the car hire company were party to the fraud. Specifically, the recorder said that the solicitors were "beyond incompetent" and that they were "elbows deep in a fraudulent claim."
140. The solicitors in MRH complained that the finding had been made in a case to which they were not a party, without warning and without the opportunity to be heard in their own defence. There was, they said, a breach of natural justice and they brought proceedings for judicial review.
141. In finding that there had been a breach of natural justice, Nicol J said, at paragraphs 34-35:
 - "34. We well understand how the Recorder's suspicions were aroused. However, in the absence of good reason a Judge ought to be extremely cautious before making conclusive findings of fraud unless the person concerned has at least had the opportunity to give evidence to rebut the allegations. This is a matter of elementary fairness. In Vogon International Ltd v. The Serious Fraud Office [2004] EWCA Civ 104 at [29], May LJ (with whom Lord Phillips MR and Jonathan Parker LJ agreed) said,

‘It is, I regret to say, elementary common fairness that neither parties to the litigation, their counsel nor judges should make serious imputations or findings in any litigation when the person concerned against whom such imputations or findings are made have (sic) not been given a proper opportunity of dealing with the imputations and defending themselves.’

35. This is not only required because of fairness to the party affected but also to avoid the court falling into error- see for instance Co-operative Group (CWS) Ltd v. International Computers [2003] EWCA Civ 1955 at [38]. As Megarry J memorably said in John v. Rees [1970] Ch 345, 402,

‘As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were answered; of inexplicable conduct, which was fully explained... Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.’”

142. MRH and the cases cited by Nicol J establish the obvious proposition that a judge should not make findings of fraud or other serious impropriety against third parties who have not had a proper opportunity to defend themselves. Indeed, it is the reason why I do not in this judgment name the fee earners whose names appear on individual client files where there is reason to doubt their authenticity. Mr Bourne is, to that extent, right to urge caution. Mr Blavo has, however, had ample opportunity to address the case against his former firm:
- 142.1 First, of course, he is a party.
- 142.2 Secondly, the issues of the law firm’s entitlement to fees and the veracity of its claims for payment are at the heart of this litigation.
- 142.3 Thirdly, the law firm was under a contractual and regulatory obligation to maintain client files, and yet was unable to deliver them up.
- 142.4 Fourthly, Mr Blavo was entitled to inspect the files and other documents in this case. Indeed, there was an express invitation to inspect the files obtained from the SRA that Mr Blavo chose not to accept. He cannot simply elect not to engage with the detail of the evidence in this case and then complain that he has not had a fair opportunity to do so.
- 142.5 Fifthly, there is evidence that Mr Blavo was the supervisor of at least one of the fee earners named on the files under suspicion.
- 142.6 Sixthly, Mr Blavo was to be an important witness in this case and had every opportunity to address the serious allegations made against his former firm. In the event, he decided against either giving evidence or calling a number of other important defence witnesses.
143. In determining the true reason for the discrepancy in this case, I consider that the detailed investigation into individual cases was particularly illuminating. I find that the extraordinary similarities between the cases of MC and PL (set out above at paragraph 76) are plainly well beyond anything that could sensibly be attributed to coincidence. I indicated in the course of argument that I struggled to see an innocent explanation for the similarities in these files. Plainly, Mr Bourne shared my difficulty since no explanation was offered and his later

Approved Judgment

submission was that while the evidence indicated that the fee earner concerned might have herself committed a fraud, these files were not evidence of systemic fraud.

144. In my judgment, there are only two credible explanations: either one or both were not genuine files. Given the fact that the named fee earner did not appear in the lists of employees, and that neither MC nor PL appeared in the MARTHA database, I find on the balance of probabilities that neither file was genuine.
145. I do not, however, accept that the MC and PL files evidence an isolated instance of fraud that can be solely attributed to one individual fee earner. Indeed, I find that 42 out of the 49 files audited in July 2015 were not genuine files but were falsely created in order to justify dishonest claims for payment. I have already analysed the difficulties with these files at paragraphs 38-41 above. In short:
- 145.1 in none of these 42 cases was there any record on MARTHA of a hearing having taken place;
- 145.2 more significantly the existence of these cases could not be corroborated by the relevant NHS Trusts; and
- 145.3 detailed investigation showed a number of clear indicators of fraud.
146. While I accept Mr Bourne's argument that I should consider the agency's case with care and treat the suggestion that a law firm might make dishonest claims for payment with some scepticism, once the dam has burst there is no reason to treat the discrepancies on the remaining files with the same caution. To quote Baroness Hale, the threshold of incredulity has been surmounted.
147. Put another way, it is not inherently unlikely that the fraud was more extensive than the relatively small number of sample files on which the agency was able to devote the resources to contact the NHS Trusts and carry out a full forensic investigation. The fact that the agency was able to find cases of fraud in 42 of the 49 files presented for audit in 2015 indicates that this was no needle in a haystack. Indeed, on the balance of probabilities, I find that the practice of making fraudulent claims on the legal aid fund was endemic at Blavo & Co. In some instances, the fraud went so far as forging false files (as in the cases of ML, PC and 42 other files). In many more cases, false files were not created and consequently there was nothing to deliver up in response to the LAA's requests.
148. In my judgment, a small number of the discrepancies between the CWA and MARTHA databases listed in Annex A are capable of innocent explanation. In a few cases the date of the tribunal hearing fell outside the initial date parameters, some cases were heard at tribunals sitting in Wales and in a small number of cases it has not been possible to reconcile files because of discrepancies in the recording of clients' names. I am, however, satisfied that there are only innocent explanations in a small number of cases and that the vast majority of the files listed on Annex A were fraudulent claims for payment.

CONTRACTUAL ISSUES BETWEEN THE LORD CHANCELLOR AND THE LAW FIRM

149. Mr Bourne argues that the Lord Chancellor was not entitled to terminate the legal aid contracts with the law firm and that his wrongful attempt to terminate the firm's contracts was itself a repudiation which Mr Blavo subsequently accepted. He therefore argues that the Lord Chancellor was neither entitled to sue the firm upon the contract nor to make further assessments.
150. Ms Sleeman's primary argument is that the Lord Chancellor was entitled to and did validly terminate the contract and that he was entitled to assess the fees payable to the law firm pursuant to the contractual machinery in clause 14. Even if Mr Bourne's analysis is right, Ms Sleeman argues that there was in any event no acceptance of the alleged repudiation.

TERMINATION OF THE LEGAL AID CONTRACTS

151. As set out above, the Lord Chancellor gave formal written notice of termination by Mr Sirodcar's letter of 30 September 2015. He relied on the Lord Chancellor's powers pursuant to clauses 25.4(a) and (c) which provided:
- “For the avoidance of doubt and without limiting this Clause 25, [the LAA]'s right to terminate this Contract in respect of your material or persistent breach is set out in Clause 24. In addition, we may serve a notice on you terminating this Contract on the date specified in the notice in any of the following circumstances:
- (a) you have committed a Fundamental Breach; ...
 - (c) we receive a Report and reasonably consider that termination is required to protect Clients or us from possible serious harm or to protect public funds or Clients' interests; ...”
152. Notice was principally given pursuant to clause 25.4(c), it being alleged that the LAA:
- 152.1 had received a “Report” that the LAA had started an Official Investigation raising the possibility of fraud; and
- 152.2 reasonably considered termination to be required “in order to protect the LAA from possible serious harm and to protect public funds.”
153. In addition, the LAA alleged that the law firm had been in Fundamental Breach of the contract in that it was in material breach of its obligations under clause 9.6 to provide files and information. Accordingly, the LAA purported to terminate the contracts pursuant to clause 25.4(a).
154. Mr Bourne argues that the LAA was not entitled to give notice of termination and that its letter of 30 September 2015 purporting to give such notice was itself a repudiation of the legal aid contracts.

Termination following a report

155. As to termination pursuant to clause 25.4(c), Mr Bourne takes three points:
- 155.1 First, he argues that the clause was not engaged because the Lord Chancellor had not received a Report.
- 155.2 Secondly, he argues that even if clause 25.4(c) were engaged, there was no causal link between the Report and the Lord Chancellor's conclusion that termination was required to protect the LAA from possible serious harm and to protect public funds.
- 155.3 Thirdly, he submits that the Lord Chancellor acted irrationally in terminating the firm's legal aid contracts.
156. "Report" was defined as "a report (written or oral) about you or your personnel from an organisation that may carry out an Official Investigation." "Official Investigation" was also a defined term; it was:
- "(a) any investigation, of which you are aware, into suspected serious professional misconduct, breaches of the Act (or other legislation), or dishonesty by you or your personnel, being carried out by or authorised by:
 - (i) any organisation (including any Relevant Professional Body) which is responsible for regulating or disciplining you or your personnel;
 - (ii) us (including our investigation team);
 - (b) any investigation by the police into suspected criminal offences relevant to your operations; or
 - (c) any investigation, on reasonable grounds, authorised by us (including our investigation team) into suspected serious breaches of this contract;"
157. Mr Bourne argues that, on the true construction of the contract, a Report was limited to a report from an "organisation" responsible for regulating or disciplining the law firm or its personnel. The Claimant could not, he submits, terminate upon receipt of a Report from the LAA. He built the argument thus:
- 157.1 A Report has to be from an "organisation" that may carry out an Official Investigation.
- 157.2 This was a reference back to paragraph (a)(i) of the Official Investigation definition.
- 157.3 It would be artificial to talk of the LAA receiving a report from itself.
- 157.4 The power of termination under clause 25.4(c) was therefore limited to cases in which the Lord Chancellor received a report from an organisation following an (a)(i) Official Investigation.
158. Issues of contractual construction fall to be determined in accordance with the well-known principles identified by the House of Lords and the Supreme Court in a series of recent cases. Such principles were authoritatively summarised by Lord Neuberger in Arnold v. Britton [2015] UKSC 36, [2015] A.C. 1619, at [15]:

Approved Judgment

“When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to ‘what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean’, to quote Lord Hoffmann in Chartbrook Ltd v. Persimmon Homes Ltd [2009] A.C. 1101, para. 14. And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions.”

159. Here, the contract expressly provided for three different types of Official Investigation, namely (a) investigations into allegations of serious professional misconduct, breaches of the Act or dishonesty; (b) investigations by the police into suspected criminal activity; and (c) investigations into suspected serious breaches of the contract. “Organisation” was not a defined term and was not therefore limited simply to the organisations referred to in paragraph (a)(i) of the definition of an “Official Investigation” that were responsible for regulation and discipline. Since the organisations referred to in the definition of “Report” were those that might carry out an Official Investigation, the natural and ordinary meaning was that it would apply to any organisation that might carry out such an investigation whether under (a)(i), (a)(ii), (b) or (c). Certainly, it would extend to the police who might carry out a criminal investigation pursuant to paragraph (b). Further, I consider that it equally applied to an investigation by the LAA.

160. Such conclusion is plainly a very significant factor in the exercise of construing the contract. Indeed, as Lord Neuberger observed, at [18]:

“... the clearer the natural meaning the more difficult it is to justify departing from it.”

161. As to other terms and overall purpose, it would seem somewhat irrational to favour a construction of “Report” that allowed the Lord Chancellor to terminate the contract under clause 25.4(c) on the basis of a regulatory but not a police investigation or an investigation by the LAA into suspected serious misconduct, dishonesty or serious breaches of the contract. Such construction would not further the apparent purpose of these provisions, namely, to provide a right of termination where the provider is subject to an Official Investigation and termination is reasonable in order to protect the public fund or clients. Equally, in my judgment, commercial common sense favours a construction of the power of termination that allows the required Report to be generated by any Official Investigation.

162. Any argument about the artificiality of the Lord Chancellor receiving a Report from the LAA itself inevitably fails given that the contract expressly provided that the agency might carry out an Official Investigation under paragraphs (a)(ii) or (c).

Approved Judgment

163. On the natural and ordinary meaning of the words used in clause 25.4(c), it is not apparent that there must be any causal connection between the receipt of the Report and the Lord Chancellor's conclusion that termination is necessary for the stated purposes. While it is certainly arguable that a link was intended, I consider it unnecessary to construe the contract as requiring a causal connection. Instead I am prepared to accept that the Lord Chancellor would not be acting reasonably (as required by the second limb of the sub-clause) in the event that he concluded that termination was necessary under clause 25.4(c) unless the Report provided at least some support for that conclusion.
164. Clause 25.4(c) therefore provides the Lord Chancellor with the contractual power to serve a notice of termination upon receipt of a Report (including a Report from the LAA) where he "reasonably consider[s]" that termination is required for one of the stated purposes. It is clear from the adverb that the discretion is qualified. Further, it was common ground before me that it was an implied term of the contract that the Lord Chancellor would exercise his contractual power to give notice of termination in good faith and that he would not act arbitrarily, capriciously or irrationally. Such implied constraint upon the contractual decision-maker's power to terminate the contract is well founded in authority and imports public law principles into the exercise of the contractual power: Braganza v. BP Shipping Ltd [2015] UKSC 17, [2015] 1 W.L.R. 1661. Further, where a public authority makes a contractual claim, the other party can rely on any public-law defences: Wandsworth London Borough Council v. Winder (No. 1) [1985] A.C. 461, at pages 481-482.
165. The Report relied upon by the Lord Chancellor was a short report from Mark Gaskell dated 28 September 2015. Mr Gaskell recited briefly the history of the Official Investigation and listed the information that the firm had not provided to the LAA. He then concluded:
- "In view of the lack of co-operation with the Official Investigation and the evidence of unsupported claims I recommend termination of all of Blavo & Co.'s legal aid contracts pursuant to clause 25.4(c) of the contract standard terms as fraud at an organisational level cannot be discounted."
166. Mr Bourne, however, points to an e-mail that Mr Sirodcar sent to Catherine Little and Hugh Barrett, being the LAA's executive team, on 25 September 2015 in which he anticipated a decision to terminate. His e-mail read:
- "On 10 August we requested 1,000 files from the firm. To date only four have been received.
- The decision as to whether this is sufficient to terminate is mine and I am intending to terminate on Wednesday 30 September.
- Amana is preparing the SRA who we would wish to intervene shortly after to protect existing clients who will need to continue to receive advice ...
- I am assuming that you will have no objections but if you do please let me know by mid-day 30 September."
167. Mr Sirodcar referred to this e-mail at paragraph 42 of his statement. He explained that the decision was his because the agency's standard operating procedure required a termination

Approved Judgment

decision to be made by the responsible national contract manager or the Head of Contract Management. He added:

“I was very much aware at the time (as I am with all decisions surrounding terminating a supplier’s contract with the LAA) of the potential knock-on effect on a supplier’s trading position and that of its employees. It is not a decision that is ever taken lightly.”

168. He added that the e-mail confirmed the latest position and his views to the executive team. It was intended to obtain their opinions. He said that they had no objections.

169. Before sending his 25 September e-mail, Mr Sirodcar said that he had first consulted Mark Gaskell and Carolyn Schofield about terminating the contract. In addition, he took legal advice from the agency’s lawyers. He said that he had requested the report and advice from Mr Gaskell in order to review whether there were sufficient grounds to terminate the contract. He added, at paragraph 46 of his statement:

“If the report had produced new facts, I would have considered these. If the report led in a different direction, I would have been open to changing the decision. At that point, it confirmed my conclusion that there had been a material and persistent breach of the Contract by the Company that entitled the LAA to terminate the Contract in order to protect the LAA from possible serious harm and to protect public funds. I also considered that the Company’s failure to supply the information and files requested by the Official Investigation (and so demonstrate that the sums it had claimed from the LAA for matters listed on Annex A were true claims) constituted a fundamental breach of Contract.”

170. The decision was made by 29 September 2015 when Mr Sirodcar reported to Mr Barrett and James Hood that the contract would be terminated the following day. By the termination letter, Mr Sirodcar referred to the Official Investigation and continued:

“On the evidence available therefore it appears that you have claimed for attending thousands of Mental Health Tribunals which have not taken place. You have not provided any explanation for why you have claimed for attendance at thousands of Mental Health Tribunals which HMCTS have no record of. There are grave concerns in relation to the potential fabrication of Mental Health hearings and clients and the sums of money involved.

In relation to the files for the Contract Compliance Audit referred to above you will be aware that the Contract allows us to extrapolate the findings over subsequent claims. As there was no record of an application or a tribunal in 42 out of 49 files reviewed the sums payable to you were assessed as nil in 42 instances. An extrapolation would result in circa £4 million being repayable to us. In addition, on 10 August 2015, as part of the Official Investigation we requested 1,000 reported Matter files for checking. To date we have received only four files. No satisfactory reason has been provided for this failure to co-operate with the Official Investigation.

The Report I have received raises the possibility of fraud on your behalf because of the difference between the claims reported by you and numbers recorded by HMCTS. Fraud is also suspected because of the unexplained failure to provide the 1,000 files for checking and a request for files from a 12-month period detailed below.

You have not confirmed the availability of these files.

Approved Judgment

On the face of things, the possible fraud appears very widespread and I cannot have confidence that these actions have not taken place at an organisational level. Until we have sight of the files requested the LAA has no way of knowing that the issues are not applicable throughout your organisation. In these circumstances all your Contracts are affected: your failure to co-operate and to comply with your contractual obligations is resulting in a lack of assurance that the issues do not affect all your Contracts.

Within the meaning of Clause 25.4(c) I reasonably consider that termination of the Contracts is required to protect the LAA from possible serious harm and to protect public funds.

Your Contracts are accordingly terminated under Clause 25.4(c) of the Contract Standard Terms which apply to (each of) the Contracts.”

171. On 21 October 2015, Mr Blavo requested an informal review of the decision to terminate the contract. Mr Sirodcar responded on 3 November 2015 that, as the position had not changed and no further files had been provided to substantiate the claims made, the termination decision would stand. Mr Sirodcar drew Mr Blavo’s attention to the right to seek a further review pursuant to clause 27 of the contract. No such review was sought.
172. In my judgment, there was nothing irrational about the Lord Chancellor’s decision that termination was reasonably required to protect him from possible serious harm or to protect public funds. Here, there was unexplained evidence of a very significant discrepancy between the number of tribunal cases recorded by MARTHA and the claims made by the law firm on the CWA. Investigation had revealed clear evidence of fraud and the law firm had failed to co-operate with the Official Investigation and was either unable or unwilling to deliver up the files to justify their claims for payment. Sufficient time had been given to produce the files, but in seven weeks only 980 files had been delivered up and, of those, only a tiny proportion provided evidence to justify the claims made. Indeed, the picture was so serious that, arguably, it would have been irrational for the Lord Chancellor to have failed to respond to Mr Gaskell’s report by exercising his right of termination.

Termination for fundamental breach

173. As to termination pursuant to clause 25.4(a), Mr Bourne argues that the alleged breach of clause 9.6 was not made out.
174. The relevant parts of clause 9.6 provided:
- “You must co-operate with us, our employees, agents or any statutory or regulatory body during any Audit (including when you are subject to an Official Investigation) carried out by us. You must provide all such explanations and answer truthfully, fully and promptly all questions which are put to you by any person carrying out the Audit and which relate to this Contract. You must, as soon as we require it, provide us with such assistance and facilities as we may reasonably require including the following:
- (c) making available any Records in connection with the performance of your obligations under this Contract as any person carrying out the Audit may request including providing assistance in accessing such Records in the format we require (including electronic and paper format); ...

Approved Judgment

- (e) provide to us in a readily legible form copies of Records requested by us (and/or permit any person carrying out the Audit) to copy Records using any reasonable means required by such person, at your expense) and we shall be entitled to remove such copies and hold them elsewhere; ...”

175. The contract contained a number of provisions in respect of the provider’s obligation to maintain efficient files:

175.1 Clause 8.1 required the provider to maintain files for each matter and/or case in an “orderly manner, showing all correspondence, attendance notes and disbursements ..., what Contract Work was performed, when it was performed and by whom, how it was performed and how long it took.”

175.2 Clause 8.2 required the provider to “record all information required by this Contract promptly and accurately and in accordance with this Contract.” Further the clause provided that material or repeated failure to do so would be deemed to be a “Fundamental Breach.”

175.3 Clause 8.3 required the provider to maintain true, accurate and complete records in connection with the Contract. Such records were to include files for each matter and/or case as referred to in clause 8.1.

175.4 Clause 8.4 provided:

“Records maintained pursuant to Clause 8.3 must be sufficient:

- (a) to verify and demonstrate performance of and compliance with your obligations under this Contract;
- (b) to verify and demonstrate the accuracy of information supplied by you in respect of Contract Work;
- (c) to enable Assessments to be performed;
- (d) to verify and demonstrate the accuracy of all information supplied by you under or in connection with Clause 14;
- (e) to facilitate an Official Investigation; and
- (f) for such other purposes as we reasonably consider necessary in connection with our statutory duties or functions.”

176. By his letter, Mr Sirodcar asserted that the law firm had failed to co-operate with the LAA’s requests. He gave the following particulars of breach:

“In particular, you have failed to:

- prove that certain files exist;
- produce a full list of all staff employed between 1 April 2012 and the present;
- confirm and identify which staff are paid a salary and which are paid commission;
- provide written confirmation of who within your organisation is responsible for billing;
- to provide written confirmation of who within your organisation is responsible for reviewing and submitting CWA submissions;

Approved Judgment

- provide a satisfactory written explanation for why HMCTS have no record of certain of the tribunal hearings on which your Claims are based;
- produce a list of all consultants used in Mental Health work since 1 April 2012 and the cases/Matters they worked on;
- provide a list of all live Mental Health cases/Matters you have identifying the office and fee earner;
- provide a list of all files stored by Mr Chaudrhury (sic) for you;
- provide a signed copy of the interview notes for John Blavo taken on the 11 August 2015;
- provide a written explanation from you as to how the fraud procedures in the Office Manual operate in practice; and
- provide a full list of all files in storage/archive, including box references, dates sent to storage and file names.”

These, Mr Sirodcar, asserted were material breaches of clause 9.6.

177. By clause 9.7, any material or repeated breach by the provider of any of clauses 9.1 to 9.6 was deemed to be a “Fundamental Breach.” Accordingly, Mr Sirodcar’s letter concluded:

“We may, therefore, terminate the Contract as a consequence of your failure to co-operate with the Official Investigation which is a breach of Clause 9.6 of the Contract Standard Terms. The Contract is hereby additionally terminated for Fundamental Breach from 1 October 2015. This termination is proportionate to the circumstances as there has been a serious failure to co-operate in the Official Investigation. Clients and/or public funds are at risk of harm – see Clause 9.10 of the Contract Standard Terms.”

178. In my judgment, material and repeated breaches of clause 9.6 were plainly made out. Focusing on the central issues, there was a clear failure to co-operate with the Official Investigation by providing full, truthful and prompt explanations and by failing to provide files to the LAA. Given the scale of the unexplained discrepancy between the claims for payment and the HMCTS data, it was in my judgment unarguably proportionate and rational to terminate the contract under clause 25.4(a).

Conclusion on termination

179. Accordingly, I find that the law firm’s legal aid contract was validly terminated pursuant to clauses 25.4(a) and (c). Mr Blavo’s case on repudiatory breach therefore fails.

ASSESSMENTS

The power to assess

180. By clause 14.6, the Lord Chancellor was entitled to assess all claims for payment under the legal aid contract. Clause 14.12 provided:

Approved Judgment

“We may issue a notice of Assessment or notice of a debt due to us in connection with Contract Work, which has the effect of making the amount specified in it payable to us, if:

- (a) we have made an ‘overpayment or mispayment’ to you; or
- (b) in respect of a Matter or case, you have breached this Contract and, as a result of the breach, we can demonstrate that we have incurred (or will incur) a financial loss; or
- (c) where you undertake civil Contract Work, you have failed to submit a Claim, as required by this Contract, after having received a Payment on Account from us in respect of the relevant Matter or case.”

181. As set out above, the first nil assessment was made on 23 September 2015. All of the remaining nil assessments were made after the termination of the contract. The right to assess was preserved post-termination by clause 26.8:

“Subject to the provisions of this Contract, the suspension or ending of this Contract is without prejudice to any of your or our accrued rights (including our rights to Assess your Claims and to recover any overpayments to you and your rights to recover in respect of any underpayments by us). This includes Clauses 26.12 to 26.19.”

182. Clause 25.6 provided that the contract was suspended immediately with effect upon the SRA intervening in the law firm. Even after suspension, the right to assess was preserved by clause 26.8. Accordingly, I reject Mr Bourne’s submission that the effect of suspension was to prevent the Lord Chancellor from raising further assessments.

183. Having rejected Mr Blavo’s argument upon repudiation, it follows in my judgment that the contractual power to assess survived both termination of the contract and its suspension upon the SRA’s intervention.

The exercise of the power

184. A contract that bestows upon one party the power to assess the sum properly payable for work done is a classic Braganza power. Thus, the exercise of the power was again subject to implied terms that the power would be exercised rationally and in good faith. The contractual decision-maker was the Lord Chancellor rather than this court, but the Lord Chancellor’s assessment decisions are open to challenge on public law grounds.

185. While accepting that the Lord Chancellor had a contractual entitlement to nil assess, Mr Bourne argues that his decision to do so was a breach of his public law obligations. He submits:

185.1 It was unreasonable and unfair to require the law firm to provide the first 1,000 files in order.

185.2 Annex A lacked necessary information such as the identity of the relevant branch of the law firm or the applicable level of the mental health scheme.

185.3 It was unreasonable to refuse to accept delivery of anything other than the first 1,000 files.

Approved Judgment

185.4 No proper account was taken of the difficulties in identifying and retrieving large number of files stored off-site, or the effect of (1) imposing the vendor hold on 10 August; (2) the suspension of the firm from taking further mental health cases on 20 August; (3) the burglary and flood on 29 August; and (4) the SRA intervention on 14 October 2015.

185.5 Imposing a nil assessment was a disproportionate remedy.

186. I have already addressed the reasonableness of the Lord Chancellor's actions in seeking the delivery up of files and the effects of the vendor hold, suspension, burglary, flood and intervention.

187. In my judgment, the Lord Chancellor was entitled to make nil assessments. There is nothing in this case to indicate a want of good faith on the part of the Lord Chancellor. Nor can it sensibly be argued that, having waited some weeks with very little return, it was irrational to assess at nil the firm's entitlement to fees in a self-certification system upon the solicitors being unable to produce the files or otherwise prove that the clients existed or that the work claimed was done.

THE LAW FIRM'S LIABILITY

Notices of assessment

188. Mr Bourne submits that the Lord Chancellor issued notices of assessment rather than notices of debt in this case. He submits that the issue of notices of assessment did not necessarily give rise to a claim in debt against the law firm. In my judgment, clause 14.12 created a debt upon issue of a notice of assessment. Indeed, clause 14.16 makes this clear.

Appeal rights

189. Further, Mr Bourne contends that the law firm's appeal rights were never exhausted. Paragraph 6.67 of the 2014 Standard Civil Contract Specification afforded the law firm the right to appeal the Lord Chancellor's assessment to an independent costs assessor. Paragraph 6.68 regulated the right of appeal and provided:

“The appeal must be made in writing (setting out full reasons) within 28 days of notification of the Assessment decision, and must be accompanied by the file. We will only extend the 28-day time limit where you have requested an extension for good reason within 21 days. Any extension of the time limit will be for a maximum of a further 14 days.”

190. Here, no appeals were lodged in respect of any of the nil assessments. Mr Bourne submits that the firm's appeal rights were suspended upon the SRA intervention. First, he argues that that was the proper construction of the contract. Secondly, he submits that it was in any event practically impossible for the firm to pursue an appeal because it could not provide the files required to support it.

191. There is, in my judgment, no merit in the appeal argument:

Approved Judgment

191.1 While the effect of clause 25.6 was that the contract was suspended upon the intervention, clause 26.8 expressly provided that suspension was without prejudice to the Lord Chancellor's right to assess. Such right carried it with it the safeguard of the firm's ability to appeal against any assessment. Accordingly, upon its true construction, the contract did not suspend the firm's appeal rights following the intervention.

191.2 I accept that it was practically impossible for the firm to pursue an appeal but that was not because the firm was at the disadvantage that it could not access its files but because, in many cases, the files simply did not exist.

191.3 In any event, paragraph 6.68 is clear. The maximum time for lodging an appeal was 28 days albeit that an extension of up to 14 days could be given.

191.4 Upon the expiry of the extended 42-day period, there could in my judgment be no question of a subsisting right to appeal. Indeed, paragraph 6.69 provided:

“Failure to comply with any of the requirements set out in paragraph 6.68 means that you accept our decision and lose your right to dispute it.”

192. Even if there were unexhausted appeal rights, Ms Sleeman relies on clause 14.15, which provided:

“Where the ‘overpayment or mispayment’ provisions of this clause 14 apply because of a reduction of a Claim on Assessment then, unless we consider that there is a risk to public funds, we will not seek repayment until any appeal against the (initial) Assessment has concluded.”

193. Here, the Lord Chancellor expressly relied on his assessment that there was a risk to public funds in the final nil assessment on 24 November 2015. In my judgment he was plainly right to identify such risk and was therefore entitled to seek immediate payment of the monies owed regardless of any appeal.

Liability

194. Blavo & Co. is therefore liable to repay the sum of £22,136,001.71 to the Lord Chancellor. Such sum is calculated as the total monies repayable upon the nil assessments raised after giving credit for the small number of further genuine files discovered by the Lord Chancellor in preparing this case for trial:

Narrative	Value
Original claim	£22,371,521.38
10 files later identified as Annex A files	(15,767.91)
69 files disclosed by the SRA	(119,672.89)
Partial reduction for 12 further files disclosed by the SRA	(6,643.23)
24 escape fee cases	(93,435.64)
	£22,136,001.71

Approved Judgment

195. If, however, I am wrong in accepting the nil assessments then I would in any event find that the law firm is indebted to the Lord Chancellor in the same sum. I have set out with some care the investigations undertaken by the LAA in respect of the 23,173 files. Its investigation has, in my judgment, been rigorous and was properly re-opened upon being provided with additional files by the SRA. I accept the possibility that there might, despite the investigations carried out to date, still be a small handful of further genuine files that have not been reconciled because they relate to a Welsh tribunal, or because the tribunal date was before even the expanded search period or because of some unidentified spelling mistake in the client's name, or indeed for some other unexplained reason. I am, however, required to decide this case on the balance of probabilities. Applying that standard, I find that it is more likely than not that the core explanation for the discrepancies between the two databases is the systemic fraud practised by Blavo & Co. Accordingly, on the balance of probabilities I am satisfied that the law firm is indebted to the Lord Chancellor in the sum of £22,136,001.71.

MR BLAVO'S LIABILITY TO THE LORD CHANCELLOR

THE DEEDS OF GUARANTEE AND INDEMNITY

196. Mr Blavo entered into two contracts of suretyship; one with the LSC on 12 March 2013 and a second with the LAA on 20 June 2014. Both were by way of deed and bore the title "Personal Guarantee and Indemnity." Mr Blavo was referred to in the deeds as "the Guarantor."

197. Clauses 1 and 2 of the 2014 deed provided:

- “1. The Guarantors unconditionally and irrevocably guarantee that the Provider (i) shall perform all of its obligations under the Contract(s) in accordance with the terms of such Contract(s) and (ii) will pay all monies due to the Lord Chancellor under or in respect of the Contract(s).
2. As a separate and primary obligation, the Guarantors unconditionally and irrevocably agree to indemnify the Lord Chancellor in respect of any losses, costs, expenses, damages or liabilities suffered or incurred by the Lord Chancellor as a result of the Provider (or any receiver, administrator or similar person appointed for the Provider) failing to comply with its obligations under the Contract(s).”

198. The legal basis on which a creditor can sue upon a guarantee was considered by the House of Lords in Moschi v. Lep Air Services Ltd [1973] A.C. 331. Lord Reid said, at pages 344-345:

“With regard to making good to the creditor payments of instalments by the principal debtor there are at least two possible forms of agreement. A person might undertake no more than that if the principal debtor fails to pay any instalment he will pay it. That would be a conditional agreement. There would be no prestable obligation unless and until the debtor failed to pay. There would then on the debtor's failure arise an obligation to pay. If for any reason the debtor ceased to have any obligation to pay the instalment on the due date then he could not fail to pay it on that date. The

Approved Judgment

condition attached to the undertaking would never be purified and the subsidiary obligation would never arise.

On the other hand, the guarantor's obligation might be of a different kind. He might undertake that the principal debtor will carry out his contract. Then if at any time and for any reason the principal debtor acts or fails to act as required by his contract, he not only breaks his own contract but he also puts the guarantor in breach of his contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid instalment but for damages. His contract being that the principal debtor would carry out the principal contract, the damages payable by the guarantor must then be the loss suffered by the creditor due to the principal debtor having failed to do what the guarantor undertook that he would do."

199. Lord Diplock added at page 348:

"It follows from the legal nature of the obligation of the guarantor to which a contract of guarantee gives rise that it is not an obligation himself to pay a sum of money to the creditor, but an obligation to see to it that another person, the debtor, does something; and that the creditor's remedy for the guarantor's failure to perform it lies in damages for breach of contract only. That this was so, even where the debtor's own obligation that was the subject of the guarantee was to pay a sum of money, is clear from the fact that formerly the form of action against the guarantor which was available to the creditor was in special assumpsit and not indebitatus assumpsit: Mines v. Sculthorpe (1809) 2 Camp 215."

200. Clause 1 of the deed in this case was a true guarantee, namely an agreement to "see to it" that the firm would itself perform its obligations and, specifically, that it would pay any monies due to the Lord Chancellor. Accordingly, upon the firm's failure to comply with its obligations under clause 9.6 and its failure to repay monies due under the contract, Mr Blavo was himself in breach of clause 1 of the guarantee. The claim against him is therefore in damages. The measure of such damages is the sum that the firm itself failed to pay to the Lord Chancellor.

201. Clause 2 comprises an indemnity. It is, however, an indemnity to pay the Lord Chancellor's losses, costs, expenses, damages or liabilities. Accordingly, the action is again in damages. In my judgment, on the facts of this case, it gives rise to the same measure of loss; namely the monies that were not paid by the law firm.

DISCHARGE OF THE GUARANTEE

202. Mr Bourne rightly submits that if a creditor commits a repudiatory breach of his contract with the principal debtor such that the debtor is entitled to and does treat the contract as at an end, the surety is also discharged from further liability. In view, however, of my findings that (1) the contract was lawfully terminated by the Lord Chancellor pursuant to clauses 25.4(a) and (c); and (2) consequently such termination was not itself a repudiatory breach of contract, this defence fails.

PROOF OF THE CLAIM AGAINST MR BLAVO

203. As in any guarantee case, it is first necessary to consider whether the Lord Chancellor has established his claim against the law firm. In this regard, Mr Bourne is right to submit that the Lord Chancellor cannot simply rely upon the fact that the insolvent law firm has failed to defend this claim. As James LJ observed in Re Kitchin, ex parte Young (1881) 17 Ch. D. 668, at page 672:

“The principal debtor might entirely neglect to defend the surety properly in the arbitration; he might make admissions of various things which would be binding as against him, but which would not, in the absence of agreement, be binding as against the surety.”

204. Citing these principles, Mr Bourne submits that the Lord Chancellor cannot rely upon the failure by the law firm, and after its intervention by the SRA, to produce files thereby leading to a nil assessment. Such failure, he argues, is an example of the principal debtor neglecting properly to defend the surety. Therefore, Mr Bourne argues that the Lord Chancellor must strictly prove each and every item of loss. Rejecting the Lord Chancellor’s argument that it would be disproportionate for him to have to prove each item of loss, Mr Bourne argues that proportionality has no role in excusing a claimant from strict proof of its claim.

205. Mr Bourne is right to argue that considerations of proportionality do not excuse a claimant from proving his case. In my judgment, there is a difference, however, between a principal debtor’s failure properly to defend itself against a claim, and a failure which itself amounts to a breach of contract. The latter may of course be the very act that gives rise to the liability and places the guarantor in breach of his own secondary liability to “see to it” that the debtor complies with the contract.

206. Mr Bourne points out that there is no conclusive evidence clause. Accordingly, he submits that the Lord Chancellor is obliged to prove his case strictly. While there is no conclusive evidence clause, Mr Blavo guaranteed to “see to it” that the law firm would pay monies payable under the legal aid contract and, in turn, such contract provided a contractual mechanism whereby the Lord Chancellor could assess disputed fee claims. Such power was subject to checks and balances, namely the Braganza implied term and the right of appeal.

207. In my judgment, the Lord Chancellor is therefore entitled to rely upon the nil assessments in proving the claim against Mr Blavo. If, however, I am wrong then, for the reasons explained above, the Lord Chancellor has in any event proved his case regardless of the assessments. Accordingly, I assess damages in the sum of £22,136,001.71.

CONCLUSION

208. I give judgment for the Lord Chancellor against Mr Blavo in the sum of £22,136,001.71.

Approved Judgment

Lord Chancellor v.(1) Blavo & Co. Solicitors Ltd
(2) John Blavo