

Neutral citation number: [2023] EWHC 465 (Comm)

CLAIM No. CC-2021-MAN-000004

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

CIRCUIT COMMERCIAL COURT (KBD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Before:

His Honour Judge Pearce sitting as a Judge of the High Court

Between:

LITKRAFT LIMITED

Claimant

- and -

(1) SIMON COTTRELL

Defendants

(2) CHRISTOPHER WILLIAMS

(3) EDWARD GOLDSMITH

Ms Claire Bunbury (instructed by **FWJ Legal Ltd**) for the **Claimant**

Mr Steven Fennell (instructed by **Pinsent Masons LLP**) for the **Defendants**

Hearing dates: 28, 29, 30 November 2022 and 1 December 2022

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The time and date for hand-down is deemed to be 10am on Friday 3 March 2023.

INTRODUCTION

1. The Claimant is a Claims Management Company. It was founded by Mr Arturas Janavicius, a qualified lawyer who is Lithuanian by birth. Mr Janavicius and the company appear to have had good connections in communities of people from Eastern Europe, especially Lithuania, assisted by their ability to translate to and from English, in particular in the context of litigation. As a result it was able to introduce a lucrative market of potential clients¹ to law firms.
2. The Defendants are solicitors who traded as Goldsmith Williams Solicitors². Much of their business related to the property market, especially equity release. However, it also had a thriving business in representing clients in Personal Injury claims. The Claimant was one of many introducers with whom it developed a relationship.
3. From around September 2011, the Claimant started to introduce clients to GWS. At first there was no written contract between the parties, but on 1 April 2013, the Claimant and GWS entered into an agreement for the provision of services (“*the 2013 Contract*”). That agreement coincided with parts of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“*LASPO*”) coming into force. *LASPO* had a significant effect on dealings between solicitors’ firms and case management companies, most particularly because of the provisions of section 56 which prohibited the payment of referral fees. Those engaged in this business had to be careful to avoid entering into arrangements that offended against that prohibition. The contract between the Claimant and GWS was, as Mr Janavicius acknowledges, an attempt to ensure compliance with *LASPO*. Whether it was successful is a matter that does not need to be dealt with, at least for the purpose of resolving the preliminary issues in this case.
4. At the time of the 2013 Contract, the parties anticipated the continued payment of fixed fees by GWS to the Claimant for its services, although the written contract did not deal

¹ There was some caution about the use of the word “*client*” on the part of the Claimant. It is the Claimant’s case that it did not enter a contractual relationship with those whom it introduced to law firms such as GWS. Whilst it is possible to see the makings of an argument that there was a contractual relationship, I ruled that it was not open to the Defendant to pursue this argument as noted below and I have not ruled on it. Nevertheless, I use the word “*client*” to mean someone introduced by the Claimant to GWS who subsequently instructed GWS to pursue a claim on their behalf, regardless of the argument as to whether such a person entered into a contractual relationship with the Claimant.

² This is asserted to be the trading name in the Particulars of Claim and admitted in the Defence. In fact, the Defendants seem to have traded under the simple name “*Goldsmith Williams*” and that is the name of the party to the 2013 Contract referred to below. The names appear to have been used interchangeably. I shall abbreviate the firm name to GWS.

with the detail of the fees. The Particulars of Claim pleads and the Defence admits that these fees fell into 3 categories:

- 4.1. Translation fees, which depended on the work required in any particular case and were not payable if not recovered from the relevant defendant or insurer in the particular case;
 - 4.2. First Tranche Service Fees, being the sum of £300 plus VAT payable at an early stage in the case;
 - 4.3. Second Tranche Service Fees³, being the sum of £360 plus VAT from 1 April 2013 to 18 August 2013, £250 plus VAT from 19 August 2013 to 31 October 2013 and £300 plus VAT from 1 November 2013 to 31 August 2015, payable on successful conclusion of the case.
5. Payment of the First Tranche and Second Tranche Service Fees was varied with effect from 1 September 2015 to the payment of a single fee of £600 plus VAT (*“the Single Service Fee”*) early in the case.
 6. From shortly after the 2013 Contract was executed, the Claimant and GWS had discussions about the payment of a higher fee for claims of a higher value (what came to be known as *“High Value Cases”*). It is common ground that the parties considered a percentage based fee. However, the parties differ on whether they reached a concluding and binding contract on this issue.
 7. The Claimant’s case is that the 2013 Contract was varied with effect from around 29 January 2014 so as to require the Defendant to pay 17.5% of the costs recovered by GWS in High Value Cases (defined as cases where damages were in excess of £25,000 and the case was not being dealt with in a fixed costs regime), capped at £10,000; alternatively that a new contract was entered into by the Claimant and GWS obliging such payment in High Value Cases. In contrast, the Defendant denies that there was a concluded agreement as to payment for High Value Cases, whether by variation of the 2013 Contract or by the parties entering into a new contract.
 8. The Claimant continued to provide case management services to GWS but a dispute arose as to the payment of its invoices. This led to the Claimant issuing a statutory demand on 8 March 2016. GWS applied to set it aside and ultimately the dispute was compromised by an agreement dated September 2016 (*“the Settlement Agreement”*). It is the Claimant’s case that the Settlement Agreement gives rise to an estoppel that

³ Mr Janavicius said that these were sometimes known as *“back end service fees.”* The phrase is used in the email from Mr Buckley to Mr Janavicius dated 21 January 2014 referred to below.

prevents the Defendants from asserting that the contractual obligations of GWS relating to High Value Cases were other than on the terms referred to in that agreement, namely, to pay to the Claimant in respect of services provided by it a sum calculated as 17.5% of profit costs capped at £10,000.

9. Following the execution of the Settlement Agreement, the Claimant stopped introducing new business to the Claimant, though it continued to provide services in respect of existing cases. Their relationship has gradually wound down, through there remain a significant number of issues between the parties as to liability for fees.

THE LITIGATION

10. The Claimant commenced a claim for unpaid fees on 25 January 2021. The fees claimed fall into several categories:
 - 10.1. Fees allegedly due as First Tranche Service Fees;
 - 10.2. Fees allegedly due as Second Tranche Service Fees;
 - 10.3. Fees allegedly due as Single Service Fees;
 - 10.4. Translation fees;
 - 10.5. Fees allegedly due in respect of High Value Cases;
11. The claim is stated to be in the sum of £569,446 or alternatively such sum as the court may determine. In addition the Claimant seeks an inquiry and account of the sums due.
12. After close of pleadings, it was apparent that, putting aside the detail of the sums allegedly due, there were certain high level issues relating in particular to the Defendants' alleged liability for the payment of fees on High Value Cases, the payment of translation fees where these were not recovered from a third party and the Defendants' liability to pay sums where files were transferred to other solicitors. At a Case Management hearing on 5 October 2021, it was ordered that there be a trial on certain preliminary issues that are set out more fully below.
13. The trial of the preliminary issues was listed before me for five days from 28 November 2022, though was in fact concluded in four. I am grateful to counsel for the efficient use of court time in that respect. I heard from Mr Arturas Janavicius⁴ and Ms Viktorija Milasevuciene⁵ on behalf of the Claimant; and Mr Christopher Williams⁶, Mr James Buckley⁷ and Mr Simon Cottrell⁸ on behalf of the Defendants.

⁴ Mr Janavicius is a director of the Claimant. He is sometimes known as Arthur.

⁵ Head of Administration for the Claimant.

14. The structure of this judgment is as follows:
 - 14.1. To set out the issues;
 - 14.2. To set out the relevant legislative background in respect of the payment of referral fees;
 - 14.3. To summarise the factual evidence of the dealings between the parties, considering the initial agreement, the alleged variation relating to High Value Cases and the circumstances of the Settlement Agreement;
 - 14.4. To summarise the arguments advanced by each party on the issues;
 - 14.5. To consider those arguments;
 - 14.6. To summarise my conclusions and to consider the appropriate steps that might be taken in the light of them.

THE ISSUES

15. The following issues were agreed to be appropriate for resolution at a trial of preliminary issues:
 - 15.1. Whether the 2013 Contract was varied by the exchange of emails referred to at paragraphs 17 to 19 of the Particulars of Claim to provide that in respect of High Value Cases, the Claimant would be entitled to receive 17.5% of costs recovered by the Defendants, capped at £10,000 in respect of cases issued on or after 5 September 2011 (Issue 1 - Variation).
 - 15.2. Whether a new written contract was agreed between the parties as pleaded at paragraph 23 of the Particulars of Claim (Issue 2 - the New Contract Issue).
 - 15.3. Whether, on its true construction, clause 6 of the Settlement Agreement has the meaning and effect contended for at paragraph 30 of the Particulars of Claim. (Issue 3 – Settlement).
 - 15.4. Whether the Defendants are bound by the estoppel as pleaded at paragraph 31 of the Particulars of Claim (Issue 4 - Estoppel).

⁶ The Second Defendant.

⁷ He is described as Business and Development and Medico-Legal Director of GWS on his business card, though in his witness statement he describes himself as Business Development Manager and in charge of the internal medico-legal organisation, Amber-Medico. He is sometimes known as Jim.

⁸ The First Defendant.

- 15.5. Whether the contract asserted by the Claimant for the payment of percentage fees in High Value Cases is void for illegality as pleaded at paragraph 30 of the Defence (Issue 5 - Illegality).
 - 15.6. Whether the Claimant is entitled to a quantum meruit in respect of High Value Claims if it does not have any entitlement thereto under the terms of a contract or an estoppel and, if so, on what basis is it to be calculated (Issue 6 - Quantum Meruit).
 - 15.7. Whether the limitation period for the sums claimed by the Claimant commenced on the date of the Claimant's invoice as contended for at paragraph 31(c)(ii) of the Defence or some other date (Issue 7 - Limitation).
 - 15.8. Whether the Defendants' obligation to pay sums due to the Claimant is conditional upon the delivery of a valid VAT invoice as contended for at paragraph 31(c)(vi) of the Defence, or whether the delivery of a fee note is sufficient as contended for at paragraph 31(c) of the Reply (Issue 8 - VAT Invoices).
 - 15.9. Whether the 2013 Contract governs the payment of fees for translation services, as alleged at paragraph 10 of the Reply, or whether translation services were governed by a separate agreement as alleged at paragraph 12 of the Defence (Issue 9 - the Translation Fees Agreement).
 - 15.10. In any event, whether the Defendants' liability to make payment to the Claimant in relation to translation services is conditional upon recovery of such sums from the other party to the relevant personal injury claim ("the third party") (Issue 10 - Liability for Translation Fees).
 - 15.11. Whether the Defendants have any liability to the Claimant in respect of files transferred from the Defendants to another firm of solicitors prior to the conclusion of the relevant claim (Issue 11 - Transferred Cases).
16. During the course of opening and then closing submissions, some of these issues were narrowed.
- 16.1. It is common ground that Issues 1 and 2 are alternatives. During closing submissions, counsel agreed that the Claimant's case on the Variation Issue was more convincing than its case on the New Agreement Issue. I agree that this is so, but in the event, my finding on the Variation Issue means that it is not necessary to deal with the New Agreement Issue at all.

- 16.2. Counsel for the Claimant confirmed that Issues 3 and 4, relating to the Settlement Agreement and the estoppel, are only live in so far as the Claimant fails on Issue 1 or Issue 2. Since the Claimant succeeds on Issue 1, it is not strictly necessary to decide these issues. Issue 3 is a matter of contractual construction which could only properly be determined in the light of the conclusion on issues 1 and 2. However, given that the Estoppel Issue raises factual questions that are best determined now in case I am wrong on other issues, it is appropriate to determine these now.
- 16.3. As to Issue 6, the claim for a quantum meruit, this is academic since the Claimant succeeds on Issue 1, subject to the defence of illegality on Issue 5.
- 16.4. Issue 7, the Limitation Issue, is no longer live, and no ruling is sought on it.
- 16.5. In respect of Issue 8, the VAT Invoice Issue, this remains in issue though I am told it is relevant only to a costs argument.
- 16.6. Again, Issue 9, the Translation Fees Agreement Issue, remains disputed, albeit that it would seem to make no difference to the resolution of the substantive issues in the claim. I am again told that it is potentially relevant to costs argument.
- 16.7. On Issue 10, the Liability for Translation Fees Issue, the parties clarified that it was common ground that, where the Claimant submitted an invoice to the Defendants and the Defendants in turn submitted that invoice to a third party for payment and the third party did not pay the invoice (whether as part of a negotiated settlement of fees or pursuant to an assessment by the court), the translation fee is not recoverable by the Claimant from the Defendants. However, it is disputed whether the Claimant would be entitled to recover the fee where the Claimant raised an invoice to the Defendants but, for whatever reason, the Defendants did not submit it to the third party. The Claimant contends that the Defendants were obliged to present the invoice to the third party or at the very least are under a duty to explain why it did not do so; the Defendant concedes that the burden lies upon it to explain why invoices were not submitted but contends that it had a discretion as to whether or not it did so. In the light of this refinement, #issue 10 is better defined as “*whether the Defendants are obliged to account to the Claimant for translation fees if they have not submitted the Claimant’s invoice to the third party.*”

17. The ambit of Issue 5 was the subject of two attempts by the Defendants to broaden the case beyond the pleading, once at the beginning of and again towards the conclusion of the trial of preliminary issues. Within the pleaded case at paragraph 30 of the Defence, the Defendants asserted that the alleged agreement was void for illegality on the following grounds: *“It is to be inferred that at all material times the intention of the parties was that no disclosure should be made to Individuals with potential high-value claims of a percentage fee payable to the Claimant by [the Defendants] (such intention, in the case of [the Defendants], being the consequence of [they] believing that no such agreement existed). An agreement to pay a percentage fee in such circumstances would be a breach of the regulatory rules applicable to each of the Claimant and [the Defendants].”*
18. In their written opening submissions for trial, the Defendants put the issue in two ways:
- 18.1. That the percentage based fee agreement as contended for by the Claimant would breach the ban on referral fees contained in Section 56 of LASPO and an agreement containing such a fee is unenforceable pursuant to section 57(6) of LASPO (“the LASPO Issue”).
- 18.2. That the agreement contended for by the Claimant would breach the regulatory rules governing both solicitors and claims management companies unless disclosed to the clients pursuant to the obligations in the Conduct of Authorised Person Rules 2013 in respect of the Claimant and relevant version of the SRA Handbook in respect of the Defendants; that it had not been disclosed; and that it should therefore not be enforced by the court on the grounds of illegality (*“the Non-Disclosure Issue”*).

Both of these issues, as advanced by the Defendants, raised questions as to the adequacy of the pleaded case.

19. The Claimant accepted that the second of these arguments was in part open to the Defendants on the pleading but contended that the first was not. The paragraph of the Defence cited above dealing with illegality did not plead this argument. This was not a technical pleading point. Rather, there was real prejudice to the Claimant if the point was pursued since it was apparent that the case involved considering in some detail the value of the services provided by the Claimant, yet the preliminary issue trial had not been set up to do this. On reflection, counsel for the Defendants accepted that it was not possible fairly to deal with this issue, given how the preliminary issue trial had been set up, and he accepted that he was confined to the non-disclosure issue.

20. I (and counsel for the Claimant) had understood this to mean that the Defendants were no longer pursuing the LASPO Issue at all, but in closing submissions it became clear that counsel for the Defendants had meant that the LASPO Issue would need to be dealt with (or at the very least could be dealt with) at the subsequent hearing dealing with the account and other quantum matters that are not contained within the proposed preliminary issues.
21. There may be a case management issue as to whether to allow an issue that could and arguably should have been properly raised in a trial of preliminary issues to be held over to the subsequent trial. The result of allowing this issue to be argued at the subsequent trial may be to increase costs and/or to delay resolution of the issues of the Claimant's entitlement to payment which are inconsistent with the overriding objective. I make no comment at this stage on whether I would permit the LASPO Issue to be raised in this way, save to repeat the point that I made in court: a successful application to amend the Defence to plead this argument is a pre-requisite to the Defendants being permitted to argue that it is still open to them to advance the LASPO Issue at the second stage of the trial.
22. As to the non-disclosure issue, the particular rules pertaining to the Claimant in the Conduct of Authorised Person Rules 2013⁹ (*"the 2013 Rules"*) on which the Defendants sought to rely in its skeleton argument were:
- 22.1. General principles 1(a) and (c) of the Client Specific Rules:
- "A business shall –*
- a) Act fairly and reasonably in dealings with all clients.*
- ...
- c) Ensure that all information given to the client is clear, transparent, fair and not misleading."*
- 22.2. General principle 11 in the Client Specific Rules:
- "A contract between a business and a client must be signed by the client and the business may not take any payment from the client until the contract is signed. The standard terms and conditions of any contract must be clear and also published prominently on the business's website (where a business*

⁹ The 2013 Rules were made by the Regulator (as established pursuant to the Compensation Act 2006) under the powers contained in the Compensation (Claims Management Services) Regulations 2006 and relate to the regulation of claims management companies.

operates a website). The business must provide the client with the following information in writing or electronically before a contract is agreed –

...

f) Any referral fee paid to, or other financial arrangement with, any other person in respect of introducing the claim.

...

i) Any relationship to a particular solicitor or panel of solicitors.”

General Principle 11 forms part of the 2013 Rules which appear under the heading: *“Taking on Business (This section applies only to businesses that have a contractual relationship for a regulated activity with a client)”*

23. During the course of opening submissions, counsel for the Claimant pointed out in respect of the Non-Disclosure Issue that the obligations under Rule 11 only arose where the Claimant was in a contractual relationship with the relevant client, and she asserted that this was not the case, so Rule 11 had no application. Counsel for the Defendants did not respond to this argument at the time. In written closing submissions, served on the Claimant and the court on the evening of what proved to be the penultimate day of the trial, the Defendants indicated that they were arguing that there was indeed a contractual relationship between the Claimant and the clients, such that Rule 11 did apply to them. The Claimant objected that this was not pleaded, nor had the Defendants indicated that they were going to take this point when the issue had arisen in opening submissions.
24. Having heard from counsel, I ruled that the Defendants were only permitted to pursue this contention if they successfully applied to amend the Defence, indicating that I would give my reasons for the ruling in this written judgment. Counsel for the Defendants stated that he was not making such an application, so it is not open for him to pursue the arguments.
25. My reasons for the ruling are:
 - 25.1. If the Defendants intended to rely upon a case of such a contractual relationship, it needed to be pleaded. Where a contract is relied on in support of a claim, the Particulars of Claim must plead the contract in appropriate detail (see PD16, paragraphs 7.3, 7.4 and 7.5. Equally, where in a defence the Defendant denies a matter (in this case the enforceability of the alleged

contract), it is obliged to state its reason for doing so pursuant to CPR16.5(2)(a).

25.2. It is conceivable that the Defendants might prove that the Claimant had a contractual relationship with clients. They are not able to assert and prove a written or oral contract but it is conceivable that they might prove a contract based on conduct. However the arguments for and against the inference of such a contract would require careful consideration of the nature of the dealings between the Claimant and the clients, including the nature of any offer and acceptance and whether it was proper to infer an intention to create legal relations between these parties.

25.3. Mr Fennell drew attention to the fact that the Claimant itself at various times has used the term “*clients*” to describe the people to whom it was providing services (on its case on behalf of the Defendant). Whilst this is correct, I do not see that it supposes acceptance that those people were in a contractual relationship with the Claimant.

25.4. I have no doubt that, had the Claimant known that the Defendants intended to pursue this issue, it would have approached the factual evidence in the case differently. There is thus real prejudice to the Claimant if the Defendants are allowed to pursue this issue without having pleaded it.

25.5. In Boake Allen Ltd & others v HMRC [2006] EWCA Civ 25, Mummery LJ said at paragraph 131:

"While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason - so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial."

25.6. It would be one matter where the issue raised was a pure point of law and where the opposing party was taken unawares but could not say that it had suffered evidential prejudice by the failure to plead it earlier. Whilst the disruption caused to a trial by the late attempt to raise such a point might be a ground for refusing to allow the party to raise the issue, it might be that any prejudice could be put right by allowing the parties additional time to prepare and make submissions on the issue.

- 25.7. Here there is real prejudice through the failure to plead the issue. In my judgment, the failure to plead the issue debars the Defendants from pursuing it. Since there is no application to amend to put this right, the issue falls away.
26. It follows that, on the non-disclosure issue, the Defendants are limited to arguing that the alleged arrangement between the Claimant and the Defendants was illegal under the 2013 Rules on the ground that it offended against General Principles 1(a) and (c) of the Client Specific Rule. It should be noted that the Defendants contend that such a fee would also be prohibited by the SRA Handbook, in that it would breach outcomes 9.4 and 9.5 referred to in Chapter 9 on fee sharing and referrals.

THE PAYMENT OF REFERRAL FEES

27. Given that there may yet be an issue in this case as to whether the payments allegedly due to the Claimant were in fact referral fees, it is not appropriate at this stage to comment on that issue. However, in order properly to understand the dealings between the parties, it is important to note a little about the history of referral fees and the change brought about by LASPO.
28. Prior to March 2004, the payment of referral fees by solicitors was banned by the Solicitors Conduct Rules. A report from the Director General of Fair Trading dated March 2001¹⁰, citing work by a consultancy firm, LECG, expressed the view that the ban might be inhibiting the development of “*an online market place that could bring clients and solicitors together.*” In March 2004, the Solicitors Conduct Rules were amended to permit the payment of such fees by solicitors.
29. However, during his Review of Civil Litigation Costs, Sir Rupert Jackson heard evidence that cast considerable doubt on their value to the litigation process. In Chapter 20 of the Final Report¹¹ in 2013, he recommended they be banned, stating:

“4.7 I consider that BTE insurers and claims management companies charge referral fees without adding any commensurate value to the litigation process. On the contrary, referral fees have now escalated to such a level that some solicitors cut corners in order to (a) cover the referral fee and (b) make a profit on the case. In straightforward road traffic accident (“RTA”) cases often more than half the fees paid to the solicitors are paid out in referral fees. This is to the detriment of the client, the solicitors and the public interest.”

¹⁰ This is available at:

https://webarchive.nationalarchives.gov.uk/ukgwa/20140402142426/http://www.oft.gov.uk/shared/oft/reports/professional_bodies/oft328.pdf.

¹¹ This contains a useful history of referral fees in Chapter 20. It is available at: <https://www.judiciary.uk/wp-content/uploads/2013/05/jackson-final-report-140110.pdf>.

4.8 *I accept that solicitors would still pay marketing costs if referral fees were banned, but those marketing costs would no longer be driven upwards by the ratcheting effect of referral fees. I see considerable force in the arguments advanced during Phase 2 [sc. of the Review] that referral fees have driven up normal marketing costs.*

4.9 *I do not accept that referral fees are necessary for access to justice...*

Such a ban was brought into effect by LASPO.

30. The change in respect of the payment of referral fees in personal injury case brought about by LASPO with effect from 1 April 2013 can be seen from Section 56 of that Act:

“Rules against referral fees

(1) A regulated person is in breach of this section if—

(a) the regulated person refers prescribed legal business to another person and is paid or has been paid for the referral, or

(b) prescribed legal business is referred to the regulated person, and the regulated person pays or has paid for the referral.

(2) A regulated person is also in breach of this section if in providing legal services in the course of prescribed legal business the regulated person—

(a) arranges for another person to provide services to the client, and

(b) is paid or has been paid for making the arrangement.

...

(4) ‘Prescribed legal business’ means business that involves the provision of legal services to a client, where—

(a) the legal services relate to a claim or potential claim for damages for personal injury or death,

(b) the legal services relate to any other claim or potential claim for damages arising out of circumstances involving personal injury or death, or

...

(5) There is a referral of prescribed legal business if—

(a) a person provides information to another,

(b) it is information that a provider of legal services would need to make an offer to the client to provide relevant services, and

(c) the person providing the information is not the client;

and “relevant services” means any of the legal services that the business involves.

(6) “Legal services” means services provided by a person which consist of or include legal activities (within the meaning of the Legal Services Act 2007) carried on by or on behalf of that person; and a provider of legal services is a person authorised to carry on a reserved legal activity within the meaning of that Act...

31. Section 57 of LASPO provides amongst other things:

“(5) A breach of section 56—

(a) does not make a person guilty of an offence, and

(b) does not give rise to a right of action for breach of statutory duty.

(6) A breach of section 56 does not make anything void or unenforceable, but a contract to make or pay for a referral or arrangement in breach of that section is unenforceable.”

32. Section 59 of LASPO identifies who are “regulated persons”. They include:

“a person authorised by the [Claims Management Regulator] under section 5(1)(a) of the Compensation Act 2006 to provide regulated claims management services”; and

“a person authorised by the [Law] Society to carry on a reserved legal activity within the meaning of the Legal Services Act 2007.”

33. The result of this legislative change in simple terms was that:

33.1. A Claims Management Company such as the Claimant would be in breach of the prohibition in LASPO if it was paid a referral fee;

33.2. Solicitors such as the Defendants would be in breach of LASPO if they paid a referral fee to the Claimant;

33.3. A contract for the payment of a referral fee by the Defendant to the Claimant would be unenforceable.

THE EVIDENCE AS TO THE DEALINGS BETWEEN THE PARTIES

The nature of the services provided by the Claimant

34. As noted above, the Claimant started to introduce clients to GWS in around 2011. The parties put the basis of that relationship in similar terms within their statements of case:

34.1. At paragraph 6 of the Defence, the Defendants state:

“(a) The Claimant introduced to GWS individuals with potential personal injury claims...

(b) The great majority of the Individuals were of Eastern European origin and many (but not all) of the Individuals had limited grasp of written and/ or spoken English. The Claimant employed persons fluent in English and in the native languages of the Individuals.

(c) GWS believed that it lacked the language capability to deal properly with the Individuals and, for example, required the assistance of a third party such as the Claimant to liaise with the Individuals in order to communicate with them as their matters progressed, arrange for them to attend medical appointments and hearings, and so on. Such services were distinct from the translation services referred to in the 2013 Contract...”

34.2. In paragraph 6 of the Reply, the Claimant asserts:

“the Claimant did not merely provide the Defendants with introductions to potential clients, but also provided a range of ancillary services. Those ancillary services included but were not limited to: liaising with clients of the De-

defendants/GSW in order to progress their case; taking instructions from clients; providing clients with detailed explanations as to the contents of letters; relaying advice from the Defendants/GSW; arranging meetings, hearings, conference calls and medical appointments with clients; taking/ making calls and messages (national and international); replying to emails from and to clients/solicitors; chasing and gathering documentation/ signatures; meeting clients for the same (in the office, home and in hospitals); monitoring and providing updates; keeping files and folders; arranging post; and providing general support throughout the progression of a case.”

34.3. At paragraph 18 of his witness statement, Mr Janavicius stated that the Claimant provided the following services to GWS:

- (a) providing GWS with a fully completed, signed and executed Conditional Fee Agreement;
- (b) obtaining and providing GWS with the full identification of the client;
- (c) providing GWS with a fully completed Claims Notification Form;
- (d) completing an initial information questionnaire;
- (e) providing GWS with a signed Declaration confirming the client had received GWS' initial letters;
- (f) providing confirmation to GWS that in accepting GWS' instructions to act as its agent, the Claimant had explained all of the above documents to the client, and how the case was being funded together with details of any loan arrangement;
- (g) taking instructions from the client as to what other services they may require, such as translation and linguistic services;
- (h) assisting GWS throughout the claim in respect of all communications they sent to the client and assisting the client with understanding any further enquiries about the accident from GWS;
- (i) assisting in the client's attendance at all appointments and interviews, e.g. medical and legal throughout the case and arranging all necessary transport to the same; and
- (j) assisting the client with all communication and documentation throughout the case and in the completion of all necessary legal forms they might require throughout the claim.

35. In the course of cross examining Mr Janavicius, Mr Fennell for the Defendant accepted that paragraph 18 of his statement provided an accurate summary of the work provided.

On any version, the services provided were typical of those provided by Claims Management Companies, in the particular context of a company operating in a community of people who are not typically native English speakers. Such services fell within the definition of claims management services in Section 4 of the Compensation Act 2006¹² and hence the Claimant was subject to the regulation of that Act. Equally, the Defendants, as partners in GWS, were subject to the regulation of the Solicitors Regulation Authority which imposed various standards in respect of dealings between solicitors and claims management companies.

The Changes in the Parties' Relationship due to LASPO

36. As I have noted, in the early period, no written contract existed between the parties. As Mr Janavicius puts it at paragraph 15 of his statement, "*Litkraft's relationship with GWS was relatively informal whereby Litkraft were paid a referral fee for each introduced claim.*" Payment was by an agreed fee, in two stages, one early in the case and one when the claim was concluded.
37. When the part of LASPO dealing with referral fees came into force on 1 April 2013, this clearly changed the landscape. Where, as here, a party was introducing clients to a solicitors' firm and was being paid for services, there is an obvious risk that such payments may be seen as disguised referral fees within this definition. It is therefore understandable that the parties should have wanted to ensure that their dealings did not breach the ban. The 2013 Contract was negotiated in this context. It was signed on behalf of the Claimant in April 2013 and on behalf of GWS in May 2013.
38. The 2013 Contract governs the relationship between the Claimant and GWS. It is headed "*Terms of Agreement (Post April 2013)*" and is on the standard terms of GWS. The company name is stated to be that of the Claimant (the Claimant is later described as "*the Introducer Company*") and sectors of work are stated to be "*Personal injury, housing disrepair, employment matters, financial products/services, C/C*¹³." The structure of the document is such that "*we*" and "*us*" are references to the Claimant.
39. In the definition section, the following terms of relevance are defined:

"Client/lead *any person or person who have been introduced by us to Goldsmith Williams*

¹² "*Advice or other services in relation to the making of a ... claim for compensation, repayment or any other remedy or relief in respect of loss or damage..*"

¹³ This may be a reference to consumer credit cases. It is not of any relevance to the issues in the case.

“Instruction	<i>the instruction by the client/potential client to Goldsmith Williams which may result in Goldsmith Williams acting on their behalf in connection with a matter</i>
“Payment for services	<i>the payment by Goldsmith Williams for services rendered by us on Goldsmith Williams’ behalf and as requested by Goldsmith Williams</i>
“Services	<i>services rendered by us on Goldsmith Williams’ behalf and as requested by Goldsmith Williams from time to time”</i>

40. Several clauses are worthy of note:

“4. We agree that if a Payment for Services is made to us by Goldsmith Williams in respect of a matter then that sum will be refunded within 28 days of the claim failing, being abandoned or not proceeding. Goldsmith Williams may look to us to offset cases received against any debt due but retain absolute discretion in this regard.”

“7. We agree that before making an introduction we will provide all clients with all information relevant to the Client concerning the introduction including details of any Payments for Service in respect of that client’s matter. We will provide Goldsmith Williams with a copy of any communication to the client that contains this information if requested.”

“14. We accept that Goldsmith Williams will review this agreement periodically in compliance with the SRA Code of Conduct...”

“25. This Agreement, and its attachments, represents the entire agreement and for the avoidance of doubt these terms may only be varied if agreed by both parties in writing.”

“28. This Agreement shall commence on the Commencement Date for a period of 2 years from such date unless terminated earlier under the provisions of this Agreement (the Initial Period). Following the Initial Period either party may give notice of termination of this Agreement by not less than 3 months written notice. During the continuance of this Agreement we agree that Goldsmith Williams will be our exclusive panel legal firm unless we maintain 2 or more panel legal firms in which case we agree that Goldsmith Williams will receive no less than []¹⁴ instructions per week/month.”

“29. It is agreed by both parties to this Agreement that any sums paid by Goldsmith Williams in respect of Payments for Services are not Prohibited Referral Fees as set out in the Solicitors Code of Conduct and that Goldsmith Williams reserve the right to alter amend or withdraw any facilities at anytime in the event that any such arrangements are considered as Prohibited Referral Fees by them or any competent Authority.”

41. As I have noted above, the amounts due by way of payments for services were not expressed in the 2013 Contract (even though it had an entire agreement clause). Rather the parties agreed the sums due, varying them from time to time.

42. In cross examination, Mr Janavicius said that the agreement was drafted by GWS. He said that Mr Buckley, the Business Development and Medico-Legal Director for GWS,

¹⁴ Blank in the original.

had told him that the 2013 Contract was compliant with LASPO. This evidence was not contradicted by the Defendants and is consistent with the contractual term at clause 29 asserting that the payments by GWS are not prohibited referral fees.

Payment for High Value Cases

43. From an early stage, the Claimant made clear that it was keen to be remunerated in higher value cases at a different rate than that for routine personal injury cases. In his witness statement, Mr Janavicius states that, shortly after the 2013 Agreement was signed, it became apparent that some claims were taking longer than the 7 month period that he said was typical for a claim arising from a road traffic accident. Such longer cases required more time and input by the Claimant. Therefore the parties began to discuss a higher rate of payment for these more complex cases.
44. Mr Janavicius states at paragraph 21 of his statement that GWS first proposed that the Claimant receive a percentage of costs. He was not contradicted on this issue, either by challenge in cross examination or by evidence from the Defendants witnesses. He recalls a meeting, either in June or in August 2013, when the issue was discussed at which he proposed payment of 25% of profit costs for higher value cases. He states that he was assured by GWS that some structure for higher fees would be devised for such cases and that on the back of this the Claimant employed more staff and increased its marketing budget to target higher value cases. In cross examination he repeated that this change to the Claimant's marketing strategy was a consequence of the assurance from GWS that a more generous fee structure would be put in place for higher value and longer lasting cases.
45. Mr Janavicius states that such negotiations are evidenced by an email of 21 May 2013 from Mr Buckley, who stated:

“Extra fees on serious injury EL/PL¹⁵ cases. We are assessing a fee structure for these cases and will inform you as soon as it is finalised. Rest assured that anything already in the system that meets the criteria will be dealt with accordingly.”

46. Further, on 1 November 2013, Mr Buckley emailed Mr Janavicius, copying in Simon Cottrell and Adele Whittle. Under the heading “Various points following recent meeting” he stated:

“Good Morning Arthur

I have just met with Eddie Goldsmith regarding the MOJ situation as discussed by phone earlier and will ring later to discuss in more detail.

¹⁵ It is common ground the EL stands for employers' liability and PL for public liability, these being recognised categories of case by the terminology of insurers concerned with claims for personal injuries, denoting the kind of policy which would give cover in particular circumstances.

I have now managed to discuss all points raised at our recent meeting with relevant personnel, get agreements or recommendations and now return to you with the results

...

Clinical Negligence & High value cases – Payment terms

Subject to compliance we can offer 12.5% of costs recovered, capped at £10K for all cases where fixed costs do NOT apply and personal injury damages exceed £25K. We will also be happy to make an initial assessment of clinical negligence cases by our external clinical negligence expert, Dr Lieberman, at no cost to yourselves.

Fees to Litkraft

After due consideration and following your request we agree to increase fees from the existing £300 initial fee and £250 further fee to £300 for each – i.e. £600 in total

...

Kind regards

Jim”

47. By November 2013, it is apparent that, when referring cases to GWS, the Claimant was seeking to identify high value cases. This can be seen for example in an email of 7 November 2013 relating to a motorcyclist injured in an accident, where the email referring the case is headed “*new RTA *** HIGH VALUE *** claim from LITKRAFT*”. Adele Whittle, the head of RTA Department at GWS, emailed back that “*the claim will go to Hayley Yates, who is experienced in dealing with more severe injuries.*”
48. At around this time, GWS was sending marketing material to introducers such as the Claimant which included reference to the risk to law firms, claims management companies and what are called “*personal injury intermediaries*” from the referral ban. One document sent by Mr Buckley on 7 November 2013, says, “*personal injury law firms have received a warning from the SRA after the regulator found examples of firms who, having rearranged business models following the referral fee ban, may now be in breach of other parts of the Code of Conduct. Whilst directed at law firms, the warnings should not be ignored by CMCs and personal injury intermediaries as this could severely impact upon their business and regulation ... You can easily minimise your exposure to this by working with us. Our business model was developed to be fully compliant under the new and existing regulations and has been approved by an eminent QC who is amongst the most experienced in the field.*” Another, sent by Mr Buckley on 11 December 2013, refers to ongoing investigations in respect of 10 law firms for breaching the referral fee ban and goes on, “*firms found in breach of the referral fee ban could find themselves in front of the Solicitors Disciplinary Tribunal (SDT), which could have a dramatic impact on their ability to conduct business with*

you. *Minimise the risk to your business. You can easily minimise your exposure to this by working with us. We renewed our PII on time and have compulsory indemnity cover of £3m for each and every claim. Our post LASPO business model was developed to be fully compliant under all the new and existing regulations and has been approved by eminent QC who is amongst the most experienced in the field.*”

49. In his evidence, Mr Cottrell stated that the reference to an eminent QC was to Mr Andrew Hopper QC. Mr Cottrell thought that the Defendants probably had consulted him about LASPO though he did not remember any of the detail.
50. Further discussion followed and on 21 January 2014, Mr Buckley emailed Mr Janavicius in the following terms:

“Subject: Various Outstanding Issues

“Hi Arthur

I trust this finds you well

Just to tie up some remaining loose ends!

1. Sheratons contract – conflict cases. Simon has now reviewed this contract and is quite happy that everything is in order

2. High value cases – You initially requested 25% of costs recovered – we went back to you with offer of 12.5% of costs recovered, capped at £10K for all cases where fixed costs do NOT apply and personal injury damages exceed £25K. You were not happy with this percentage so we are now willing to compromise at 17.5% as requested.

3. Some form of guarantee/contract/agreement – signed by a partner, that Goldsmith Williams will be responsible for the back end services fee.

We propose this should be in the form of a letter with the following wording:-

Dear Arthur,

For the avoidance of doubt please accept this letter as confirmation that we will pay Litkraft the fee of £300 plus VAT at the successful conclusion of any of our clients mutual personal injury claims. This payment to be made on receipt of our costs.

This payment for additional services will reflect the ongoing help and assistance from your company to ours throughout the life of the claim following your initial provision of services to us at the outset of the claim in respect of execution of the CFA, CNF, relevant authorities, provision of client ID etc.

Yours etc.....’

Please confirm if this is acceptable before we will draft out and forward to you.

Further to this and to ensure that this additional services fee is processed and logged correctly may we suggest that this further invoice is forwarded to us at say the stage when the medical report is accepted and agreed by the client. Finally concerning this invoice for additional services please find attached guideline template listing and clarifying additional services that you may find useful.

Kind regards

Jim”

51. Mr Janavicius replied to Mr Buckley by email dated 29 January 2014, stating:

“Dear Jim,

Hope you are well.

Thanks for the first 2 points.

Regarding the last one.... I am not really happy with a letter. As we are providing services we should have a contract between of us?

Regards

Arthur

52. Mr Buckley in turn responded to Mr Janavicius on the same day:

“Hi Arthur

I’m well thanks and hope the same goes for you

I’m not sure why a letter would not be acceptable as it would certainly be treated a contract and agreement by a court – even qualified emails are treated as contracts by courts nowadays!

Also your invoice itself would act as a contract.

However if you feel more comfortable we are happy to look at incorporating this agreement as a further clause in your current Terms Of Agreement for re-signing.

Kind regards

Jim”

53. Within his witness statement at paragraph 4.9, Mr Buckley said that he would not have sent this email without the authority of the partner in charge of the department, who at that time was Mr Cottrell. He went on to deal with the previous email from Mr Janavicius, saying *“having re-read the email exchange, when Arthur refers to the ‘last one’ I assume that he was unhappy to rely on a letter as forming a contract regarding High Value case and wanted this formalising in a contract”* In cross examination, he retracted this assertion, in light of the fact that it is obvious that the last point mentioned by him in the email to which Mr Janavicius was replying related to Second Tranche fees not fees in High Value Cases.

54. Mr Janavicius dealt with the issue of a written contract further in an email to Mr Buckley of 3 February 2014, saying:

“Good afternoon Jim,

Hope you had a nice weekend.

Just wanted to thank you for your son's Chris help with all the mortgage issues - finally we were able to complete.

In regards of the contract, I would rather have it in one place as a contract than in number of letters, agreements, emails..

Many thanks for your understanding.

Kind regards

Arthur”

Mr Buckley replied on the same day that he would “*now have a look at incorporating all the terms on one agreement and get back to you.*”

55. Thereafter, at least within the disclosed documents, there were no further communications on the issue of incorporating the parties’ agreement in a written document. However, high value cases are also recorded as an item of discussion in the minutes of a meeting on 27 November 2014. The reference in those minutes is to the detail of dealing with such cases rather than the specific terms of payment referable to them, but the Claimant contends that this record is supportive of its argument that “High Value Cases” was a term of art and that such cases merited special treatment.
56. Mr Janavicius stated in his witness statement that he believed that GWS were satisfied that there was regulatory compliance with LASPO and that the percentage fee was unconditionally agreed in respect of High Value Cases. He states at paragraph 29, “*if an agreement had not been reached, then we would not have continued to service these cases.*” In cross examination, he expanded on this, saying that it would not have been viable for the Claimant to continue serving High Value Cases had a higher rate of payment not been agreed. He asserted that the Claimant could easily have found other solicitors who would have paid them more for its work if GWS had not stated that the percentage rate was agreed.
57. The Defendant’s pleaded cases in respect of these negotiations is set out in paragraph 14 of the Defence¹⁶. Having asserted that there were discussions involving Mr Janavicius on behalf of the Claimant and Messrs Cottrell, Williams and Buckley on the part of the Defendants, paragraph 14 goes on:

“(c) On each occasion on which payment to the Claimant for high value cases was discussed, GWS’s representative indicated that GWS would be willing in principle to consider entering into an agreement to provide for a higher payment to the Claimant but only on terms which were compliant with the requirements of the parties’ respective regulators and the provisions of LASPO. On each occasion, GWS’s representative would have made it clear to Mr Janavicius that the Claimant needed to propose terms which were so compliant, i.e. the onus was on the Claimant to propose a compliant scheme and not on GWS to do so. By reason of the passage of time, the Defendants no longer recall the precise words used in such discussions.

¹⁶ I note in passing that the Defence was signed by each of the Three Defendants.

(d) The parties were unable to reach agreement on a mechanism which would provide the Claimant with the payment terms it sought which were compliant with the matters pleaded at sub-paragraph (c) above.

(e) No agreement was in fact reached between the parties to provide for additional payments to the Claimant in respect of high value cases and the relationship between the parties in respect of such high value cases continued to be governed by the 2013 Contract and the course of dealing relating to translation fees.”

58. However, the Defendants’ evidence was not consistent with this pleading:

58.1. Mr Williams said that he had not been involved in discussions with the Claimant about the terms of payment following the introduction of LASPO; rather it was Mr Buckley who was involved in such discussions.

58.2. Mr Cottrell said that he was aware that Mr Janavicius was raising the question of being paid more for higher value cases, but again that the discussions were with Mr Buckley on behalf of the Defendants.

58.3. Mr Buckley said that he was involved in such negotiations. He accepted in cross examination that the emails read as though he had agreed to the 17.5% deduction and that, were there to have been any qualification or condition to the offer of 17.5%, he would have told Mr Janavicius of that qualification or condition. He accepted that, as far as he was concerned, a deal had been done for the payment of 17.5% and he took Mr Janavicius to have accepted that. Thereafter, if asked what the agreement was in respect of High Value Cases, he would have said that it was an agreement for GWS to pay 17.5% of recovered profit costs, capped at £10,000. It is unfortunate that the Defendants, as solicitors, have advanced a case in a pleading that is inconsistent with the true evidence available to it on an issue.

The Settlement Agreement

59. In 2015, the relationship between the Claimant and GWS seems to have become more difficult. In simple terms, the Claimant’s case is that GWS stopped paying its invoices; GWS contends that the Claimant’s record keeping was inaccurate and unreliable creating difficulties in making the appropriate payments.

60. This dispute culminated in the Claimant serving a statutory demand on GWS on 8 March 2016. On 24 March 2016, GWS filed and served an application to set aside the statutory demand. This led to negotiations between the parties and, in September 2016, the execution of the Settlement Agreement.

61. The Settlement Agreement provided for the payment of sums on account of the amount due from GWS to the Claimant, the dismissal of proceedings relating to the statutory demand¹⁷ and the institution of a mechanism for determining the actual amount due to the Claimant. At clause 6, headed “*Release*,” the following terms appear:

“This agreement is in full and final settlement of all claims that [the Claimant] has against [the Defendant] in respect of the services, but specifically excluding (but not limited to) the following:

6.1 High Value Cases: Being those cases which are of a high value open brackets (that is those cases where fixed costs do not apply and personal injury damages exceed £25,000) where the parties have agreed that [the Claimant] will receive 17.5% of profit costs build and received by [the Defendant], capped at £10,000 in respect to claims issued on or after 5 September 2011...

6.3 Transferred Claims: Being those cases which have been referred by [GWS] to another firm of solicitors to act for the claimant(s). The cases were initially introduced by [the Claimant] to [GWS], then [GWS] referred to another firm.

6.4 Translation Fees: Being all sums due or to become due from [GWS] to [the Claimant] for translation services provided by [the Claimant].

6.5 [The Claimant] specifically reserves all rights in respect of all such cases/claims that fall outside the scope of this agreement in full.”

62. Mr Williams dealt with the question of compliance at paragraph 7.5 of his statement. He stated there (and repeated in cross examination) that Mr Cottrell had told him that the percentage deduction of 17.5% was not compliant with LASPO. It would appear that this communication happened at around the time of the dispute that led to the execution of the settlement agreement, since Mr Williams had not been aware of the alleged obligation to pay 17.5% earlier than this. In respect of the Settlement Agreement itself, Mr Williams said that he considered that it released the dispute about High Value Cases to another day. He did not accept the interpretation of the Settlement Agreement as a recording that the parties had agreed that a 17.5% fee was due on such cases - he considered clause 6.1 merely to be an assertion of the Claimant’s case rather than an acknowledgement of an agreement.
63. Mr Cottrell was asked about the terms of the Settlement Agreement and in particular the apparent acknowledgement within it that the parties had indeed reached a concluded agreement on High Value Cases. He said that he considered clause 6 to have the effect of hiving out from the agreement issues that were not agreed. He described the wording of clause 6.1, in seemingly acknowledging the existence of a concluded agreement, as “*unfortunate*”. However, he maintained that he had raised the issue of compliance at the time of the settlement agreement and had not intended in signing the

¹⁷ The terms of the dismissal of those proceedings are not included in the bundle of documents before the court.

agreement to acknowledge a contractual liability to pay the percentage fee. Indeed, he said that the Defendants had never been satisfied that the payment of a percentage fee was compliant with LASPO and that, until a compliant scheme was put in place, GWS was simply agreeing to pay the same fee as was payable in respect of other cases.

64. Both parties had legal representation in respect of the negotiation of this agreement. The Defendants were represented by Brabners LLP. During the course of negotiations leading to the execution of the Settlement Agreement, Brabners sent an email to the Claimant's solicitors dated 16 June 2016 stating, amongst other things:

“On reflection there is an issue with the fees proposed for the High Value Cases. My clients were not previously aware that the firm's former business manager had agreed to such terms until you forwarded the historic email¹⁸ to us.

Having considered this payment structure further they consider that since it involves sharing fees it would amount to a referral fee which is banned in personal injury cases under section 56 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. I am told it would also be a breach of Litkraft's agreement or code of conduct with the MoJ.

My clients would be willing to consider another fee arrangement for high value cases which benefits your client but it must be a compliant alternative.”

65. Accordingly, it is clear that Mr Cottrell was right in his recollection that the issue of compliance relating to the alleged terms for payment in High Value cases was indeed raised during the negotiations that led to the execution of the Settlement Agreement. The email is also consistent with Mr Buckley's evidence that he believed a deal had been done in respect of High Value Cases, as recorded in the Settlement Agreement, since it refers to the fact the parties “*had agreed*” this term.

Illegality

66. As noted above, the only disputed issue on illegality that was within the ambit of the trial of preliminary issues was the argument that the alleged agreement in respect of High Value Cases would be illegal (and therefore should not be enforced) because of the failure of the parties to notify clients of the alleged agreement. The Defendants' case is that the failure to notify clients of the terms of the agreement rendered it illegal under both their and the Claimant's regulatory regime at the material time:

- 66.1. As to the Defendants' obligation, the SRA Handbook in force at the relevant time, provided in Outcomes 9.4 and 9.5:

“O(9.4) clients are informed of any financial or other interest which an introducer has in referring the client to you.

¹⁸ This email is not identified but may well be the email of 21 January 2014 referred to above.

O(9.5) clients are informed of any fee sharing arrangement that is relevant to their matter.”

66.2. As to the Claimant’s obligations, general principles 1(a) and (c) of the Client Specific Rules in the 2013 rules provide:

“A business shall –

a) Act fairly and reasonably in dealings with all clients.

...

c) Ensure that all information given to the client is clear, transparent, fair and not misleading.”

67. In his witness statement, Mr Janavicius says that the Claimant met its regulatory requirements by stating that on its website that it would be paid by solicitors. The relevant passage, cited in his statement (and not denied by the Defendants), is:

“Please be aware that we will receive a payment from the solicitors for some of the work that we will undertake on this matter. This will not affect any award of compensation that may be due to you.”

68. He said in cross examination that the Claimant’s regulator had wanted to see this reference on the website. Clients would ask how much they were going to have to pay the Claimant, to which the Claimant would respond that they were paid by the solicitors for their services and that the clients did not have to pay anything. This again was not challenged.

69. Ms Milasevuciene’s statement was to the like effect that clients were made aware that the Claimant was being paid by solicitors through the website. She also was not challenged on this issue.

70. The Defendants accept that they did not notify clients of the payment of a percentage of fees to the Claimant. This was for the simple reason (they contend) that the Defendants did not consider that they were liable to pay such a percentage.

VAT invoices

71. It is common ground that there is no factual evidence relevant to the issue of the Claimant’s alleged liability to render a VAT invoice before liability for payment became due.

Translation fees

72. There was no relevant evidence given on whether the translation fees were due pursuant to the 2013 Contract. On the issue of the liability to pay such fees, Mr Janavicius deals with this at paragraph 54 and following of his statement. However, although he queries why the Defendants have not accounted to the Claimant for certain fees, he does not give evidence that goes to the issue of the nature of the obligation.
73. Mr Cottrell's account of the payment of translation fees appears at paragraph 8.4 of his statement:

“A lot of Litkraft's clients didn't speak English (or good English). We said that if Litkraft had given genuine translation services to the client to help us over the course of this claim then please submit a translation invoice and we will submit it with our fees when we send details of our fees to the third-party insurers. If we recovered it then obviously it would be passed onto Litkraft as a service that they provided. We made it clear to Litkraft (and other claims management companies) that (a) if the client spoke good English that they shouldn't try and submit a translation invoice and (b) if the other side refused to pay the translation invoice, it certainly wasn't a liability of ourselves within the proceedings.”

Transferred cases

74. It is common ground that GWS would on occasions transfer cases to another firm of solicitors, Nesbitt's. Such transfers would take place where there was perceived conflict of interest between GWS and the client.
75. The Claimant draws attention to an email exchange between Mr Buckley and Mr Janavicius on 23 July 2014. Mr Janavicius referred to an email from a member of staff at GWS which made reference to a file being closed and a refund of fees being sought. His email to Mr Buckley stated, *“This is an example when GW closes file and requests refund of Agency Fee, but after closing file its being transferred to Nesbitt's, who are getting LITKRAFT and Medexante services for free. It can not continue like that and we are not in the position to fund someone's business.”* Mr Buckley replied, *“For core introducers such as yourselves we have set up procedures NOT to request a refund on Nesbitt's transfers until Nesbitt's themselves close the file as no prospects – in which case – we all lose.”*

THE CLAIMANT'S CASE

Issues 1 and 2 – Variation or New Contract

76. As noted, these are alternative arguments. They turn on the same evidence and can conveniently be dealt with together.
77. In arguing that the 2013 Contract was varied to provide for the payment of a percentage fee for High Value Cases (or alternatively that there was a new contract for the payment of a percentage fee for such cases), the Claimant contends that the effect of the email of 21 January 2014 and the two emails of 29 January 2014 is clear that such an agreement had been reached. There is no ambiguity in what was being negotiated, nor is there any conditionality in the ultimate acceptance on behalf of the Defendants as expressed by Mr Buckley. Both Mr Williams and Mr Cottrell accepted that Mr Buckley had authority to enter into a contract of this kind. Therefore, there can be no doubt that there was a concluded agreement to this effect, whether by way of variation of an existing contract or by the entering into of a new contract.
78. In the alternative, the Claimant contends that the emails amounted to the offer and acceptance of a new contract that was entered into, the terms of which were for the payment of fees in High Value Cases in accordance with the rate in the final email. The Claimant argues that this is a less probable interpretation of the emails, not least because there was an existing contractual arrangement between the parties for fees relating to all cases and it was that fee scale that was being altered, albeit with retrospective effect, for High Value Cases.

Issue 3 – Settlement

79. In the event that the Court does not find an agreement to pay fees on High Value Cases at 17.5% of profit costs, capped at £10,000, the Claimant contends that the Settlement Agreement clearly and unequivocally records a contractual obligation to pay those fees and the mechanism for calculating them. The only issue relating to High Value Cases that is reserved in the agreement is as the amount of fees due in cases to which that formula applied.
80. As the Claimant pointed out in its written opening, the Defendants' case in respect of the Settlement Agreement was unclear from the statements because the Defendants' witnesses did not engage with the terms of the agreement or how they contended it did not give rise to or reflect a binding obligation to pay the sums referred to. In closing, the Claimant contended that the position was unchanged – the evidence of Messrs

Williams and Cottrell did nothing to undermine the clear meaning of the words in the Settlement Agreement.

Issue 4 – Estoppel

81. The Claimant contends that, in the event that it loses on issues 1, 2 and 3, the Settlement Agreement gives rise to a convention the effect of which is the Defendant is estopped from denying an agreement on the terms acknowledged in the Settlement Agreement.

82. The nature of such an estoppel is stated by the authors of Chitty on Contracts as follows:

“Estoppel by convention may arise where both parties to a transaction “act on assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other.” The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable (typically because the party claiming the benefit has been “materially influenced” by the common assumption) to allow them (or one of them) to go back on it.”

83. In Revenue and Customs Commissioners v Benchdollar Ltd [2009] EWHC 1310 (Ch), Briggs J as he then was said of estoppel by convention:

“(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.”

By way of clarification, the authors of Chitty cite paragraph 92 of the judgment of Hildyard J in Dean v Blindley Health Investments Ltd [2015] EWCA Civ 1023 to make the point in respect of the first factor identified in Benchdollar that *“something must be shown to have ‘crossed the line’ sufficient to manifest an assent to the assumption.”*

84. The Claimant contends that the estoppel was relied on by the Claimant continuing to provide services to the Defendants in respect of High Value Cases, relying on the common assumption that it was to be paid for those services at the agreed rate.

Issue 5 – Illegality

85. The Defendants’ pleaded case on illegality does not, as noted above, include pleas in respect either of a breach of LASPO rendering the agreement unenforceable on the basis that it amounts to the payment of a referral fee or that it amounts to a breach of Regulation 11 of the 2013 Rules. The Defendants’ case is limited to an argument of illegality based on non disclosure by themselves pursuant to an obligation under the SRA Handbook (essentially the failure to inform clients of any financial or other interest which an introducer has in referring the client to the solicitor and the failure to inform the client of any fee sharing arrangement that is relevant) and by the Claimant in failing to act fairly and reasonably in its dealings with its clients and/or in ensuring that all the information given to the client was clear, transparent, fair and not misleading.
86. The Claimant’s case is that it gave the appropriate disclosure to the clients. It relies on Mr Janavicius’ evidence as to what was said on the website and how the Claimant dealt with queries from clients.
87. The Claimant draws attention to the fact that an agreement where fees to a claims management company are calculated on a percentage basis is not necessarily illegal and unenforceable. Rule 7(1) of the Solicitors Rules 1990, stating “*a solicitor shall not share or agree to share his or her professional fees with any person except ...*” made such an agreement illegal (and unenforceable - see Westlaw Service v Boddy [2010] EWCA Civ 929) save in specified circumstances. However, those rules were long since revoked, and the regulatory code for solicitors in force at the relevant time, the Solicitors Regulation Authority (“SRA”) handbook expressly refers to a need for solicitors to disclose fee sharing agreements, demonstrating that such agreements are no longer necessarily illegal so long as they do not offend other principles of regulation.
88. Equally, there is nothing express in the 2013 Rules to prohibit the Claimant from entering into such an agreement. The Claimant further denies the Defendants’ assertion that the 2013 Rules require the disclosure of the existence of a percentage agreement such as that alleged by the Claimant. The obligation to act reasonably and fairly under General Principle 1(a) does not require the disclosure of full details of payments that do not affect the clients’ liabilities. Clients would not be interested in how much the Claimant was being paid, so long as the payment was not being met from monies to which they would otherwise be entitled.

Issue 6 – Quantum Meruit

89. If the Claimant were to be wrong on the issue of there being a binding contract to pay a percentage of recovered profit costs for High Value Cases and fails on the estoppel argument, it contends that nevertheless it is entitled to payment for the valuable services that it has provided. As Robert Goff J put it in British Steel Corporation v Cleveland Bridge and Engineering [1984] 1 All ER 504, a case where work had been carried out but the parties had failed to agree the price or other essential terms of the work, “ *if, contrary to [the parties’] expectations, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in queasy contract, or, as we now say, in restitution...* ”
90. In so far as the Defendants may have been in breach of their professional rules, the Claimant says that this does not taint the agreement between the parties. My attention is drawn to the judgment of the Court of Appeal in Mohammed v Alaga & Co [2000] 1 WLR 1815. That case involved a fee sharing agreement between a firm of solicitors and an interpreter by which the Claimant agreed to introduce Somali refugees to the defendants and to assist the defendants in the preparation and presentation of asylum claims, and that in consideration he would be paid one half of the fees received by the defendants by way of legal aid. Such an agreement was held by the Court of Appeal to be illegal and unenforceable under the regime then in force, namely rules 3 and 7 of the Solicitor’s Practice Rules 1990 made pursuant to powers contained in Section 31 of the Solicitors Act 1974. Whilst the claim based on the agreement itself failed, the Court held that the Claimant was entitled to payment on a quantum meruit for a reasonable sum for the services in fact provided.
91. Lord Bingham noted in his judgment the Defendant’s argument that the Claimant was *in effect seeking to recover part of the consideration payable under an illegal and unenforceable agreement. That is, I think, a possible view of the case. But the preferable view in my judgment is that the plaintiff is not seeking to recover any part of the consideration payable under the unlawful contract, but simply a reasonable reward for professional services rendered. I accept that as an accurate description of what on this limited basis the plaintiff is, in truth, seeking. It is furthermore in my judgment relevant that the parties are not in a situation in which their blameworthiness is equal. The defendant is a solicitor’s firm and bound by the rules. It should reasonably be*

assumed to know what the rules are and to comply with them. If, in truth, it made the agreement as alleged, then it would seem very probable that it acted in knowing disregard of professional rules binding upon it. By contrast the plaintiff, on the assumption made (which I have no difficulty in accepting), was ignorant that there was any reason why the defendant should not make the agreement which he says was made. In other commercial fields, after all, such agreements are common.” The Claimant notes that the correctness of this decision was expressly affirmed in paragraph 119 of the judgment of Lord Toulson in Patel v Mirza.

92. The Claimant contends that the same argument applies here. This is not an attempt to recover part of the sum dues under the contract between the parties but rather a reasonable valuation of the work in fact provided. If the court is forced to look at whether any illegality taints the claim on the quantum meruit, the court should reject that argument.
- 92.1. Any illegality is limited to that of the Defendants;
- 92.2. GWS was purporting to take advice on the legality of its arrangements and was promoting itself as behaving in accordance with the relevant professional principle – this was certainly not illegality which the Claimant either knew of or intended;
- 92.3. A denial of recovery to the Claimant would be a serious and excessive sanction where it had provided services to the Defendants in circumstances where the Defendants, a firm of solicitors, represented their conduct to be lawful and compliant with the regulatory regime;
- 92.4. Denial of relief would not further the purpose of the SRA Handbook, which is about the conduct of solicitors, not claims management companies.
- 92.5. Denial of relief would not prevent the Claimant from making a profit out of wrongdoing – rather it would deny the Claimant profit from a legitimate activity which was illegal (if at all) purely because of the Defendants’ breaches of regulatory obligations;
- 92.6. Denial of relief would not avoid inconsistency in the law – there would be nothing wrong with one party being denied relief because of illegality when it was in breach of its professional obligations whilst allowing the other party relief when there was no such breach on its part and furthermore that party had provided something of value to the party that was in breach.

93. In so far as the Defendants seek to rely on the contractual clause requiring the Claimant to notify clients of “*all information relevant to the Client concerning the introduction including details of any Payments for Services in respect of that client’s matter*”, the Claimant says that it discharged its contractual duty by stating on its website that it would be paid by solicitors. There was no contractual obligation on it to notify clients that the agreement was a fee sharing agreement, in particular where its own professional rules did not (in contrast to the Defendants’) require such a fee sharing arrangement to be disclosed.

Issue 8 – VAT Invoices

94. The Claimant contends that there is no general principle of law that renders payment for services contingent upon an invoice (whether to record VAT or otherwise) by the provider of the services. Such an obligation could only arise if it were a term of the contract for payment of fees by the Defendants. There was no such term here, either expressed in the parties’ written contract or to be implied from their relationship or dealings..
95. In any event, such an obligation would be meaningless where the information necessary to raise the issue lay in the hands of the party who was liable to pay for the services. The Defendants would know when a case had been successfully concluded (to give rise to the second tranche fee) and what profit costs had been recovered (in order to calculate the amount due under the agreement for High Value Cases). The Claimant simply did not have the necessary information to raise an invoice until that point. There is therefore no basis to imply an obligation to raise a VAT invoice before payment.

Issue 9 – The Translation Fees Agreement

96. The Claimant’s point quite simply is that, although the Defendant gives evidence as to the course of dealings in respect of translation fees, there is no material to show that the 2013 Contract which contains an entire agreement provision, did not supersede any pre-existing agreement.

Issue 10 – Liability for Translation Fees

97. On the issue of the liability to pay translation fees, the Claimant’s opening expresses the argument that the Defendants must have been under an obligation to seek to recover the relevant fee from the third party. As it puts it, “*If there was no such requirement, the Claimant would have been a complete hostage to fortune, because it would be providing translation services in good faith, knowing that payment was dependent upon*

recovery from a third party, and that the recovery process was entirely in the hands of the Defendants.’

Issue 11 – Transferred Cases

98. The Claimant contends that the email exchange of 23 July 2014 referred to above shows that the course of dealings between the parties involved the Claimant being entitled to fees that were due before a case was transferred to another firm of solicitors.
99. The Defendants conceded in closing submissions that, where a case had been transferred to Nesbitt’s, the Claimant would have no right of action against that firm in respect of its fees. Accordingly, unless the Claimant was entitled to retain the fees that it had received, it risked going unpaid for cases transferred to Nesbitt’s without having any control over that process, such as requiring Nesbitt’s to assume liability for its payment on transfer. It concedes, consistent with the position in respect of cases retained by GWS, that there would be no such liability if the claim failed.

THE DEFENDANTS’ CASE

Issue 1 – Variation

100. In closing submissions, Mr Fennell agreed with the Claimant’s position that the discussions between the parties about the payment of a percentage of costs rather than a fixed fee for High Value Cases had more the air of variation about it than of the negotiation of a new contract. However, he contended, that, on the proper interpretation of the communications, there was no objective offer and acceptance. He invites the court to give them the following interpretation:

100.1. The email of 21 May 2021 gives the context of the parties considering higher value cases (albeit in the context of those being claims on employers’ liability or public liability insurance policies, rather than based on the valuation of the claims).

100.2. The email of 1 November 2013 contained a conditional offer by which GWS was saying that it would agree the payment of 12.5% of costs recovered with a cap of £10,000 provided that the issue of regulatory compliance could be dealt with. That was not an offer capable of acceptance so as to form a concluded contract since it supposed further negotiation between the parties on the compliance issue.

100.3. The email of 21 January 2014 was the first email capable of being construed as an unconditional offer. However, that document is clear that the so-called

“Sheratons cases” where a conflict existed such as to prevent GWS acting for the client, was to be the subject of a written contract. On a proper reading, that qualification applies equally to the alleged agreement to the payment of a fee of 17.5% of recovered costs, so that there was no concluded agreement but rather consensus about entering into a written contract to be prepared at some time in the future. The Defendant contends this is not consistent with the email being interpreted as an offer to pay 17.5% of recovered costs that was capable of acceptance.

- 100.4. Correspondingly, the email from Mr Janavicius dated 29 January 2014 in response is not an acceptance of an offer because it too supposes a separate contract at a later time. Essentially, he was saying that the percentage fee was agreed but that the contractual terms needed to be documented. As he makes clear in reference to the last point of the previous email (that relating to payment of the so-called back end services fee, which in fact relates to the Second Tranche Fee for lower value and fixed costs claims), he wished their agreement to be documented. This point was repeated in Mr Janavicius’ email of 3 February 2014, where he spoke of a desire to have a single written document containing the parties’ contract.
101. Mr Fennell made the point in closing submissions that the context of the negotiations between the Claimant and the Defendants was that both sides operated in regulated professions who had to demonstrate, to a sometimes hostile outside world, that their agreements were compliant with the regulatory regime. In that context, a caution about concluding a contract was understandable and helps to explain why, on their true interpretation, the communications did not amount to an offer and acceptance
102. For the avoidance of doubt, the Defendants do not raise any issue over Mr Buckley’s authority to enter into a contract on their behalf. Although paragraph 28 of the written opening points out that Mr Buckley was not a partner in GWS, the context of that statement is that the type of guarantee referred to as the third point of Mr Buckley’s email of 21 January 2014¹⁹ was to be signed by a partner and therefore this could not have been a reference to Mr Buckley. But Mr Cottrell accepted that Mr Buckley had the authority to enter into an agreement with the Claimant about the fees payable for specific categories of cases.

¹⁹ As cited above, he refers to “*Some form of guarantee/contract/agreement – signed by a partner, that Goldsmith Williams will be responsible for the back end services fee.*”

Issue 2 – New Contract

103. As I have indicated, the Defendants agree with the Claimant that, if there was a contractual obligation to pay the percentage fee for High Value Cases, this more naturally should be seen as a variation of the existing contractual arrangements rather than a new contract.

Issue 3 – Settlement

104. The Defendants contend that the Settlement Agreement did not include a compromise of the dispute about fees for High Value Cases. This is apparent from the terms of clause 6, which excluded several categories of case from the ambit of the full and final settlement therein referred to, including High Value Cases. There was simply nothing in the document to indicate that it amounted to a contractual agreement as to such matters.

Issue 4 – Estoppel

105. In dealing with this argument, the Defendants acknowledged the test set out by Briggs J as he then was in Benchdollar cited above, noting that this judgment was approved by Lord Burrows in Tinkler v Revenue & Customs Commissioners [2021] UKSC 39:

“51. It may be helpful if I explain in my own words the important ideas that lie behind the first three principles of Benchdollar. Those ideas are as follows. The person raising the estoppel (who I shall refer to as “C”) must know that the person against whom the estoppel is raised (who I shall refer to as “D”) shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C's reliance on the common assumption.

52. It will be apparent from that explanation of the ideas underpinning the first three Benchdollar principles that C must rely to some extent on D's affirmation of the common assumption and D must (objectively) intend or expect that reliance.”

106. The Defendants' case on the alleged estoppel is first to assert that the meaning of the Settlement Agreement has been misstated for reasons identified in respect of the previous issue. However, if the court is against the Defendants on this issue, Mr Fennell, rightly to my mind, conceded that that the alternative meaning advanced by the Claimant involved a common assumption which “crossed the line.”
107. However, the Defendants emphasise that this is insufficient to make out an estoppel. The Claimant must go on to show some reliance on the common assumption in subsequent mutual dealings. Mr Fennell argued that there was no sufficient evidence of this to make out the requirement for an estoppel. As he put it in opening submissions,

the relationship between the parties did not change following the entering into of the Settlement Agreement.

Issue 5 – Illegality

108. The Defendants contend that the Claimant was in breach of General Principle 1(a) and/or (c) of the 2013 Rules (and accept that they would have been in breach of the terms of Version 15 of the SRA Handbook, which applied to them at the relevant time) if the alleged agreement relating to High Value Cases were in fact to have been entered into by the parties. This would have been a fee sharing agreement, of a kind that the Court of Appeal in Westlaw Services Ltd v Boddy [2010] EWCA Civ 929 held to be a breach of the provisions of regulation 7 of the Solicitors Practice Rules 1990, and consequently unenforceable. They contend that such an agreement, if not disclosed to the client, remains illegal under the terms of the SRA Handbook in force at the relevant time. The Handbook is worded in terms of outcomes that must be achieved by solicitors, including in chapter 9 that deals with fee sharing and referrals:

“O(9.4) clients are informed of any financial or other interest which an introducer has in referring the client to you.

O(9.5) clients are informed of any fee sharing arrangement that is relevant to their matter.”

109. The Defendants rely on the analysis by the Supreme Court in Patel v Mirza [2016] UKSC 42 in considering a defence of illegality. The policy reasons for the defence of illegality are that a person should not be allowed to profit from their own wrong doing and that the law should be coherent and not self-defeating. In considering the defence, the court should assess whether the public interest would be harmed by enforcement of the illegal agreement, which requires it to consider (a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) any other relevant public policy on which the denial of the claim may have an impact and (c) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.

110. They contend that the decision in Westlaw v Boddy remains good law following the consideration of the law in Patel v Mirza [2016] UKSC 42. As the Defendants’ opening submissions put it:

“If the court were to enforce a fee sharing agreement which involves a breach of the regulatory requirements of both parties by reason of non-disclosure to clients, that

would undermine and not enhance the underlying policy of the professional standards applicable to both sides.”

111. The Defendants draw attention to paragraph 7 of the 2013 Contract which provided an obligation on the Claimant to “*provide all clients with all information relevant to the Client concerning the introduction including details of any Payments for Service in respect of that client’s matter.*” The Defendant contends that the payment of a percentage of profit costs would fall within the ambit of this contractual obligation and that it was therefore the Claimant’s responsibility that there was non-compliance with the SRA Handbook on the part of GWS.

Issue 6 – Quantum Meruit

112. Following on from their argument under issue 5, the Defendants contend that, in its alternative claim for a quantum meruit, the Claimant is seeking to recover benefits that arise under an illegal contract and that this should not be permitted.
113. As to the decision of the Court of Appeal in Mohammed v Alaga & Co, the Defendants contend that this is a factually very different case. In that case, the Claimant was simply a member of the Somali community, helping out his fellow nationals; in contrast here, the Claimant is a regulated Claims Management Company who was entering into a written contract with GWS for the provision of services. Those obligations included, under Clause 7 of the 2013 Contract, the obligation on the Claimant to provide clients “*with all information relevant to the Client concerning the introduction including details of any Payments for Services in respect of that client’s matter.*” The relevant payments included the alleged fee share and therefore the Claimant was obliged to tell the clients of the arrangement. Its failure to do so was itself a cause of the illegality that leads to the contract being unenforceable.
114. The Defendants contend that the requirement in the SRA Handbook to disclose fee sharing arrangements means that, if they are undisclosed, Westlaw v Boddy remains good law. In considering the balancing act under Patel v Mirza, the Court should bear in mind that, even if the Claimant’s professional rules do not expressly prohibit such agreements, the emphasis remains on the disclosure of arrangements to clients; that the Claimant did not disclose the detail of this arrangement and that in so doing it was in breach of its contractual obligation to the Defendants under clause 7 of the 2013 Contract.

Issue 8 – VAT Invoices

115. The Defendants pleaded cases is that their liability to make payment to the Claimant is conditional on the delivery by the Claimant of a valid VAT invoice. Their argument for such a condition is that the necessity for the delivery of a VAT invoice would mean that an implied term to this effect would go without saying.
116. In closing submissions, they conceded that the obligation to raise VAT invoices only arose in respect of the liability to pay the fixed fees, They argue that, because the Claimant had regular contact with the clients, it would know when cases had been settled and therefore would know when it was necessary to raise a VAT invoice.

Issue 9 – The Translation Fees Agreement

117. The Defendant’s pleaded case on this issue is contained at paragraph 12 of the Defence. Having pleaded that the 2013 Contract does not expressly cover such fees, the Defendant pleads that there was a course of dealing as follows:

- “i. The level of fee initially claimed by the Claimant varied from case to case and depended on the amount of work involved;*
- ii. GWS would seek to recover the translation fee from the relevant defendant or insurer as part of the client’s claim to costs generally;*
- iii. GWS would account to the Claimant for such sum in relation to translation services as was in fact recovered from the relevant defendant/insurer;*
- iv. Where all or part of the translation fee was not recovered as aforesaid, the Claimant would waive such fee or part and the Defendants would not be liable to pay it.”*

118. In its opening submissions, the Defendants said that there was no identifiable issue between the parties either on this point.

Issue 10 – Liability for Translation Fees

119. Again, the Defendants contended in opening that there is no identified issue to be determined. In closing submissions, the Defendants acknowledged that there was a difference between the parties as to whether they were under an absolute obligation to deliver the Claimant’s invoice to the relevant third party (as the Claimant contends) or whether the Defendants had the discretion not to do so if they considered this to be inappropriate (which is the Defendants’ case).

120. The Defendants contend that its interpretation of the contract is more in keeping with the context, namely that a firm of solicitors, which owes professional duties to its clients, as well as duties as officers of the court, should not be expected to submit fees for recovery which it does not consider to be properly recoverable.

Issue 11 – Transferred Cases

121. The Defendant’s case on the transferred cases is that, unless they were reimbursed by Nesbitt’s for the Claimant’s fees, they had no liability to the Claimant. This is an acute issue, I am told, because Nesbitt’s have gone into administration and there are cases in which they made recovery but where the Defendants have not been reimbursed for the Claimant’s fees. The Defendants argue that, since once a case has been transferred, they have no control over the recovery of costs, they should not be expected to pay the Claimant for services rendered in such cases.

DISCUSSION

The Witnesses

122. The first matter to note in considering the witness evidence is that the Defendants contend that the Claimant’s statements do not comply with PD57AC in three respects:

122.1. They contain extensive argument, submission and speculation, contrary to paragraph 3.1;

122.2. They do not identify what documents the witnesses considered in preparing their statements, contrary to paragraph 3.2;

122.3. They do not appear to be in the witnesses’ own words, contrary to paragraph 3.3 (which itself refers to paragraph 18.1 of PD32).

123. The first of these is a clear case of non-compliance. The second is also a well made point – paragraph 24 and 38 of Mr Janavicius’ statements are good examples of this. Paragraph 25 of Ms Milasevuciene’s statement also offends PD57AC in this regard. The third point is harder to judge, though it is difficult to think, having heard her give oral evidence, that (for example) Ms Milasevuciene would have worded paragraph 26 of her statement in this way had she been using her own words.

124. It is also the case that there was some rather less significant non-compliance with the Practice Direction on the Defendant’s side. For example, Mr Buckley four times makes reference to “*guessing*” about factual matters. A witness’ guess does not fall within the proper ambit of the contents of a witness statement that complies with paragraph 3.1 of PD57AC.

125. In Lifestyle Equities v Royal County of Berkshire Polo Club Ltd [2022] EWHC 1244, Mellor J cautioned against parties taking minor technical points about non compliance with PD57AC. At paragraph 98 he stated:

“In my view PD57AC should not be taken as a weapon with which to fillet from a witness statement either two or three words at various points or essentially insignificant failures to comply with PD57AC in a witness statement. Furthermore, in my view, before an application is brought seeking to strike out passages in a witness statement based on PD57AC, careful consideration should be given as to proportionality and whether such an application is really necessary. Indeed, in my view, an application is warranted only where there is a substantial breach of PD57AC (as, for example, in Greencastle). If there really is a substantial breach of PD57AC, it should be readily apparent and capable of being dealt with on the papers. That might provide a mechanism for dealing with objections in an efficient and cost-effective manner.”

126. As I noted in Cumbria Zoo Company Ltd v The Zoo Investment Company Ltd [2022] EWHC 3379 (Ch), the worse problems with non compliance with PD57AC are where the issue only arises at trial. In such cases, the Court’s powers are likely to be limited either to disregarding the witness evidence altogether (which will often be a disproportionate response and is not contended for here) or to reflect the non-compliance in the making of costs orders. However, Mr Fennell is right to say in his opening submissions that such non-compliance may affect the weight to be placed on a witness’ evidence. This is not a penalty for the non-compliance, but rather an appropriate response to the distortion in evidence that arises from a failure to appreciate and act on the need for a witness’ evidence to be their factual account based on what they saw and heard rather than a discourse on the case generally.

127. This said, the non compliance here is far less serious than in either the Cumbria Zoo case or the case of Greencastle v Payne [2022] EWHC 438 (IPEC) heard by the Vice Chancellor that I cited therein and which is mentioned by Mellor J in Lifestyle Equities). There is little material from which to conclude that the account of either Mr Janavicius or Ms Milasevuciene has in fact been tainted by the failures of compliance with the Practice Direction. This was implicitly recognised by Mr Fennell in his sensibly not pursuing the issue in closing submissions. In reality, though I bear the non compliance in mind, it has little affect on my assessment of those witnesses.

128. Mr Buckley’s non-compliance is, as I have noted, less serious. In fact, he retracted some of his more speculative statements and, in the circumstances of this claim, I had no difficulty identifying what was his factual evidence and what was speculative or opinion.

129. The Defendants contend that the witness evidence adduced on behalf of the Claimant was unsatisfactory. In particular, Mr Janavicius was described in closing submissions as having been evasive and argumentative. It is certainly the case that at times Mr Janavicius was unwilling to answer questions on matters that he thought were not relevant to the issues before the court. An example of this was when he was asked about the involvement of Ms Milasevuciene in the medical agency Medexante. Whilst he accepted that Ms Milasevuciene was both the head of administration for his company and his partner, he said he did not know whether she was a director of Medexante, even though that company was involved in the delivery of services on behalf of clients who had been introduced by the Claimant. This is highly implausible. Equally, he was reluctant to answer questions about the financial and commercial success of the Claimant.
130. I am however not persuaded that this undermines his evidence more generally. In both cases, the strong sense I gained was that Mr Janavicius was avoiding answering questions that he thought were designed to undermine his credibility generally. In fact however, the issues were no more than peripheral to the main issues that arise between the parties. On those core issues, I found Mr Janavicius' account to be straightforward and consistent with contemporary material. Whilst he asserted a belief that the Defendants were wrongly trying to avoid a liability which in fact they had agreed to (a belief that is in fact understandable, given some of my later findings), his feeling of injustice in this regard did not lead him to try to twist the evidence in favour of the case that he was advancing. By way of example, he did not purport to recall detail of the meeting on 27 November 2014. Had Mr Janavicius been dishonestly tailoring his evidence, one might have expected him to give an account of that meeting consistent with his case that there was a concluded agreement on High Value Cases. Instead, he said that he "*struggled to recall*" what had been said at the meeting, beyond what was in the minutes.
131. Ms Milasevuciene's evidence was largely peripheral to the matters in issue. In so far as it was relevant, I did not find her to be an obviously unreliable witness.
132. I have commented on Mr Buckley's evidence above. He was willing to acknowledge that the parties' communications had all the appearance of their having reached a concluded agreement on High Value Cases. Indeed, he himself thought they had. It is surprising that this comment did not make it into his witness statement, since his belief is at least arguably relevant to looking at the circumstances of the alleged agreement as perceived by the parties. However, it may be that those involved in drafting the

statement did not consider it to be a relevant or helpful piece of evidence. In any event, I found Mr Buckley to be straightforward in his evidence.

133. The reliability of the evidence of both Mr Williams and Mr Cottrell is complicated by the fact that they were seeking to assert a meaning for the Settlement Agreement that is obviously wrong. Whatever their intention in respect of the Settlement Agreement, the actual wording of clause 6.1 asserts unconditionally a liability to pay the Claimant 17.5% of profit costs in the stated circumstance and at no point does the agreement record a dispute on that issue which is to be resolved at some later date.
134. In fairness to Mr Cottrell, he accepted that the wording of Clause 6.1 was not consistent with his case that it was the intention of the parties (or at least the Defendants) to reserve the dispute in respect of the level of fees in High Value Cases to a later occasion. But this is simply not what the agreement says. No lawyer reading that could consider that its effect was other than to record an existing agreement that the Claimant was entitled to 17.5% of profit costs for High Value Cases. Indeed, the email from Brabners of 16 June 2016 acknowledges that there had been such an agreement. Yet Mr Williams asserted in cross examination that the terms of the Settlement Agreement held over the issue of the Defendant's liability to pay a percentage of fees and Mr Cottrell maintained that he had never believed that there was a compliant way of paying a percentage of profits such that, until a compliant scheme was put in place, GWS was simply agreeing to pay the same fee as was payable in respect of other cases.
135. This obvious inconsistency between the actual words of the agreement (and the Defendants understanding as recited in Brabners' email) and the accounts given by Messrs Williams and Cottrell causes me to be highly cautious about accepting their evidence. At worst, they have changed their position from accepting that GWS had an agreement with the Claimant to pay the percentage to a denial that any agreement was ever reached, presumably for the dishonest purpose of avoiding paying the Claimant its due. It is easy to see how Mr Janavicius has come to this view. At best, they are each so hopelessly confused about what was discussed and recorded in the Settlement Agreement that they cannot now distinguish between what they thought the position to be at different times. It is not necessary to determine which of these is correct since, either way, their reliability as witnesses is severely undermined.

Issues 1 and 2 – Variation or a New Contract

136. These two issues are sensibly taken together since they are alternative arguments based on the same material. In considering issue 1 (or in the alternative issue 2), the first

consideration is as to whether there were the elements of a concluded contract, whether by way of variation of an existing or creation of a new contract.

137. I agree with the position of both parties that the issue of contractual construction here is the conventional exercise of determining what a reasonable person with the background knowledge available to the parties would have understood them to have meant by the language used. There is no question of drafting infelicities, this being a contract which, if it is to be found at all, is dependent on an interpretation of an offer and an acceptance rather than a single document containing its terms. Further, there is no scope for appeal to commercial common sense. Either interpretation contended for is capable of making common sense. The question is rather one of the objective interpretation of their communications.
138. The relevant factual matrix is that the parties were seeking to agree a new scheme of payment for higher value and more complex claims. The Defendants have never denied that they were willing in principle to pay more for the work of the Claimant relating to such cases. The Defendants were understandably concerned that any contractual term agreed was compliant with their professional obligations and regulation, as can be seen in their email of 1 November 2013 where Mr Buckley refers to the issue of compliance.
139. Whilst I agree with the Defendants that it is not possible to interpret the email of 1 November 2013 as an offer because of the conditionality in the reference to compliance, I do not accept that the same conditionality is apparent in Mr Buckley's email of 21 January 2014 or Mr Janavicius' email of 29 January 2014. These documents read as a straightforward offer by GWS as to payment of 17.5% of costs capped at £10,000 where the claim is not in a fixed costs regime and where personal injury damages exceed £10,000 in the first and acceptance of that offer by the Claimant in the second. There is nothing in the words to suggest any conditionality, whether on the issue of compliance with the regulatory regime or otherwise.
140. The Defendants argue that this conditionality is implicit in other aspects of those emails, in particular in the Claimant's request that there be a "contract" (meaning fairly obvious a written contract contained in a single document) between the parties. However:
- 140.1. Mr Janavicius expressly raises the issue of their being a written contract only in respect of the third issue raised in Mr Buckley's email of 21 January 2014, that is to say the commitment to paying a Second Tranche fee. The terms of the letter proposed by Mr Buckley in his email would appear to suggest that

the concern was that the Second Tranche Fee might be taken to be a disguised referral fee, hence the need to identify the services to which it related; but in any event, it is clear from these emails that the proposed document related to that aspect of the parties' dealings, not the question of payment for High Value Cases.

- 140.2. In any event, Mr Janavicius' request as clarified in his email of 3 February 2014 appears to be about having a single written record of the agreement(s) in place between the parties. But on the natural interpretation of the emails of 21 January 2014 and 29 January 2014, this would be a record of an agreement that had already been reached in respect of the High Value cases, namely the 17.5% fee referred to.
141. It is notable that this was the position that Mr Buckley accepted the negotiations to have reached. Whilst his opinion as to whether there was a concluded agreement is irrelevant, his belief that there was such an agreement is relevant because it supports the Claimant's case there was nothing in the discussion between the parties that suggested any conditionality to him. Whilst paragraph 4.9 of his witness statement might be taken to be suggesting that he considered any agreement to be conditional upon a written contract being entered into, when directly asked the question he made clear that this was not what he was saying.
142. The parties, especially GWS, had expressed concerns about whether the proposed agreement was compliant with the regulatory regime. But GWS had taken advice from specialist leading counsel on the issue of compliance with LASPO and made a virtue of that compliance in the marketing materials referred to above. The reasonable person with the background knowledge available to the parties would know that the Defendants had taken advice and that they were asserting that their dealings with Claims Management Companies were compliant. The lack of any express qualification in respect of this particular part of the proposed agreement would naturally lead the observer to conclude that GWS (or at least Mr Buckley as its representative) did not have a continuing concern about the proposed terms.
143. The terms of the Settlement Agreement are of course consistent with such an agreement having been reached. Indeed, the email from Brabners referred to above also supports there being a concluded contract, since it does not suggest any conditionality. It is clear that the Defendants had concerns about whether the contract was compliant with LASPO (and presumably therefore whether it was enforceable) but they did not suggest

that no such agreement had been reached whether through want of compliance, lack of authority on the part of Mr Buckley or otherwise.

144. It is a distinctly unattractive feature of the manner in which this case has been defended that a firm of solicitors should argue amongst other things that the failure of the parties to reduce the agreement to writing is fatal to the argument that there was a concluded contract between the parties, yet their own employee had stated in an email that a written contract was unnecessary and indeed gave oral evidence that he believed that a binding oral contract had been conducted.
145. Having determined that there were all of the elements of a concluded agreement between the parties, the question as to whether it amounted to a variation of an existing contract or the creation of a new contract is of somewhat technical interest only. Whilst at first blush the negotiations between the parties may make this look like an oral variation of the 2013 Contract, there are difficulties in this analysis:
- 145.1. The 2013 Contract contained a clause prohibiting variation other than in writing;
- 145.2. The 2013 Contract did not in fact contain terms as the payment due for the Claimant's services and hence the terms agreed would not amount to the simple variation of existing terms but rather than the addition of new terms in an area of the parties' dealings that had previously been governed by oral agreement rather than the written contract.
146. The first of these arguments is not fatal to the argument for variation as is apparent from the analysis of the Court of Appeal in Globe Motors Inc v TRW LucasVarity Electric Steering Ltd [2016] EWCA Civ 396. However the second is a pointer against variation of the existing contract. In my judgment, the agreement of the parties to pay a percentage fee in High Value Cases is better seen as a variation of the pre-existing oral agreement for the payment of First Tranche Fees and Second Tranche Fees referred to above than as a variation of the 2013 Contract.
147. This is a slightly different legal consequence than that pleaded in the Particulars of Claim, which refers only to variation of the 2013 Contract or alternately the creation of a new contract relating to High Value Cases only. It was not argued in the course of submissions by counsel for either party. However, I cannot see any prejudice to the Defendant in my finding on this issue. This is a pure point of inference on the material before the court coupled with legal analysis. The Defendants would not conceivably have conducted their case in any different way had the issue been pleaded in

accordance with my finding. On the other hand, if my finding were wrong on this issue, then, given my finding on the parties' agreement for the payment of a percentage fee for High Value Cases, it is inevitable that the Claimant would in any event have succeeded either on Issue 1 or Issue 2 as formulated for the trial of preliminary issues. Hence, the determination of the issue in this way does not alter the substance of the parties' rights.

Issue 3 – Settlement

148. As I have noted above, this issue becomes academic if the Claimant succeeds on Issue 1 or 2 since the Claimant can sue for its fees on the contract as varied (pursuant to Issue 1) or the new contract (Issue 2). Given my findings on Issues 1 and 2, it is not necessary to consider this further. In any event, it is problematic to deal with this issue in the abstract. My findings on Issue 1 mean that the parties were already in a contractual relationship pursuant to which there was an obligation to pay the higher rate for High Value Cases. Thus the factual context of the Settlement Agreement does not suppose that there was any unresolved issue on the calculation of fees in such cases. Thus, the Settlement Agreement merely records that which had already been agreed. If I were wrong on my interpretation of the effect of the parties' previous dealings, those dealings would become part of a different factual matrix than that which I have found to be case. This in turn might affect the true interpretation of the Settlement Agreement and its contractual effect.

149. However, it is of relevance to the consideration of issue 4 to record that, on its face, the Settlement Agreement contains a clear and unequivocal acknowledgement that the parties have agreed that the fee due for a High Value Case is 17.5% of profit costs, capped at £10,000.

Issue 4 – Estoppel

150. Again for reasons set out above, this is academic given my finding on Issue 1. However, for the reasons identified above, it is desirable to consider this in further detail since, if I were wrong on Issues 1 and 2, it might be of assistance for findings to have been made on the factual aspects of the estoppel argument.

151. I have referred above to my finding that the Settlement Agreement contains a clear statement as to the parties' agreement to pay a fee for High Value Cases calculated in accordance with the mechanism there set out. In my judgment, the terms of the Settlement Agreement show a clear case first of a common assumption as to the rights of the parties. Further that assumption has "crossed the line to" the extent that each

party indicates to the other their agreement that the sum due for High Value Cases is as stated in clause 5.1. Each party had taken legal advice and each can properly be taken to have assumed a responsibility for their part in the common assumption. As noted above, the Defendant did not dispute that these requirements would be made out if the Claimant's argument on the meaning of the Settlement Agreement was preferred.

152. Whilst the High Value Cases in respect of which the Claimant claims fees were all introduced by the Claimant before the Settlement Agreement and some of the Claimant's work almost certainly predates its execution, the Claimant's case is that it continued to provide services on High Value Cases after the date of the Settlement Agreement, but would not have done so had there remained a live issue as to the rate of payment for those cases. That evidence is uncontroverted and is consistent with Mr Janavicius' evidence more generally (which is accepted by the Defendants' witnesses) that he wished to establish a system of higher rates of pay in such cases. Mr Janavicius had consistently pursued the idea of a higher rate of payment for High Value Cases prior to what I have found to be an agreement to vary the contract terms for such cases. Thereafter, he did not pursue this precisely because he believed that the parties had agreed these terms. His failure to pursue that argument after the Settlement Agreement was executed is a further examine of him relying on the assumption that special terms had been agree for High Value Cases. This is clear evidence of detrimental reliance by Claimant in its continued dealings with the Defendants.
153. Had they thought about it, the Defendants must have realised that the continued provision of services by the Claimant was as a result of a reliance on the assumption that there was agreement as to the rate of payment. That is clearly sufficient to make it unconscionable for the Defendants to resile from the common assumption.

Issue 5 – Illegality

154. As I have indicated, the only basis for arguing illegality open to the Defendant in the trial of preliminary issues on the pleaded case is that based on non-disclosure. This creates some difficulty for the Defendant's case. At the time of the decision in Westlaw v Boddy, the state of the law was that an agreement of the kind referred to therein was illegal as being in breach of subordinate legislation, namely the solicitors Practice Rules, made under Section 31 of the Solicitors Act 1974. However, whilst certain arrangements between solicitors and other parties, most obviously the payment of referral fees, are expressly illegal, there is now no regulation that renders fee sharing agreements illegal as a matter of course. Indeed, both the SRA Handbook and the 2013 Rules suppose that fee sharing agreements may be entered into provided their existence

is, in certain circumstances, notified to the client. I do not therefore find Westlaw v Boddy to be of assistance on the issue of illegality.

155. Rather, the court must look at whether the enforcement of the claim would be contrary to the public interest. In this respect, Patel v Mirza sets out the relevant considerations:

155.1. What is the underlying purpose of the prohibition that has been transgressed?

155.2. Would the denial of the claim have impact on any other relevant public policy?; and

155.3. Would denial of the claim be a proportionate response to the illegality?

156. The prohibition contended for here is a prohibition on solicitors entering into a fee sharing agreement where that agreement has not been notified to the client. It should be noted the duty to notify (at least on the facts of this case) is only the Defendants. The Claimant would only be under an express obligation to notify the client if it was in a contractual relationship with the client for reasons set out above. On the pleaded case, it is not open to the Defendant to argue such a contractual relationship.

157. Further, I do not accept the Defendants' argument that the failure of the Claimant to notify the clients of the profit sharing agreement amounts to a breach of its duties under the 2013 Rule. The express obligation to do so arises only where the Claims management company is in a contractual relationship with the client. In *Lewison on Contracts*, the authors at part 6 of chapter 7 state as a canon of construction: "*Where the contract expressly mentions some things, it is often to be inferred that other things of the same general category which are not expressly mentioned were deliberately omits. Similar principles apply to the express inclusion of obligations dealing with a particular area of application.*" This maxim, which in previous times was known as *expressio unius est exclusio alterius*, is, in my judgment, a good principle of interpretation. It would tend to suggest that the failure expressly to include the obligation to inform the client of the fee sharing agreement in circumstances other than where there is such a contract was the deliberate decision of those who drafted the rules. Further, I agree with the Claimant that there is nothing inherently unfair in failing to tell the client of the basis of calculation of a payment that in fact will not be met by client.

158. Not to have told the clients at all about the fact that the Claimant was paid by GWS for its services would arguably amount to a breach of general principle 1(c) of the Client Specific Rules. However the unchallenged evidence before me is that the Claimant did tell clients of this.

159. It follows that in my judgement the Claimant was not in breach of the 2013 Rules in notifying clients of its dealings with the GWS. The only illegality in respect of the fee sharing agreement for High Value Cases was therefore that of GWS. It is at the very least ironic that a firm of solicitors should be using its own illegality to seek to defeat a claim against it for fees that it has otherwise agreed to meet for services which it accepts have been of value to it in earning fees.
160. Whilst the courts will doubtless wish to express disapproval of such agreements where the duty to notify the client has not been discharged, I do not see that the underlying purpose of the requirement for notification would be furthered by barring the Claimant's claim. In particular:
- 160.1. The regulatory regime points in the direction of preventing solicitors from enforcing such agreements, but not others, provided that, as here, those others have discharged their regulatory duty.
- 160.2. The regulatory breach and hence the illegality arises from the conduct of the solicitors who are seeking to resist the Claimant obtaining relief for service that it has actually provided.
- 160.3. The Defendants represented to the Claimant and other claims management companies that its conduct was consistent with the regulatory landscape. Whilst that representation might have been made in ignorance of the fact that this particular agreement had been entered into, it lies ill in the mouth of the Defendants to make such a representation but to be excused having to pay for services that have actually been provided as a result of its own non compliance.
- 160.4. By denying the Claimant relief, it would not be losing a profit from wrongdoing but rather denying a profit for works which it carried out and which would have been recoverable but for the Defendant's breach.
161. I accept that the Claimant's contractual obligation to disclose the detail of its arrangements with the Defendants is a factor against allowing relief, since it can be argued that Claimant itself has caused the circumstances in which the contract is unenforceable. But any blame to be attributed to the Claimant is dwarfed by the blame that lies on the Defendants who as solicitors, can be expected to know the law and who, on the clearest of evidence, represented that their dealings were compliant with the regulatory regime. At least some of those making representations about the regulatory

compliance of GWS may have been unaware of the terms of the agreement that Mr Buckley had entered into but that ignorance cannot be laid at the door of the Claimant.

162. In light of these factors and applying the test in Patel v Mirza, the Defendants fail to persuade me that a fee sharing agreement between a claims management company and a firm of solicitors should be treated as being unenforceable at the suit of the claims management company where the illegality alleged is the solicitors' obligation to notify the client of the agreement has not been discharged.

Issue 6 – Quantum Meruit

163. Given my conclusion on issue 5, it is unnecessary for me to determine issue 6. The factors pointing in the direction of my conclusion that the agreement is not unenforceable on grounds of illegality are equally strong arguments for allowing a quantum meruit but it is unnecessary to analyse the arguments for or against that conclusion since they are essentially matters of law or inference, rather than primary fact, that the appeal court would be as well able to deal with as me.

Issue 8 – VAT Invoices

164. As I have noted, the Defendant limits its case on this issue to the cases where a fixed fee was payable. However whilst it might be correct that the Claimant would usually have been aware when such cases were settled, there is no necessity that this would be the case.
165. The Claimant's argument is to be preferred for the following reasons:
- 165.1. Absent a term of the contract to this effect, liability to pay provider of a service is not dependent on a VAT invoice being submitted – the Defendants have not suggested any alternative basis for such an argument;
- 165.2. There is no express term to this effect in the parties' contract, even though one could have been included in the 2013 Contract had the parties wished to agree such a term;
- 165.3. There is no sufficient ground to imply a term requiring such an invoice to be rendered before payment becomes due either invoking the officious bystander or the business efficacy test. The amount of the liability or the date upon which it became due was not dependent on material that was in the hands of the Claimant rather than the Defendants - if anything, the opposite was the case.

Issue 9 – The Translation Fees Agreement

166. The question as to whether the obligation to pay translation fees arose from a course of dealings or from the 2013 Contract (as superseding a course of dealings) is seemingly academic other than as to costs. As a matter of principle, it is more apt to categorise it as an agreement that formed part of the dealings between the parties, just as the fees payable for cases were the subject of such a course of dealings. Whilst the 2013 Contract contains an entire contract provision, it was in fact silent on translation fees and did not identify any obligations on either side. In this respect my reasoning is similar to that under Issue 1 – given that the 2013 Contract did not on either party’s case set out all of the obligations between the parties, it is clear that some of their obligations are to be found from their course of dealings. Whilst I accept that that contract may have some bearing on aspects of the duties relating to translation fees, that silence means that the obligations in respect thereof can only be seen as an aspect of the course of dealings between the parties.

Issue 10 – Liability for Translation Fees

167. I have redefined this issue above as whether the Defendants are obliged to account to the Claimant for translation fees if they have not submitted the Claimant’s invoice for such fees to the third party. The course of dealings is not sufficiently clear as to allow me to reach a conclusion on the particular question as to whether the parties expressly agreed that the Defendants had a discretion not to submit invoices that it considered questionable. This must then be determined as a matter of the implication of terms in the agreement, by an objective survey of the dealings between the parties and the application of commercial commons sense.

168. Three factors are important:

168.1. the Claimant had no control over whether the Defendant any particular invoice (the “hostage to fortune” argument advanced by the Claimant);

168.2. the Defendants, as highly regulated professionals and officers of the court, were under an obligation only to submit fees for payment by the third party which they reonably believed were recoverable, such that they might be subject to criticism and indeed public censure if they sought to recover fees that went beyond this.

169. In my judgment, the Defendants’ obligations would be given commercial sense by interpreting them as follows:

- 169.1. The Defendants were obliged to consider whether any invoice for translation fees submitted to them by the Claimant should be submitted to the third party who might putatively meet the fee in the particular case;
 - 169.2. If the third party paid the fee, the Defendants were liable to account for it to the Claimant;
 - 169.3. If the third party did not pay the fee, the Claimant could not recover it;
 - 169.4. If the Defendants had good reason to doubt that a fee was recoverable, they were entitled not to submit the invoice to the third party;
 - 169.5. In the event of the Claimant challenging the failure to submit a particular invoice to the third party, the Defendants were obliged to explain why they had not done so.
170. So long as all of these obligations were met, the Claimant is protected against any lack of effort by the Defendants in that, if an invoice is not submitted, the Defendant would be in breach of contract unless it could justify declining to do so. There are no sufficient grounds to impose a higher obligation on professionals in the position of the Defendants in respect of the invoices that were in dispute, such that they became effectively insurers who were liable to meet the invoice even if it had not been paid by the third party.

Issue 11 – Transferred Cases

171. As with the liability for translation fees, the 2013 Contract does not help define what is payable in respect of transferred cases. Here however commercial common sense strongly points in favour of the Claimant's reading:
- 171.1. When cases were transferred from GWS to Nesbitt's, the Claimant had not control over the process – it could not require Nesbitt's to assume responsibility for payment of its fees as part of the transfer process;
 - 171.2. On the other hand, GWS could have required to it assume responsibility and furthermore could have enforced that responsibility by requiring Nesbitt's to pay up front for the liability that GWS had assumed to the Claimant for its fees.
 - 171.3. In such circumstances, commercial common sense required the Defendants to take responsibility for the process by retaining its liability for the Claimant's fees.

172. Furthermore, the emails of 23 July 2014 suggest that this conclusion is consistent with both parties' reading of their course of dealings.
173. The same conclusion is reached by the slightly different route of looking at the agreed position of the parties that, where a claim that was commenced with GWS was successful, the Defendants were liable for the Claimant's fees in accordance with the fee structures referred to above. There is however no material before the court to lead to the conclusion that the obligation was different in respect of fees that were already due from the Defendants to the Claimant, but where subsequently the case was transferred to Nesbitt's.
174. Either way, I am satisfied that the Defendants remained liable to the Claimant for fees accrued prior to the transfer of a case to Nesbitt's, regardless of whether Nesbitt's in fact reimbursed either the Claimant or the Defendants for the fee, provided always that the claim was successful.

CONCLUSION

175. In summary, my answers to the questions raised at the trial of the preliminary issue are:
- 175.1. Issue 1, Variation - whether the 2013 Contract was varied by the exchange of emails referred to at paragraphs 17 to 19 of the Particulars of Claim to provide that in respect of High Value Cases, the Claimant would be entitled to receive 17.5% of costs recovered by the Defendants, capped at £10,000 in respect of cases issued on or after 5 September 2011. **It was so varied.**
- 175.2. Issue 2, A New Contract - whether a new written contract was agreed between the parties as pleaded at paragraph 23 of the Particulars of Claim. **This falls away because of the answer to Issue 1.**
- 175.3. Issue 3, Settlement - whether, on its true construction, clause 6 of the Settlement Agreement has the meaning and effect contended for at paragraph 30 of the Particulars of Claim. **This is academic because of the answer to Issue 1 and I do not answer it here.**
- 175.4. Issue 4, Estoppel - whether the Defendants are bound by the estoppel as pleaded at paragraph 31 of the Particulars of Claim. **They would be, were the Defendants not contractually bound to pay these fees in any event by reason of the answer to Issue 1.**

- 175.5. Issue 5, Illegality - whether the contract asserted by the Claimant for the payment of percentage fees in High Value Cases is void for illegality as pleaded at paragraph 30 of the Defence. **It is not.**
- 175.6. Issue 6, Quantum Meruit. Whether the Claimant is entitled to a quantum meruit in respect of High Value Claims if it does not have any entitlement thereto under the terms of a contract or an estoppel and, if so, on what basis is it to be calculated. **This issue becomes academic in light of my answer on Issue 5 and I do not answer it here.**
- 175.7. Issue 7, Limitation - whether the limitation period for the sums claimed by the Claimant commenced on the date of the Claimant's invoice as contended for at paragraph 31(c)(ii) of the Defence or some other date. **No determination is sought by the parties on this issue.**
- 175.8. Issue 8, VAT Invoices - whether the Defendants' obligation to pay sums due to the Claimant is conditional upon the delivery of a valid VAT invoice as contended for at paragraph 31(c)(vi) of the Defence, or whether the delivery of a fee note is sufficient as contended for at paragraph 31(c) of the Reply. **Payment is not conditional on the delivery of a valid VAT invoice.**
- 175.9. Issue 9, the Translation Fees Agreement - whether the 2013 Contract governs the payment of fees for translation services, as alleged at paragraph 10 of the Reply, or whether translation services were governed by a separate agreement as alleged at paragraph 12 of the Defence. **It is governed by the course of dealings between the parties.**
- 175.10. Issue 10, Liability for Translation Fees - whether the Defendants are obliged to account to the Claimant for translation fees if they have not submitted the Claimant's invoice to the third party. **They are not so obliged, although they do have a duty to submit such invoices to the relevant third party unless they had good reason to consider the fee not to be recoverable.**
- 175.11. Issue 11, Transferred Cases. Whether the Defendants have any liability to the Claimant in respect of files transferred from the Defendants to another firm of solicitors prior to the conclusion of the relevant claim. **They are liable for fees already due at the time of transfer so long as the claim is ultimately successful.**
176. I have commented during this judgment on various aspects of how the Defendants have conducted the defence of the claim, in particular: (a) in advancing, through a Defence

with a statement of truth signed by each of them and through written and oral argument, which asserts a case about whether a concluded agreement that was contradicted by the evidence of their own employee; (b) advancing a case on the meaning of the Settlement Agreement which is clearly unsustainable; and (c) arguing a defence based on illegality which involves impugning their own conduct. These factors point to the defence of this claim being based at least in part on wishful thinking bolstered by after the event attempts at rationalising the meaning of discussions that in retrospect have looked unhelpful. This manner of defending claims is all too common across all jurisdictions but seems particularly to infect cases in the Business and Property Courts. It is unattractive in any case, but is the more serious where the litigants who are solicitors, owing not only professional duties to their clients but also obligations as officers of the court.