Neutral Citation Number: **[2025] EWHC 185 (SCCO)**

SCCO Ref: SC-2023-APP-000405

IN THE IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Date: 31 January 2025

Before :

COSTS JUDGE BROWN

- -

Between:

LOUISE MICHELLE REEVES

Claimant

- and -

SIMON KEVIN FRAIN (aka SIMON KEVIN REEVES aka BILL REEVES (2)

MARK RYAN MCKINNON (4)

Defendants

- -
- -

Robert Marven KC (instructed by Stokoe Partnership Solicitors) for the Claimants
Craig Ralph (instructed by LLP Solicitors) for the Second Defendant
Ben Quiney KC (instructed by LLP Solicitors) for the Fourth Defendant

Hearing dates: 6 and 7 November 2024
Draft circulated: 23 January 2025

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Approved Judgment

Judge Brown:

1. This is my decision on preliminary issues arising in the detailed assessment of the costs claimed by the Second and Fourth Defendant. The costs are claimed pursuant to the order of Green J on 4 March 2022 which provided that the Claimant pay 70% of the Second and Fourth

Defendants' costs subject to detailed assessment on the indemnity basis if not agreed.

2. The order was made in contested probate proceedings brought by the Claimant (in Claim Number PT-2019-000803), concerning the validity of a will dated 7 January 2014 made by Kevin Patrick Frain ('the Deceased'), the father of the Claimant and the Second Defendant and the grandfather of the Fourth Defendant. The Second and Fourth Defendants (collectively 'the Defendants') maintained that this will was not valid alleging that it was procured without the Deceased's consent.

3. On 31 January 2022 following a lengthy trial, judgment was given in favour of the Defendants (see [2022] EWHC 159 (Ch)). Green J made an order granting probate of the deceased's will dated 18 April 2012, pronouncing for the force and validity of that will and pronouncing against a later will of 7 January 2014. He found that the Claimant had not proved that the Deceased knew and approved of the 2014 will. Subsequently an application for contempt proceedings was made against the Claimant and a solicitor (which application was refused by Joanna Smith J: see [2023] EWHC 73 (Ch)). It is perhaps however important to note for current purposes that although the Defendants have been successful on their claim, the estate was and is (I am told) still to be distributed.

4. The Defendants funded their case in part by Damages Based Agreements ('DBAs') with The London Litigation Partnership Ltd t/a LLP Solicitors ('LLP').

5. The Second Defendant's Bill states that Part 15 'was funded by way of a DBA'; further, according to the Replies, after 'success', the DBA 'concluded' and part 16 "represented (was founded on) 'a (new) private retainer'. The position is the same in respect of Parts 2 and 3 of the Fourth Defendant's bill: his Bill narrative asserts that Part 2 'was funded by way of a DBA'; but, according to the Replies, after 'success', the DBA 'concluded' and Part 3 represented 'a (new) private retainer'.

6. At a hearing in the costs proceedings on 15 January 2024 I decided that genuine issues arose as to whether there were enforceable claims for costs in respect of the Parts of the Defendant's bills identified in the previous paragraph, putting the Defendants to their election either to disclose all retainers and, in particular, the DBAs in respect of the relevant parts of their respective bills or to prove the terms of such retainers in some other way.

7. The Claimant now challenges the recoverability of the costs claimed in the Parts identified above to the extent that such costs are claimed under the order of Green J. The estate of the Deceased has, I am told, a substantial value of some £100 million and the sums which turn on the points that arise, both between the parties to the litigation and between LLP and the Defendants, are substantial.

The Defendants' DBAs

8. The Second Defendant entered into a DBA with the LLP which bears the date of 16 February 2021. It was apparently signed on 18 February 2021 when the Second Defendant also signed the LLP's retainer letter, the DBA 'checklist' and LLP's Terms and Conditions.

9. The Fourth Defendant and/or his guardian[1] entered into a DBA with the LLP on or about 16 December 2020 and LLP's retainer letter was signed on 9 December 2020. A DBA 'checklist' was signed and is dated 16 December 2020; and LLP's (undated) Terms and Conditions appear to be signed.

10. The Terms and Conditions appear generic in nature in that they contemplate different forms of funding arrangements. Under the heading *Charges and Expenses* there is provision for charging by reference to the time spent by solicitors at an hourly rate. However, alongside this heading, the Terms and Conditions provide in brackets and in bold "*unless you have agreed alternative arrangements with us under Conditional Fee Agreement or a Damages Based agreement - the terms of which take precedence over these terms*".

11. Although apparently entered on different dates and providing for different percentages payable of any money or any non-monetary award or settlement received (see below), the two DBAs are otherwise - the parties agree for current purposes - materially the same. Each contained the following provisions:

a. 'This is … a Damages-Based Agreement within the meaning of section 58AA of the Courts and Legal Services Act 1990 and the Damages-Based Agreements Regulations 2013'.

b. Clause 1 defines 'expenses' to include 'the cost of instructing … barristers'.

c. Clause 3.1: 'This agreement covers … Any claim brought or arising out of Claim Number PT-2019-000803 …'

d. Clause 8.2: 'You agree to be responsible for payment of the barrister's fees (as explained in Paragraph 9 below). We may ask you to provide payment in advance to cover the barrister's fees before any hearing at which they are instructed to represent you.'

e. Clause 9.1: 'You are responsible for paying expenses that are incurred on your behalf regardless of whether you win or lose.'

f. Clauses 9.2 and 9.2.5: 'Expenses typically include … Fees paid to a barrister. These may be for advice given in a conference, or for representing you at a hearing. If your case settles shortly before a hearing, and your barrister has already undertaken the preparation for that hearing, then you may still have to pay for part of their fee.'

g. Clause 10.1: 'If you win you agree to pay us [10% for the Second Defendant, or 24% for the Fourth Defendant] of any money and any non-monetary award or settlement received'.

h. Clause 11.1, under the heading 'What do you pay if the claim or proceedings are lost?': 'You will always have to pay disbursements which have been incurred, because you are always liable to pay disbursements.

[1] I understand that the Fourth Defendant was young and had a guardian signing on his behalf. Nothing, I am told, turns on this.

12. The retainer letters each state in bold: '*Under DBAs we will always expect you to meet disbursements. It is for that reason that we need money on account of Counsel's fees before we take over his instruction***.**'

13. The checklists state at paragraph 2: '… *I am responsible to meet the costs of all expenses. This might include items for example, such as … counsel's fees …*'.

The Defendants' alleged private retainers

14. After Green J's judgment had been handed down on 31 January 2022, but before the consequential hearing on 4 March 2022, LLP sent letters dated 16 February 2022 to the Fourth and Second Defendants which stated:

> '*As you know, once the judgement was handed down, or work so far as the no win no fee (DBA) arrangement was concerned was complete. The "win" therefore means that our fees for this aspect have become due under the DBAs.*
>
> *As discussed prior to the Judgment and immediately after hand down, any new work done since the hand down of the Judgment, ie the "win", is chargeable at our hourly rates of £500 per hour … for all work done in relation to the estate from point onwards going forward. As explained this could take some time to conclude in its entirety.*
>
> *Going forward the amount of work required and therefore the fee payable with be significant it would seem, in the light of what we have seen thus far, such a HMRC issues and the undervaluation of properties….*
>
> *As you are aware the issue of costs will be argued on 4 March as well who will be appointed as the PR of the estate. We are preparing the proposals that we have, along with the new PR's that we are proposing….*

15. The representations in these letters are alleged by the Claimant to amount to repudiation of the DBAs by the LLP. The Defendants contend that they gave rise to fresh retainers which are said to support the claims at Part 16 of the Second Defendant's Bills and Part 3 of the Fourth Defendant's Bill including in particular the work done for the hearing dealing with consequential matters (costs etc) on 4 March 2022.

The statutory DBA regime ('the DBA rules')

16. As is well known DBAs are an exception to the common law rule (preserved by statute: section 14(2) of the Criminal Law Act 1967) that a champertous contract is contrary to public policy and hence unlawful. Champerty is an agreement (or arrangement) in which a person with no previous interest in a lawsuit finances it with a view to sharing the disputed property if the suit succeeds, and a contingency agreement in respect of the proceeds of litigation is one form of such an agreement. In *Re Trepca Mines Ltd.* (No. 2) [1962] 3 W.L.R. 955, Lord Denning set out what it is about champerty that is objectionable:

> *The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law*

for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law, and I may observe that it has received statutory support, in the case of solicitors, in section 65 of the Solicitors Act, 1957.

17. In *Diag Human v Volterra* [2023] EWCA Civ 1107 Stuart – Smith LJ, when giving the lead judgment of the court, said this (at [17] and [18]):

Until 1990 it was axiomatic that contingency fee agreements entered into by lawyers with their clients were illegal and contrary to public policy, because they gave lawyers an interest in the outcome of the litigation that could create conflicts between the lawyer's interests and those of their client. That axiomatic position was authoritatively restated by Buckley LJ in Wallersteiner v Moir (No. 2) [1975] 1 QB 373 at 401D–E.

Because one of the foundations for the public policy rule was the need to avoid conflicts of interest, what is prohibited at common law is not merely entering into an agreement tainted by maintenance or champerty but also acting in accordance with such an agreement. "If anything is against public policy it is the solicitor undertaking or continuing to act for a party in litigation in circumstances where the solicitor stands to gain more from the action if it is won than if it is lost.": see Awwad v Geraghty & Co [2001] QB 570, 594B–C per Schiemann LJ (emphasis added).

18. He went on to say, in respect of the mutability of public policy, (at [26]):

Any further modification of public policy in this area is for Parliament to establish and define: it is not for this court to attempt.

19. The Courts and Legal Services Act 1990 s 58AA(3)(a) ('the Act') defines a damages-based agreement as follows:

'*a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that—*

(i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and
(ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.' (my underlining)

20. Section 58AA (4) of the Act sets out various conditions and provides for conditions to be prescribed by regulation. In particular:

The agreement—
(a) must be in writing;

(aa) must not relate to proceedings which by virtue of section 58A (1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of a description prescribed by the Lord Chancellor;

(b) if regulations so provide must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner;

(c) must comply with such other requirements as to its terms and conditions as are prescribed; and

(d) must be made only after the person providing services under the agreement has complied with such requirements (if any) as may be prescribed as to the provision of information.

21. Subsections 58AA (1)&(2) of the Act provide:

'*A damages-based agreement which satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement*.
But … a damages-based agreement which does not satisfy those conditions is unenforceable.'

22. Regulation 3 of the Damages-Based Agreements Regulations 2013 ('the 2013 Regulations') provides, under the heading, *Requirements of an agreement in respect of all damages-based agreements*:

The requirements prescribed for the purposes of section 58AA(4)(c) of the Act are that the terms and conditions of a damages-based agreement must specify—

(a) the claim or proceedings or parts of them to which the agreement relates;

(b) the circumstances in which the representative's payment, expenses and costs, or part of them, are payable; and

(c) the reason for setting the amount of the payment at the level agreed, which, in an employment matter, shall include having regard to, where appropriate, whether the claim or proceedings is one of several similar claims or proceedings.

23. Regulation 4 of the 2013 Regulations provides under the heading P*ayment in respect of claims or proceedings other than an employment matter and provides in respect of such proceedings,*

(1) '…a damages-based agreement must not require an amount to be paid by the client other than—

(a) the payment, net of—
(i) any costs (including fixed costs under Part 45 of the Civil Procedure Rules 1998); and
(ii) where relevant, any sum in respect of disbursements incurred by the representative in respect of counsel's fees,
that have been paid or are payable by another party to the proceedings by agreement or order; and

(b) any expenses incurred by the representative, net of any amount which has been paid or is payable by another party to the proceedings by agreement or order.'

24. And regulation 4(3) provides:

'*…a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 50% of the sums ultimately recovered by the client*.' (my underlining)

25. Regulation 1 of the 2013 Regulations defines 'payment' as '*that part of the sum recovered in respect of the claim or damages awarded that the client agrees to pay the representative, and excludes expenses but includes, in respect of any claim or proceedings to which these regulations apply other than an employment matter, any disbursements incurred by the representative in respect of counsel's fees'*. (my underlining).

The Civil Procedure Rules: inter partes costs recovery where a party has entered into a DBA

26. CPR 44.18 deals with the recovery of costs as between litigating parties under the heading *Damages Based Agreements*. It provides:

> *(1) The fact that a party has entered into a damages-based agreement will not affect the making of any order for costs which otherwise would be made in favour of that party.*
>
> *(2) Where costs are to be assessed in favour of a party who has entered into a damages-based agreement –*
>
> *(a) the party's recoverable costs will be assessed in accordance with rule 44.3; and*
>
> *(b) the party may not recover by way of costs more than the total amount payable by that party under the damages-based agreement for legal services provided under that agreement.*

27. Thus, the paying party is not required to pay more than would have been payable if the receiving party had entered conventional retainer, but the indemnity principle also applies so that the paying party cannot be required to pay more than the receiving party has in fact paid or is liable to pay under the DBA.

The issues

28. The Claimant alleges that the DBAs do not comply with requirements of the DBA rules and are unenforceable. In particular it is said:

> (1) a DBA may only provide for payment to the solicitors ('the Payment') out of sums recovered and, it is said, the DBAs in this case do not do so;
>
> (2) the Payment to the solicitors under a valid DBA must include counsel's fees, which may not be charged as expenses, and in this case counsel's fees are charged an expense and in addition to the Payment; and,
>
> (3) the Payment to the solicitors must be 'net of' any *inter partes* recovery of solicitors' costs and the DBAs do not provide for this.

29. The Defendants do not accept that the funding agreements failed to comply with the relevant provisions, and contend that if that there was any departure from the relevant

provisions such a departure was not material or sufficient to render the agreements unenforceable (more particularly as to the challenges at (2) and (3) above, as to which see below). Further, in certain specific respects (more particularly as to the challenges at (2) and (3) above) concerning the treatment of counsel's fees that any relevant offending terms could be severed leaving an enforceable DBA without materially altering the other parts of the DBA or the core bargain. I address all these matters under the headings Issues 1, 2 and 3 (following the numbering above of the challenges).

30. There is an issue as to whether the DBAs were wrongly repudiated, this being another ground on which it is said that the DBAs give rise to no enforceable claim for costs - Issue 4. As intimated above, the Claimant says the solicitors repudiated the DBAs before they had completed their obligations under the agreements and this, she argues, is a further reason why LLP are not entitled to any payment thereunder. This is also denied.

31. There are further issues arising as to whether there was a conventional or private retainer supporting the claims for the costs in Part 16 of the Second Defendant's bill and Part 3 of the Fourth Defendant's bill. The Claimant does not accept that the representations which I have set out above gave rise to any new retainer. But even if they did, and there were such an agreement by variation of the DBA or otherwise, the Claimant argues that they were void or voidable on the grounds of misrepresentation or mistake and do not give rise to a proper claim for costs. These allegations are also disputed. They were dealt with relatively lightly in argument (the costs which turned on it are modest). I raised my own concern as to whether the relevant representations should be read in their factual context in the way the parties alleged. In any event I deal with these various issues under the heading 'Issue 5'.

32. I should perhaps say that although I had the benefit of detailed skeleton arguments, it is- I think -not unfair to say the arguments were developed somewhat sketchily by the Defendants in the skeleton arguments and developed more substantially orally.

General principles of statute interpretation

33. There appears a large measure of agreement as to the approach I should take when interpreting the DBA rules.

34. As explained by Lord Bingham *(Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 the court's attention should not be confined to a literal interpretation of a particular provision giving rise to difficulty. He said this at [8]:

> *"… It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."*

35. In *Pollen Estate Trustee Co Limited v Revenue and Customs Commissioners* [2013] EWCA Civ 753, [2013] 1 WLR 3785, Lewison LJ said this:

> *"The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. … In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole… The essence of this approach is to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, on its true construction, applies to the facts as found".*[2]

36. I was also reminded of the presumption against absurdity. In *Bennion, Bailey and Norbury on Statutory Interpretation* (8th Ed) at paragraph 13.1 the presumption was explained as follows:

> *"(1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature. Here, the courts give a very wide meaning to the concept of "absurdity", using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.*
> *(2) The strength of the presumption against absurdity depends on the degree to which a particular construction produces an unreasonable result.*
> *(3) The presumption may of course be displaced, as the ultimate objective is to ascertain the legislative intention."*

37. As it was put by Lord Millett in *R (Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20 [116] to [117], " [*the*] *more unreasonable a result, the less likely it is that Parliament intended it…"*

38. I was also reminded of the presumption that the secondary legislation (in this case the 2013 Regulations) should be read in accordance with the primary legislation (the Act). The presumptions in respect of secondary or delegated legislation, as explained in *Bennion*, are that the general principles of statutory interpretation apply but there is an additional consideration that since delegated legislation derives it authority from the enabling Act, it must be interpreted in the light of that Act (see *Bennion* para. 3.17).

The Statutory Objective

39. In the context of the arguments that were put, it is important for me to note the Statutory Objective underlying the DBA Rules which is set out in Section 17 of CLSA:

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[2] See too *Zuberi v Lexlaw Ltd and The General Council of the Bar of England and Wales* [2021] EWCA Civ 16 at [30]

> *17 The statutory objective and the general principle*
> *(1) The general objective of this Part is the development of legal services in England and Wales (and in particular the development of advocacy, litigation, conveyancing and probate services) by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice.*

40. In *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28, Lady Rose, in her dissenting judgment, said this at [149]:

> *"The parties drew our attention to two recent cases considering the application of section 58AA. They illustrate, in my view, the courts' awareness that provisions enacted to enable "new or better ways" for legal services to be provided should not be used either by the client to avoid paying their own lawyers for successful work done pursuant to the retainer or by the opponent to disrupt the proceedings and avoid the adverse costs consequences that normally follow from having fought and lost".*

41. It is submitted by the Defendants (apparently uncontroversially) that the plain purpose of the DBA Rules is to change the common law in order to permit the remuneration of lawyers by means of a share of recoveries made by their client; this is with the clear aim of increasing parties' access to justice by providing further and innovative methods of funding litigation (see too *Zuberi v Lexlaw Ltd and The General Council of the Bar of England and Wales* [2021] EWCA 16 at para. 34 and s. 17(1) of the Act).

Materiality

42. If there has been a breach of or departure from the DBA Rules (which is not accepted) then such a breach or departure, it is said by the Defendants, does not inevitably lead to a finding that the DBA in question is unenforceable. Any departure, it is argued, from the regulations must be a material one. In *Hollins v Russell* [2003] 1 WLR 2487 the Court of Appeal were considering whether various Conditional Fee Agreements [CFAs] had "s*atisfied*" the relevant statutory regulations. As it was then put, in carrying out this exercise, the court is required to consider whether any departure from the regulations had *"a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice*?" (see [103] and [107).

43. The Defendants say that the same consideration applies in respect of DBAs as apply in respect of CFAs, and that this is not least because the terms which apply to DBA (see [18] above) are in similar, if not identical, to the terms to those that apply in respect of CFAs. Thus, the term "satisfies" requires a qualitative judgment on these matters specified by the Court of Appeal.

44. In *Garrett v Halton BC* [2006] EWCA Civ 1017 the Court of Appeal rejected a contention that because a breach had not caused the client loss it could not be material for these purposes. Dyson LJ (giving the judgment of the court) said at [27] and [30],

> *"…The starting point must be the language of section 58(1) and (3) of the 1990 Act. It is clear and uncompromising: if one or more of the applicable conditions is not satisfied, then the CFA is unenforceable. (?) Could have adopted a different model. It could, for*

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

….

In our view, this is the approach which should be adopted in relation to section 58(1) and (3) of the 1990 Act. To use the words of Lord Nicholls, Parliament was painting with a broad brush. It must be taken to have deliberately decided not to distinguish between cases of non-compliance which are innocent and those which are negligent or committed in bad faith, nor between those which cause prejudice (in the sense of actual loss) and those which do not. It would have been open to Parliament to distinguish between such cases, but it chose not to do so. The conditions stated in section 58(3)(c) and in particular the requirements prescribed in the 2000 Regulations are for the protection of solicitors' clients. Parliament considered that the need to safeguard the interests of clients was so important that it should be secured by providing that, if any of the conditions were not satisfied, the CFA would not be enforceable and the solicitor would not be paid. To use the words of Lord Nicholls again, this is an approach of punishing solicitors pour encourager les autres. Such a policy is tough, but it is not irrational. The public interest in protecting solicitors' clients required that the satisfaction of the statutory conditions was an essential prerequisite to the enforcement of CFAs. It is to be noted that in September 1999, the Lord Chancellor issued a consultation paper entitled Conditional Fees: Sharing the Risks of Litigation. The Law Society and the senior costs judge responded that the Law Society's new Client Care Code adequately covered the need to provide additional information about CFAs. But in the view of the Government, such was the need to ensure client protection that this response was not accepted.

45. And then at [31]:

The only mitigation of this strict approach is that, as was made clear in Hollins v Russell, the breach must be material in the sense described at para 107 of the judgment. Thus, literal but trivial and immaterial departures from the statutory requirements did not amount to a failure to satisfy the statutory conditions. It is unnecessary to decide whether the test stated at para 107 was no more than an application of the principle that the law is not concerned with very small things.

46. Mr. Marven KC, recognising the close similarity in the provisions governing the two regimes, initially, accepted that the principle of materiality applied to the relevant DBA rules. He later caveated this acceptance saying his acceptance followed from an understanding that the CFA and DBA regimes worked in the same way; if that were not the case, then by implication a different approach would be required. In any event he submitted that to the extent that it is suggested that there was special principle that applied in respect of solicitors, it would

be offensive and that the approach set out in *Hollins* is to be understood to address only trivial departures which, when considered at the time they occurred, would not make any difference[3].

47. It seems to me clear, and I therefore accept, that a departure from the DBA Rules does not inevitably lead to a finding that the DBA in question is unenforceable. However it is clear from *Garrett* that a party (in effect solicitors) cannot say that because in the particular instance there has been no loss caused by the breach, then it is not material. The question to address is whether the departure has the tendency to materially adversely affect either the protection afforded to the client or the proper administration of justice: it is not enough that it has not in fact had that effect. In the event and for reasons which I set out below it is not necessary for me to address the more difficult questions raised in argument as to whether the principle of materiality applies just to small things that do not matter, or whether it is an example of the application of the presumption against absurdity and unworkability.

Severance

48. The general common law test for severance, explained by Lewison LJ in *Zuberi v Lexlaw Ltd and The General Council of the Bar of England and Wales* [2021] EWCA Civ 16[4] and referred to as the '*Beckett'* test, is as follows:

> *"The criteria that must be fulfilled before severance is possible are that:*
>
> *(a) the offending provision can be removed without modifying or adding to other terms of the agreement;*
> *(b) the remaining terms continue to be supported by adequate (?) and*
> *(c) the removal of the unenforceable part of the contract does not change the nature of the contract, such that it is not the sort of contract that the parties entered into at all...*"

49. It is also clear that public policy considerations may also be relevant in considering whether severance may be effected. In *Diag Human SE v Volterra Fietta* [2023] EWCA Civ 1107, (at [27] to [53]) the court was considering whether terms relating to a success fee could be severed. Stuart-Smith LJ rejected the case that the Beckett test had been satisfied but went on to say this:

> 62. *Even if I were wrong in this conclusion, I would hold that severance is precluded as contrary to public policy. The principal effect of severance would be to permit partial enforcement of the unenforceable CFA. As was pointed out during submissions, if the client lost the arbitration, the effect of allowing severance would be that the solicitors would recover precisely the same amount of their fees as if the CFA had been held to be enforceable. That is not, in my view, a tolerable outcome. Nor is it any answer to submit that there is no disadvantage to the client in enforcing the discounted fee element in respect of work carried out for and at the client's request. The regime imposed by the 1990 Act is concerned with conflicts of interest giving rise to potential harm to clients: see Garrett per Dyson LJ at [38]–[39].*

[3] See too, *Silvera v Bray Walker Solicitors* [2010] EWCA Civ 332, [2010] 4 Costs LR 584 and *Stoop v Johnson* [2024] EWHC 286 (Ch), [2024] Costs LR 983 which to my mind are consistent with the approach I have set out.

[4] See *Beckett Investment Management Group Limited v Hall* [2007] EWCA Civ 613 and *Egon Zehnder Ltd v Tillman* [2020] AC 154

> *63. The effect of implementing public policy, as explained by Dyson LJ at [27]– [30] of Garrett, cited at [21] above, is that "if the applicable conditions are not satisfied, the CFA shall be unenforceable with the consequence that the solicitor will not be entitled to payment for his services".*
>
> *64. Awwad, like the present case, involved a CFA of the type that has been described as a "discounted fee agreement". The solicitor in Awwad agreed to charge the client at her normal rate if the client won the litigation and at a lower rate (£90 per hour) if he lost. The agreement was not sanctioned by the 1990 Act. After acceptance of the opponent's Part 36 offer, the client declined to pay the solicitor's bill of costs. The Court of Appeal held that it was contrary to public policy for the solicitor to have acted in pursuance of a fee agreement that was not sanctioned by statute and that the agreement would not be enforced. The solicitors in Awwad, as in this case, submitted that there could be no objection to enforcing the agreement in respect of the discounted element of their fees that were to be payable in any event: see 574F. That argument too was rejected on grounds of public policy: see 594C–E per Schiemann LJ.*
>
> *65. It would therefore be contrary both to principle and to authority to allow partial enforcement of the unenforceable CFA in the present case, on grounds of public policy. That precludes any residual arguments in favour of severance.*

50. Mr. Quiney KC drew my particular attention to the passage in the judgment at [53] which founded his argument that the public policy that underlies the DBA rules is different from that which underlies the CFA regime and that there could be no public policy objection to severance of any offending clauses in the DBA in respect of some of the objections. I will deal with this matter below.

Issue 1: was the Payment out of sums recovered?

51. As I have indicated, the Claimant argues that relevant provisions in the DBA rules only enable the making of an agreement which provides for payment out of sums recovered. In the relevant proceedings no sum was ever recovered, or even sought, by the Defendants from the Claimant. The claim was, in effect, for a declaration. The benefit from the claim would require a distribution under the 2012 will which had been declared valid, and the claim itself gave rise to a mere contingent benefit.

52. Reliance is placed by the Claimant on the (lead) judgment of Andrews LJ in *Candey Ltd v Tonstate Group Ltd* [2022] EWCA Civ 936. She stated at [58]:

> *'"Payment" is defined in regulation 1(2) as "that part of the sum recovered in respect of the claim or damages awarded that the client agrees to pay the representative" (my emphasis). Regulation 4(1) prohibits a DBA from requiring an amount to be paid by the client other than the payment (as so defined) net of costs, disbursements or expenses recoverable from another party to the proceedings. Regulation 4(3) puts the matter beyond doubt by restricting the payment to a percentage of "the sums ultimately recovered by the client*".

53. And at [62]:

> *'The Regulations do not conflict with the statute but are entirely consistent with the concept that a DBA provides for payment to the representative to be made only from what is recovered by the client from the opposing party, and then only up to a prescribed percentage of the amount so recovered. That is the fundamental premise upon which the Regulations were enacted. In order to be enforceable, a DBA must not only fall within the statutory definition, but also satisfy the conditions in section 58AA (4), including the requirements of the Regulations. A DBA which provided for payment to be made when there is no financial recovery would not do so.*

54. It is important for me to make clear that it is not said by the Defendants that the DBAs continue to apply in respect of work on the distribution of the estate. Accordingly, the Defendants do not take issue with the contention that the claim that is covered by the DBAs has essentially been resolved[5]. The Defendants' case is that their solicitor's claim for costs in respect of their work on Claim Number PT-2019-000803 has crystallized under the terms of the DBA's (at least initially, they said this occurred when the 2014 will was declared invalid by the order of 30 January 2022 and before the consequentials hearing on 4 March 2022).

55. The Defendants (albeit perhaps more particularly their solicitors) rely on the definition of a DBA in the Act (see [16] above). They say that what was being sought by the claim was a "financial benefit", relying on the generality of the term in the Act. They also rely on the generality and breadth of the terms used in the Act providing that the benefit is obtained "*in connection with the matter in relation to which the services are provided*" (my underlining). The "connection" does not have to be directly with the claim; and "the matter" is not limited to the claim.

56. The 2013 Regulations being secondary legislation, should, it is argued, be interpreted by reference to this definition in the Act and it is appropriate to interpret the rules purposively. Reference was made to the definition of 'payment' in Section 58AA (3) of the Act which includes the transfer of assets and other transfer of money's worth which is said to be support the wide definition of 'specified financial benefit'. The Defendants distinguish *Candey* (in that case the client was resisting a claim for the transfer of shares and there was no claim at all by the client in which the solicitor sought payment) and argue that properly understood, the judgment of Andrews LJ supports their case.

57. The Defendants say that if a DBA could not be used in this case and the benefit to be gained in the claim was not enough to count as a specified financial benefit or otherwise to satisfy the 2013 regulations it would rule out the use of DBAs in a large number of cases where it might otherwise be thought appropriate for such agreements to be available. Relying on the Statutory Objective and at least in part on the Court Appeal's approach in the case of *Zuberi)* they say that the DBA Rules should be interpreted and applied so as to permit the general aim of facilitating clients and lawyers entering into agreements and thus permitting access to the courts. They say that the approach of the Claimant is overly narrow or prescriptive and runs the real risk of interfering with the freedom of clients and lawyers to contract for legal services, thereby hindering the very access to justice that the DBA rules are seeking to encourage, would mean that proceedings for a declaration and indeed in any claim for return of goods without a specified value, a DBA could not be used. Further, it was suggested, at least in written argument, that any departure from the DBA rules in this case cannot be shown to have materially adversely affected the Defendants or the administration of justice.

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[5] Cf perhaps issues of costs on the claim.

58. In my judgment the Claimant is correct to assert that these DBAs do not comply with the DBA rules.

59. I agree that in *Candey* the Court was concerned with a materially different situation. The client in that case had resisted a claim for the transfer of shares but he had not obtained anything in the litigation; the Defendant did not have a counterclaim and the client in that case merely preserved what he had already. Here, the Defendants have obtained a declaration in their favour pronouncing the 2014 will to be invalid. But I do not accept that the approach set out in the judgment of Andrews LJ in *Candey* as to the meaning and effect of the DBA rules could be said to be wrong, even if it could be said that it was not necessary for the decision and therefore to be regarded as *obiter*. In particular I see no reason not to follow the reasoning set out in that decision, that the essential feature of a DBA is that it provides for payment to the representative to be made only from what is recovered by the client in the matter in which the solicitors were instructed (whether or not it must also be obtained from the opposing party). The position is clear that in this case the Defendants were not seeking recovery in the claim from the Claimant any sum out of which the Payment could be made.

60. Mr. Quiney KC (whose submissions were made on behalf of both Defendants) argued that I should read the judgment of Andrews LJ in *Candey* as supporting the Defendants' case. He referred in particular to the following passage (at [55]):

> *In my judgment, the language of the statute is clear. I accept that the draftsman chose to refer to the recipient of the services rather than to the claimant possibly to cater for the possibility that a DBA might be made in respect of what Mr Fulton described as an outgoing claim by a defendant, i e a counterclaim. I also accept that the phrase specified financial benefit is not confined to damages. Thus the expression damages-based agreement cannot be interpreted literally, as only applying to cases in which damages are paid (and not to debts <u>or other forms of financial recovery</u>). However, the word obtains envisages the litigant acquiring something that they do not already possess by necessary implication, from the opposing party. That language is not apposite to describe a situation in which the defendant retains money or other assets of value, or is not required to make a payment or transfer of assets to the opposing party, even if this is the consequence of successfully resisting a claim for debt or damages, or a claim to those assets.* (my underlining)

61. Mr. Quiney argued that the term "financial recovery" was sufficient to cover the benefit that was sought by the Defendants in this case. Since the word 'damages' cannot be understood literally as only applying to cases in which damages are to be paid, it should be interpreted as applying more generally when a party is expected to achieve a financial benefit (such as here). It seems to me to be clear that Andrew LJ's words cannot be read in this way. Quite apart from the use of the word "recovery", which it strikes me as plainly not apt to cover the circumstances where a mere declaration is made, when seen in context it is clear that the term "financial recovery" is to have the characteristic of debt and damages, being a sum of money. This seems clear not just from those passages in the judgment including at [51] the reference to the Jackson report proposing the payment of a percentage of "*what he recovers from the other side*".

62. Further, I do not accept what appears to underpin Mr. Quiney's argument that the terms of the Act should simply be read across to the 2013 Regulations by use of a presumption that secondary legislation must be interpreted in the light of primary legislation. Such an approach would ignore the provisions under section 1 of the Act that permit Parliament further to specify

the terms on which DBAs may be entered into by secondary legislation; the Act provides expressly for the Regulations to prescribe the terms and conditions of an enforceable DBA. They plainly contemplate that provisions may narrow the circumstances in which a DBA may be entered.

63. The words in the Act provide that there must be a "specified financial benefit" (my underlining) and it struck me that Mr. Quiney's argument rather focuses on a need only for a financial benefit without perhaps giving any or any adequate weight to the word "specified" and its meaning in this context. Further, a specified financial benefit must obtained in connection with "the matter in relation to which the services are provided" (my underlining) and the amount of that payment is to be determined by reference to the amount of the financial benefit "obtained" (my underlining). I agree that other words might have been used such as 'claim' or 'litigation'. I recognise that the fact that the Act provides that the transfer of shares might come within the definition and might provide some support for Mr. Quiney's argument as to the meaning of the phrase 'specified financial benefit' in the Act. But, it seems to me even concentrating only on the terms of the Act, the specified financial benefit must derive from the matter on which the solicitors are instructed, rather than any benefit that might be derived by any further litigation or action and the amount of that Payment is to be determined by reference to the amount of the financial benefit obtained.

64. In any event, the 2013 Regulations put the matter beyond doubt. The declaration is expected to bring some financial benefit; the Defendants were expected to be better off because of it. That, in my judgment, is not enough. To my mind the 2013 Regulations are clear: there must be a sum "recovered in respect of the claim or damages " (my underlining). The Defendants' arguments, in effect, seek to read in the words "sum to be recovered" in place of the terms "sum recovered". In my view this does too much violence to the literal meaning of the words.

65. Regulation 4 restricts the amount of the Payment to 50% of "*the sums ultimately recovered* …". I agree that the word "ultimately" in the latter provision might give some weight to the suggestion that the financial benefit could be contingent liability, but that is only if the words are looked at in isolation, not in context. In context the literal meaning of Regulation 2013 is, it seems to me, the agreement must provide for the payment out of sum recovered so that there must be ascertainment of the actual financial benefit in money terms. It seems to me to be plain that what was to be obtained in this case by the declaration is not ascertained and therefore what at least part of what Andrew LJ referred to as the fundamental premise is not present[6].

66. It thus seems to me to be clear that on a literal reading of the DBA rules that Parliament did not provide for and did not intend DBAs to be available where the financial benefit was merely contingent and hence the sum due could not be ascertained at the conclusion of the matter on which the solicitor was instructed.

67. Moreover, there seems to be good reason why the 2013 Regulations should limit the terms on which a DBA may be entered in this way. This is, quite apart from nothing else that might be said, for reasons of practicability. Until the value of what has been recovered is ascertained the amount of the payment due to the solicitors cannot be ascertained. Indeed, the

[6]Whether Andrews LJ was also right to say that the payment must come from the other party to the litigation (a conclusion she reached by necessary implication) does not matter.

amount of the cap under Regulation 4(3) and the inter partes cap imposed by CPR 44.17 cannot be ascertained and it is unclear how they could be ascertained for the purposes of the inter partes costs assessment or for an assessment between the solicitor and client.

68. Different scenarios were floated in written and oral argument to illustrate or support the parties' cases on this point. Mr. Marven raised the example of a claim for an injunction (and emphasised the difficulty in valuing any financial benefit from it) - albeit I think Mr. Quiney did not press this as one which could be pursued by a DBA. The example perhaps most illustrative of the Defendants' case was that of a claim for the return of a Rembrandt painting. However, in such a claim the financial benefit may not be specified or ascertainable and there would need to be a determination of the value of the Rembrandt painting in a costs assessment. This would, at the very least, be a somewhat unusual feature of costs assessment. The problem of ascertaining the benefit for the purposes of the caps may not be obvious in the case that I am now dealing with (given what I am told is the value of the estate) or in a case involving a Rembrandt but it seems if the Defendants' approach were right, that in other cases clear and obvious difficulties would arise.

69. I accept, of course, that the corollary of the Claimant's position, if right, is that DBA would be precluded in the case of the claim for the return of a painting. That is because in that case, if it were successful, there would be no determination or ascertain the value of the painting. But I do not find that a surprising outcome, since whilst it may be said that regulations "*were not their finest hour*" (see Coulson LJ, *Zuberi* at [74]) they are nevertheless sufficiently clear in their meaning on this point.

70. Moreover, in my judgment, Mr Marven is clearly right to say that if it had been the intention of Parliament to permit a DBA to be entered into in circumstances where the benefits to be recovered were not ascertained, not only would the 2013 Regulation have made this clear they would also have provided for a mechanism for ascertaining the value of that which is to be recovered. The potential for difficulties and the need for consumer/client protection in such circumstances, and in any such process, seems to me to be clear.

71. There might, it occurred to me, be further problems which would flow from the Defendants' approach, one of which is perhaps illustrated by the facts of this case. Were it sufficient for a mere contingent financial benefit to count for these purposes it might mean that solicitors could enter more than one DBA in respect of what might be otherwise appear to be one claim (typically perhaps in personal injury cases one DBA dealing with liability only and then another dealing with quantum). Further litigation appears to be contemplated in this case to ascertain the amount due to the Defendants in this case and further funding arrangements required. There might, I suppose, be some difficulties reconciling multiple sequential DBAs, each of which permits a solicitor to take a share of the proceeds, with the limitations in Regulation 4 (3). Although Mr. Quiney asserted that there was nothing wrong with sequential DBAs the issue was not clearly raised or considered in the hearing. Since I consider the outcome clear on the other matters that were raised, it was not necessary for me to invite further submissions on this point or to make any decision on it. But without making any decision on it this consideration might be an additional reason supporting what I regard as the literal meaning of the 2013 Regulations.

72. When the practical and other considerations which I have referred to above ([67] -[69]) were raised with Mr. Quiney he, realistically, recognised the difficulties but says, in effect, that they should not weigh against the imperative of such agreements giving effect to the Statutory

Objective. I am not persuaded by this: where the literal meaning of the 2013 Regulations is clear and where practical and, perhaps other considerations weigh against rather than for the meaning he contended for, it seems to me there is no room for the imperative that he relies upon. The alleged imperative must give way to the limitations that Parliament intended to apply to such funding arrangements.

-Is the departure material?

73. As I understood it, in oral argument Mr, Quiney accepted that if he was wrong about the above, the position could not be saved by the principle of materiality, the DBAs are either a DBA as defined by the DBA rules or not, and he did not seek to argue that any departure could be saved in this way.

74. To my mind, it is clear that the departures could not be saved by resort to this principle. The inability to specify the financial benefit in the manner that Parliament intended probably impacts on the administration of justice, but in any event impacts upon the client protection, for the reason set out above (not least because it creates clear difficulty in ascertaining the cap and the sums that are due - further action, if not litigation, would be required to do that). In my view the departures in this case have this tendency; and it is substantial and material, whether or not in this case the statutory caps that apply by virtue of Regulation 4(3) will not in fact be exceeded.

Severance

75. Mr. Quiney did not seek to point me to a way I which could excise the relevant offending parts leaving any meaningful agreement. Applying the *Beckett* test and without need to consider any public policy consideration (as per *Diag*, see above) it seems to me clear that severance is not possible.

Default provisions?

76. Unheralded in written submissions and somewhat in passing, Mr. Quiney referred to the provisions in the Terms and Conditions which I have referred to at [10] above, apparently (at least at one stage) to argue that a conventional retainer would supplant the DBA in the event of its failing; and thus it appeared to be suggested supported the claim for costs.

77. I raised my concern as to this argument given that it was not raised in the Defendants' statements of case (the Replies) and thus as to whether it was open to argue this point at least without Mr. Marven at least having had a further opportunity to consider it.

78. In the event, as Mr. Marven argued (in a brief reply on this point) and, it seems to me plainly to be the case, the DBA displaced any conventional retainer. That is the effect of the express provision in Terms and Conditions which provides that where, as here, a DBA is agreed, its terms take precedence over any arrangement to change on conventional basis. The Terms and Conditions are plainly intended to apply generally to the conduct of cases on a variety of different bases. But not as a default funding arrangement in event of the DBA or other arrangement failing for whatever reason: not only would this not fit with the literal meaning of words used, it would deprive the clients, the Defendants of the 'no win no fee' of the DBA and cannot have been intended (see too the reasoning in the case of *Radford v Frade* [2018] EWCA Civ 119 at [21], [30] and [31] to which Mr. Marven alluded).

79. Further, it seems to me that any such point was probably not open to either Defendant if, as appeared to the case at least with the Second Defendant, the signing of the DBA preceded any signing of the Terms (which could not alter the terms of the DBAs, even if they were to be read with it).

80. Mr. Marven understandably complained that he had not come prepared to deal with the point. It struck me that other objections (based on public policy[7]) would be available. However as I understood it, the point was not pursued further by Mr. Quiney and, accordingly, I have not addressed this matter in any further detail.

Issue (2) - Counsel's fees charged as expenses on top of the Payment

81. Given the above, it is not necessary to deal with this further challenge. However, I heard extensive and detailed argument on it and if I should be wrong about the first challenge it may be relevant. So, I will address it - albeit in parts relatively lightly.

82. The Claimant's case is that the Payment as defined in Regulation 1 must include counsel's fees; and thus must be 'net of' counsel's fees'. In the 2013 Regulations 'expenses' are expressly defined (outside employment matters) to exclude counsel's fees, a matter which is clear from the definition section of the 2013 Regulations and the terms of Regulation 1. The DBAs in this case breach this requirement because they charge counsel's fees as expenses which are payable in any event. (It is to be noted the rules in this regard are different from employment cases which led Mr. Marven to suggest that what has happened here is that an employment DBA has been used inappropriately for litigation).

83. It seems to me clear that if the 2013 Regulations are to be read as the Claimant says, the underlying concern must be a charging abuse by outsourcing of work to counsel. Accepting that in litigation, some work might be done either by a solicitor or by counsel, a solicitor might for instance do little work themselves and instruct counsel to do much of it. The potential for this to occur without the client being aware appears substantial. (It was suggested that the difference with regard to the employment claims was explained by the different forms of representation that are possible in employment claims but I am not sure and nobody argued that it mattered for current purpose why that should be so).

84. In their initial written case the Defendants argued that the DBAs provided for the Defendants to incur counsel's fees directly, i.e. that the Defendants had a direct obligation to counsel which did not go via LLP. It seems to me that is plainly not the case: the DBAs do not provide for the Defendants to be directly liable to counsel; rather they provide for the Defendants to be liable to LLP for counsel's fees (which LLP incur). If the Defendants' liability had been directly to counsel there would have been agreement to this effect with counsel. The use of the word 'expense' (and the word 'disbursement') in the funding arrangements in letter of retainer, the definition section and section 9 of the DBAs) do not, to my mind, make the client directly liable to counsel. They are an expense of the solicitors and treated like other expenses/disbursements, such as experts' fees.

85. I understood Mr. Quiney to put the matter somewhat differently in oral submissions.

[7] Essentially for same reasons that Court of Appeals rejected a quantum meruit argument in *Diag* |([67] – [69])).

Counsels' fees in this case were merely expenses so that they were not caught by the definition of disbursements and thus any requirement in Regulation 1 that they be included in the Payment and not charged separately. He relied on the use in the 2013 Regulations of two different terms: 'expenses' and 'disbursements', as pointing to an important difference in their treatment.

86. However, it seems to me that Mr Marven is right to say that the two terms are used essentially interchangeably in the 2013 Regulations, just as they have been other similar regulations (see *Jones v Wrexham* [2007] EWCA Civ 1356, at [28] and [29]). It appears to reflect the historical position that counsel fees, albeit an expense of the solicitor, are often referred to as a disbursement. Indeed the 2013 Regulations define expenses as "*disbursements incurred by the representatives including the expense of obtaining an expert's report and, in an employment matter only, counsel's fees*". As Mr. Marven explained the use of two different terms avoids a difficulty that might arise in explaining the difference in the treatment of counsels' fees in litigation (which are cases other than employment cases) and other expenses (the Regulations might otherwise have to state that expenses in the form counsel's fees are excluded from expenses in this part of the definition which might be confusing).

87. I recognise that there can be a significant difference in the treatment of other expenses or payments made by solicitors which are not conventionally claimed by solicitors in a bill[8] but there can be no doubt that it was envisaged in this case that counsels' fees were to be treated as an expense or disbursement which could be charged in a bill on the normal way and that the retainer documentation I have referred to above used, so far as is material to this point, the terms interchangeably.

88. The further response to the Claimant's contentions, as it was developed in oral argument, was as follows:

> (1) There is no requirement in the DBA rules that prevents counsels' fees being charged separately from the Payment and the provisions relied upon by Claimant do not have effect she contended for.
> (2) In any event the arrangement in respect of payment of counsel's fees was to be considered as part of multiple or hybrid agreements only part of which was the DBA and this part remained valid as it was independent of the clauses concerning counsels' fees.
> (3) Even if there were a departure from the 2013 Regulations was not a material breach.
> (4) The DBAs can nevertheless be saved by severance.

Dealing with these contentions in turn:

(1) <u>Whether charging counsels' fees separately from the Payment as an expense is permitted under the 2013 Regulation (other that in employment cases)</u>

89. The Defendants argue, as I understand it, that the Claimant's case is based on a misconstruction of the 2013 Regulations. Regulation 4 is only concerned with 'netting off', that the mischief to which it is addressed is to ensure that the client receives the benefit of inter partes costs recovery: it prevents the solicitors retaining the benefit of such a recovery. A solicitor must give credit against the Payment for the sum received inter partes but not for any shortfall (i.e. the difference between what is claimed and what is recovered). It was argued by

[8] See *Herbert HH Law* [2019] EWCA Civ 527 by way of contrast the position in respect of ATE insurance premium in respect of which the solicitor merely acts as agent.

the Defendants that this was the sole concern of Parliament. Thus if a claimant has liability to his solicitors for £10,000 in costs under the DBA but £5,000 is received from a defendant; £5,000 is credited (by way of netting the £5,000 against the Payment) leaving the sum of £5,000 payable. No credit need be given to a liability to counsel which was claimed in the inter partes costs claim but not recovered.

90. I recognise that Regulation 4 should be read as imposing an obligation that the DBA must not require an amount to pay without netting off what might be received by way of profit costs and disbursements (expenses) including counsel's fees from the other side to the litigation (see above Reg 4 (1) at [23] above). However the terms of Regulation 4 (1) are at the very least consistent with the definition section (in Regulation 1) which provides in terms that (save in employment matters) the Payment to be made by client is to include any disbursements incurred by the representative in respect of counsels' fees.

91. I agree with Mr. Quiney that one might have expected the requirement that the Payment should include counsel's fees should be set out in some other way, perhaps in Regulation 3 setting out what terms DBA must contain, or perhaps Regulation 4. However, I am satisfied that whatever may be said about the quality of the drafting of these provisions it is sufficiently clear that the Payment (out of the sum recovered) must include counsels' fees. On this point there is a clear distinction with employment cases. The distinction made in Regulation 4 between those sums to be included in the Payment (dealt with in Regulation 4(1) (a)) and other expenses (dealt with in Regulation 4(1) (b)) is at the very least a reflection of, or consistent with this provision and confirm that the sums netted off against the Payment are to include counsel's fees recovered.

92. The concern which underlies the regulations is perhaps not adequately dealt with by the netting off provision in Regulation 4 because that provision merely deals with any sums which might be received from the other side. The client's liability to the solicitor for counsel's fee, if that is charged separately from the Payment, it will remain whether or not any such costs is recovered from the other party in the litigation.

93. In any event, I reject the Defendants' case on this point.

(2) Hybrid agreement?

94. The essence of the argument, founded on the decision in *Zuberi*, is that only part of what might be regarded as an umbrella retainer agreement was the DBA. The agreement to pay Counsel's fee was separate from the DBA.

95. *Zuberi* concerned the enforceability of a DBA. The appellant in that case argued that the existence of provision, which permitted solicitors to charge on a conventional basis in the event of the termination by the client, rendered the agreement unenforceable as this arrangement – so it was put - was not expressly provided for under the 2013 regulations.

96. Lewison LJ concluded that the DBA element was separate from other elements (see [33] and [34]) and only those provisions in the contract of retainer which dealt with the payment out of recoveries amount to the DBA; the retainer was thus a *hybrid* agreement.

97. Newey LJ held that this approach was not consistent with the history or proper construction of the legislation (see [65]) and observed that if it were right it would seem that a

retainer could provide for a solicitor to become entitled to "*both half of recoveries and full time costs in the event of the claim succeeding*" (his emphasis). Having parted company with Lewison LJ on what a DBA is, Newey LJ held that the relevant DBA rules did not bite on the termination provision so that the termination provisions in the agreement did not fall foul of the 2013 Regulations.

98. Coulson LJ also rejected the challenge to the enforceability of the DBA. Having commented adversely on the quality of the drafting of the regulations (in terms I have already noted) he said that the term 'damages based agreement' should be given a narrow meaning, in agreement with Lewinson LJ. He held (at [77]) that this was the agreement between the parties relating to the payment as defined in the 2013 Regulations, namely that part of the sum recovered in respect of the claim or damages awarded that the client agrees to pay the representative; other elements of the agreement between the solicitor and the client (such as at which of the solicitor's offices the work would be done) were not part of the DBA itself. However, if that were too narrow an interpretation, he remained of the view that neither section 58AA of the Act, nor regulation 4 of the 2013 Regulations, affected the operation of the early termination provisions. He held that Parliament had shied away from imposing any restrictions on termination provisions generally because it acknowledged that, in such cases, lawyers would be involved and therefore would be subjected to the regulatory provisions of their own professional bodies. He went on to say (at [84]):

> *Thus, the highest that it can be put by the appellant is that regulation 4(1) could be read as saying that a damages-based agreement must not require any amount to be paid by the client other than the payment itself, and expenses, whatever circumstances may eventuate. So, if the narrow view of a damages-based agreement is not accepted, then, on that literal reading, regulation 4(1) would, for example, prevent the legal representative from recovering any of its own costs, whatever the retainer actually said, even if the client terminated the agreement without cause after two years of work by the lawyer. That would not only be a commercial nonsense, but it would be contrary to the statutory purpose of section 58AA, which was designed to encourage the use of DBAs, not make them commercial suicide for the lawyer. It would also be contrary to regulation 3, contrary to the assumptions made about termination provisions to which I have already referred, and render regulation 8 redundant. I therefore reject that interpretation of regulation 4(1).*

99. Mr. Quiney argued that I was bound, given the reasoning of the majority, to find the retainer consisted of a hybrid agreement in the way described. However, as the judgment of Coulson LJ demonstrate Lewison LJ's reasoning is not essential to the decision (indeed Lewison LJ acknowledged this himself, at [50]). Accordingly, it is not clear to me that it is part of the essential reasoning upon which the outcome depends (and such as to make it part of the *ratio* of the case). In the event however and for reasons set out below, nothing turns on whether I am bound in this way.

100. Mr. Quiney argued, that it was significant that Lewison LJ acknowledged that he had considered the judgement of Newey LJ in draft before reaching his conclusion and thus he would have been aware of what Newey LJ understood to be the corollary of his argument that a lawyer can both act for a share of the sums recovered and additional 'time' fees. But when referring to the issue of additional time fees he said at [44],

> *I recognise that this conclusion means that the current Regulations do not deal with a lawyers remuneration in the event that the client pursues a case to trial and loses. But that, in my judgment, is a matter that could be provided for in Regulations under section 58AA(4)(c). In other words, it could be a requirement of a DBA that it was part of an overall contract of retainer which either precluded (or limited) a lawyer from charging fees if the claim were lost*.

101. It is, it seems to me, clear, as Mr. Marven argued that in this passage the early termination provisions in the relevant contract which were in direct contemplation of Lewison LJ. What was not in contemplation, is the situation as here, where what is said to be a hybrid retainer purports to achieve in totality that which the Regulations say cannot happen.

102. Mr. Marven argued that there is a distinction on Lewison LJ's analysis between the situation that arises here where the obligations would be additive in the sense of adding an amount by way of a topping up of the payment due under the DBA and the termination provisions in *Zuberi*, where the obligations are complementary. I agree. In my judgment, the majority of the Court of Appeal were not endorsing an arrangement which would permit a solicitor to avoid the clear effect of the regulations by entering into an associated agreement. It seems to me that if Mr. Quiney's analysis were right even the netting off provisions in Regulation 4 (which limit solicitors to Payment net of inter party costs recovery) could be avoided by a hybrid retainer which included a DBA alongside an associated agreement for a separate payment on conventional basis. Newey LJ was obviously alive to this concern and his reasoning makes it clear that it is objectionable (see [64]). However for the reasons which Mr, Marven gave, it seems to me sufficiently clear that the judgment of Lewison LJ does not such support such arrangement either.

103. Mr. Marven argued that the passage in the judgment of Lewison LJ at [44] in effect makes this distinction because it carries with it the understanding that an associated agreement may stand alongside a DBA if it is complementary to it but not if it is in <u>conflict</u> with any prohibition under the DBA rules. As it was put, it could be a requirement of a DBA that it was part of an overall contract of retainer which either precluded (or limited) a lawyer from charging fees if the claim were lost - but it was not (the 2013 Regulations could, in other words, have precluded early termination provisions but they did not). Here the associated agreement would be in conflict with requirement of the 2013 Regulations.

104. Mr. Quiney argued, in effect, that the analysis above cannot stand because in fact the payment for early termination in litigation cases was to be taken as being prohibited by the 2013 Regulations. Regulation 8 expressly provided for such provisions in employment cases but there were no such provision in respect of litigation[9] so that provision for early termination

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[9] *8.— Terms and conditions of termination in an employment matter*
(1) In an employment matter, the additional requirements prescribed for the purposes of section 58AA(4)(c) of the Act are that the terms and conditions of a damages-based agreement must be in accordance with paragraphs (2), (3) and (4).

(2) If the agreement is terminated, the representatives may not charge the client more than the representative's costs and expenses for the work undertaken in respect of the client's claim or proceedings.
(3) The client may not terminate the agreement —
(a) after settlement has been agreed; or
(b) within seven days before the start of the tribunal hearing.

must be taken to have been proscribed by the 2013 Regulations; thus the hybrid retainer analysis in fact then permitted arrangements that were contrary to the 2013 Regulations. However it is plain to me that Lewison LJ did not accept that the 2013 Regulations could be read in this way. He made clear at [39] that Regulation 8 does not authorise termination payments in employment but assumes that they are chargeable outside the scope of the 2013 Regulations and caps them. Accordingly termination provisions could not be said to be proscribed in litigation cases. This passage would then seem to provide further support the conclusion that the learned Judge could not be understood as saying that an associated agreement could provide for that which the Regulations proscribe.

105. Accordingly, I do not accept that on a proper reading *Zuberi,* whether on the reasoning of the majority or, rather obviously on the reasoning of Newey LJ - authorises payment of counsel's fees as expenses so as to authorise that which the 2103 Regulations say cannot happen.

3) Not a material departure?

106. The Defendants' argument is that the Act and the 2013 Regulations, as interpreted in *Zuberi*, reflected what was described as a seismic and fundamental change of public policy. The judgment of Lewison LJ allowed for the possibility of entering hybrid arrangements so that payments under a DBA could be topped on additional fees. As it was put by Mr. Ralph (memorably), in respect of DBAs the continents had merged and the sea of illegality was now no more than a dried up river bed. There was in principle no policy objection to champerty in respect of DBAs. Concerns about the administration of justice were unnecessary because the terms of CPR 44.18 limit *inter partes* costs (and protect the other party in the litigation). The DBA rules give the parties extensive freedom to allocate risk and reward as they see fit and there was sufficient protection to the client from Solicitors Act assessment.

107. It was submitted that the public policy problems that affect CFAs (exemplified in *Diag*- a success fee in the CFA which exceeded 100%) do not affect DBAs. Particular reliance was placed on the comment at the end of the following paragraph of the judgment Stuart Smith LJ in *Diag* (at [53]):

> *In my judgment, Foster J was right to reject the solicitors' submissions based on Zuberi, essentially for the reasons that she gave. The starting point is the terms of s 58(2)(a), which I have set out above at [19] above. As I have already indicated, that definition of a CFA precludes splitting off the provisions for payment of the solicitor's discounted fees and treating them as not forming part of the (unenforceable) CFA. I accept the client's submission that the discounted fee provisions which the solicitors seek to enforce are part of the core agreement that make the September 2017 Agreement a CFA. Second, the provision for discounted fees is not analogous to the "termination" provision in Zuberi. Third, the considerations of public policy which supported Lewison LJ's narrow construction of the meaning of a DBA are absent in a case involving CFAs such as the present." (*My emphasis)

102. Reliance was also placed in the recent decision of *Therium Funding v Bugsby Property*

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(4) The representative may not terminate the agreement and charge costs unless the client has behaved or is behaving unreasonably.
(5) Paragraphs (3) and (4) are without prejudice to any right of either party under general law of contract to terminate the agreement.

LLC [2023] Costs LR 1641 and in particular a passage in which Jacob J indicated that public policy considerations in respect of CFAs may not be read across to DBAs, and that different public policy considerations might apply in respect of these two distinct regimes.

108. The substance of the point is, or appears to be, that there is no public policy objection to lawyers receiving remuneration however it is calculated; it is not a matter which any more invokes any concerns about consumer protection or the administration of justice. Further, even if counsel's fee were added to the Payment from the sums recovered, the overall sum would be within the cap provided for in Regulation 4 so there is no material detriment to the consumer and no adverse effect on the administration of justice.

109. For reasons which I have already set out, I am not persuaded that Lewison LJ interpreted the 2013 Regulations in the way the Defendants contend. Nor am I persuaded that he was saying public policy concerns do not arise, in general in respect of DBAs: his concern was specifically whether the early termination provisions conflicted with the restrictions on the Regulations and whether the analysis he was proffering conflicted with the policy underlying the relevant provision (see in particular [41]), not, in my view, more general conditions of public policy (see [34]) where he refers to the need for Parliament to modify the rules in relation to champerty but not modify other statutory or regulatory control or the common law. The termination provisions in the event did not offend public policy, they did not provide for a share of the proceeds indeed they were, as Coulson LJ explained, plainly necessary to make the agreement work. Quite apart from anything else that might be said, it seems that if Lewison LJ was intending to say that the general public policy concerns of champerty do not apply he would have said so in clearer terms.

110. Further, I am not persuaded that Stuart Smith LJ was indicating in *Diag* in the passage relied upon or elsewhere that the underlying public policy concerns of champerty did not apply or no longer applied. I agree with Mr. Marven's analysis of this. It seems to me clear that the public policy concerns that arose in *Diag* were not the same as the concerns that arose in *Zuberi*. Moreover the comment of Stuart Smith LJ on which the Defendants seek to build this argument was made in the context of explaining why Foster J had been correct to reject the solicitor's submission on the narrow issue as to meaning of the DBA. It is to his own analysis on this point at [20(iii)] that the learned Judge as referring to when he said "[as] I have already indicated". Indeed, as Stuart-Smith LJ said elsewhere, public policy in respect of champerty is not a matter for the courts but for Parliament.

111. In *Therium* Jacob J was concerned with an application by a litigation funder for a freezing injunction in respect of the proceeds of litigation. The issue he had to determine was whether the claim by litigation funder for payment under a DBA gave rise to a seriously triable issue in circumstances where there were objectionable clauses in the agreement (following the decision in *PACCAR)* but which it was argued could be severed. Jacob J held that it was arguable and the different consideration may be applicable to severance of CFAs (*Diag*) and DBAs (*Zuberi*) and there was legitimate room for argument about whether there were policy objections to severance in respect of a DBA. He described this as a developing area of law.

112. I accept Jacob J was referred to and could be understood as having in mind the passage of the judgment in Stuart -Smith LJ to which I have been referred ([53]). However, it seems to me clear that not only were the arguments not fully developed and no decision actually made on this point, it also seems to me important to note that the issue arose in the context of a claim by a third party litigation funder whose remuneration was by way of a share of the damages. It

was the third party funders whose interests were at stake. It seems clear the litigation funders are not in the same position as solicitors. As pointed out by Jacob J, historically and before *PACCAR,* the treatment of litigation funders was understood to be different from solicitors ([3]).

113. Accordingly, I do not consider that these decisions provide any adequate basis for the conclusion that champerty and limits on a solicitor's remuneration under a DBA are no longer matters of concern to Parliament. Quite obviously Parliament placed restrictions on the extent to which lawyers could be paid out of sums recovered and provided that DBAs which do not comply with those restrictions are unenforceable. As I understood Mr. Marven to put it, the public policy concerns are reflected in the express terms of the rules: they dictate the limit to which champerty is acceptable.

114. Further, I should perhaps add that it is clear that materiality must be addressed as the time when the agreement was entered into (enforceability cannot fluctuate over time). The question as whether it could be said with confidence now or at an earlier stage the payments sought to by way of counsel's fees and solicitors time costs in aggregate exceed the statutory cap of 50% is, to my mind, irrelevant.

115. Applying the test as expressed in *Garrett*, the departures are, in my judgment, clearly material. They are breaches of the statutory requirements, which are not either trivial or immaterial. The DBAs impose impermissible payment obligations on the Defendants which therefore have an adverse effect on the protection required to be afforded to the client, namely the protection against being required to make such payment in the first place. It can also be said, albeit that it is not necessary for my conclusion, that the proper administration of justice is also affected for the reasons of *Trepca*: the clause gives solicitors too much interest in the outcome of the litigation in the course of their instruction.

116. The position is not saved merely because the client can apply to the court for an assessment under the Solicitors Act. On this further point I think that the relance on the judgment of Lewinson LJ at [42] was misplaced. There, the learned Judge was referring to assessment of costs on a conventional basis (in respect of early termination provisions). Quite apart from the time limits for such an application[10] limiting the remedy under the Act, the availability for such relief has not been held sufficient to save an unlawful CFA- and it is difficult see why any different approach should apply here.

4) Severance

- *The blue pencil test*

117. Mr. Quiney, referring to all such references which have made by the Claimant in the Points of Dispute (see also inter alia [11] above), argued that I could simply strike through the reference to counsel's fees as being an expense. However, as Mr. Marven pointed out, that would still leave an agreement which provided for the payment of expenses in addition to the Payment and such expenses would still be understood as including reference to counsel and this would still be payable in addition to the Payment (out of sums recovered). It seems to me that the Defendants cannot achieve what they would seek to achieve by use of a *blue pencil*; they are in effect requiring me to rewrite the DBAs.

[10] (see *Signature Litigation LLP v Ivanishvili* [2024] EWCA Civ 901)

-*Would there still be consideration?*

118. Mr. Marven accepts that there would still be consideration.

- *Would the removal of the unenforceable part of the contract change the nature of the contract, such that it is not the sort of contract that the parties entered into at all*

119. Mr. Quiney's point is that the contract would still remain a contract for services and to that extent severance does not change the character of the contract. Mr. Marven argued that the price for the services is an important part of the contract (as it was in *Diag*, so that the offending success fee in *Diag* could not severed); if I were to remove the obligation in respect of payment of counsel's fees that would fundamentally change the character of the agreement. Notwithstanding the apparent force of Mr. Marven's point, I am not sure that this matter was adequately explored in argument and since there are the other objections which would prevent severance it is not necessary for me to take a decision on it and I shall not do so.

- *Public policy objections, illegality*

120. It seems that the considerations which led Stuart Smith LJ to reject severance in *Diag*, apply here. To allow a solicitor who entered into an unlawful agreement to simply drop any claim to additional fees when faced with a challenge would offer no real disincentive to a solicitor entering an unlawful arrangement and acting on such arrangements. Severance would permit and facilitate a solution to that which public policy considerations dictate cannot happen. Accordingly, I am satisfied that severance cannot be used as a means to avoid the Parliamentary sanction of unenforceability,

Conclusion on Issue 2

121. It follows that in my judgment if the DBAs were valid notwithstanding the first objection, I consider that they would be unenforceable for these further reasons.

Issue 3: Was the 'payment' 'net of' any *inter partes* recovery of solicitor's costs?

122. The Claimant's case was that the DBAs fail to comply with the requirement in regulation 4(1) that the 'payment' must be 'net of' any *inter partes* recovery of solicitors' costs. The DBAs set out the payment at clause 10, but there is no provision, as mandated by regulation 4(1), to the effect that it is net of *any inter partes* recovery of solicitors' costs.

123. It was put to me by Mr. Marven that the only real issue was whether as matter of fact the DBA did provide for the netting off required. There was however force in Mr. Quiney's point that when the documents were looked at in aggregate the agreement did achieve a netting off (the retainer letter refers in terms to the solicitors reimbursing to the Defendants any contribution to the costs received from the other side). There is substantial authority dealing with the question of what constitutes a retainer in the context of a CFAs[11] and which might support such an analysis but which was not addressed at the hearing. I might also still have to decide which elements of the arrangement constituted a DBA and whether there were elements of the arrangement part of a separate agreement (having regard to the analysis of Lewison LJ

[11] See *Jones v Wrexham* [2007] EWCA Civ 1356; *St James v Wilkin Chapman LLP* [2024] EWHC 1716 (KB)

in *Zuberi*). I think that this required perhaps more exploration at the hearing that took place and since it is not necessary for me make any decision on this point and invite further submissions, I shall not do so.

Issue 4: were the DBAs wrongfully terminated by LLP?

124. The Claimant said that the DBAs covered all work up to and including the consequential hearings, and the representation made in the letter of 16 February 2022 (see [14] above) amount to repudiation of the obligations under the DBAs. This was said to represent a further reason why LLP are not entitled to any payment under the DBAs. Whilst it is not necessary for me to decide this I think it probably appropriate for me to deal with it not least because of the interaction with matters arising under Issue 5 (which I do have to decide).

125. It is well-established that a solicitors' retainer is an entire agreement for the relevant matter (see *Gill v Heer Manak Solicitors* [2018] EWHC 2881 (QB), [2018] 5 Costs LR 1165 at [18]). Ordinarily a solicitor is not entitled to any payment under an entire agreement unless they complete their obligations thereunder (see *Underwood & Piper v Lewis* [1894] 2 QB 306.

126. The first sub-issue arising is whether the retainer under the DBA did continue to the hearing in March 2022 when Green J dealt with consequential issues and beyond the date when the declaration was made by Green J (on 31January 2022).

127. It appears that on 16 February 2022 a 'win' as defined in the DBAs had been achieved: a remedy claimed by the Claimant had been secured by court order (see bullet points 5 and 7 of the definition of 'win' in the DBA). But winning the case and completing the obligations under the retainer agreement are not the same thing. In general, a conditional fee agreement does not end immediately upon a 'win'; otherwise there would always need to be a post-judgment conventional retainer after a conditional fee agreement or damages-based agreement. In *Halloran v Delaney* [2002] EWCA Civ 1258 the Court of Appeal held that a typical conditional fee agreement which contemplated that the claim will normally be "won" by achieving a result whereby the client is to recover her damages, basic charges, success fee and disbursements from his/her opponent in a quantified amount did nevertheless cover costs only proceedings.

128. The terms of the DBAs here are different from the terms of such a CFA. Each DBA however provided at clause 3.1 that it covered the claim and the proceedings; they did not exclude any stage of these proceedings. Plainly, to my mind, the consequential hearings are part of 'the claim' and 'the proceedings' are expressly covered in the agreement. Furthermore, clause 10.1 refers to payment from compensation 'received'; and the reference to 'received' would tend to confirm that post-judgment steps such as receipt of an award or settlement are covered by the DBA. Clauses 10.3 and 10.4 refer for enforcement action, also confirming that post-judgment steps are covered by the DBA.

129. In the circumstances I agree that the DBAs covered the whole of the proceedings including steps taken after the handing down of judgment, in particular consequential matters which were being addressed thereafter and at the hearing on 4 March 2022. I might add that if it were otherwise it would lead to the extraordinary position that the solicitors ordinarily bound by an entire agreement would in respect of these DBAs be able to say that once judgment had been given that was the end of their obligations. It seems to be plain that if the DBA covered the claim it covered ancillary matters.

130. However, I do not agree that LLP's representations amounted to a repudiation of the DBAs. It seems to me that on 16 February 2022, LLP wrongly told the Defendants that work under the DBAs was complete. There was no suggestion that they would not in fact complete the obligations under the agreements. They were going to do the work required and, as I understand it, did it. Indeed it is clear that the solicitors considered that further work was to be done following the judgment which would not be covered by the terms of the DBA and undoubtedly the solicitors had it in mind that there would need to be a funding agreement deal with this work.

131. I suggested in argument that properly interpreted the representations were just an ill-expressed attempt by the solicitors to address the need to enter into a new retainer for this work only on new issues which arose and that the terms of the letter are not to be read literally as applying to work already covered by the DBA. Mr. Marven however argued that this was a cynical attempt to supplement the DBA with conventional charging, and the solicitors must have known that the DBA would cover much of the work up to and including the consequential hearing. I am not satisfied that this matters or makes any difference to my decision. Whichever view might be taken, it seems to me that this objection must fail. The solicitors were not seeking to deny the DBAs. The solicitors were plainly at the very least mistaken as to the terms and effect of the DBAs, but that does not seem to me to be enough to amount to a repudiation of these agreements; to my mind, more would be required.

132. I therefore dismiss this challenge.

Issue 5: whether there was a private retainer for work otherwise covered by the DBA from 16 January onward and, if so, does it give rise to a proper or reasonable claim for costs

133. The Defendants' position was that privity of contract prevented any challenge to these arrangements. It is a matter for the Defendants and their solicitors how they regulate their affairs and the representations on 16 February were sufficient to create a new retainer or vary the DBAs. Furthermore, the burden, it was said, was on the Claimant to show there was no retainer to cover the costs claimed in the relevant period, which she was unable to do. It was not, however, I should point out, argued that the outcome on this point could be affected by a finding that the DBA was unenforceable.

134. It seems to me that the Court needs to be satisfied that there is an indemnity for the Claimant to satisfy. Ordinarily in costs assessment that is achieved by reliance on a signature on the bill but this determination is made pursuant to an order requiring the Defendant to disclose all retainers in respect of the relevant parts of their respective bills or to prove the terms of such retainers in some other way. That order was made in circumstances where I considered that it was not appropriate to rely upon the signatures on the Bills.

135. Mr. Marven argued there is no evidence that what was at best an offer in the letter of 16 February (to enter into private retainer to do the work for the consequential hearings on a private retainer) was accepted. Further, the statement in LLP's 16 February 2022 letters that the DBAs did not cover the post-judgment period was wrong; it was a misrepresentation or the basis of a common mistake, such that any such private retainer was void or voidable.

136. Mr, Quiney argued that I could infer acceptance of an offer because of the claim for costs in the bill (he might also have relied on the signature of the bill as evidence).

137. It is right that it is often the case that instructions to carry out work can carry with them the implicit acceptance that payment will be made for that work. But continuing to give instructions to LLP for work is consistent with the terms of the DBA and so could not, in my judgment, be said either to be acceptance of a variation of that retainer or to create a new retainer. I have some difficulties in accepting that the Defendants would not themselves have been alive to the obvious difficulties with their solicitors' representation that they would need to be paid more for completing their work in the proceedings (and simply accepted what they were told). More significantly perhaps I think that Mr. Marven is also right to say that he would have expected to see more, if there was a variation of the DBA, than appears in LLP's 16 February 2022 letter by way of witness statements or otherwise and that I should make an inference against the Defendants from the absence of evidence. In any event I am not satisfied, on the limited evidence that I have seen, that there was an effective variation of the DBA to charge for work already covered by the DBA under a new private retainer. For this reason the claim for the costs which are pursued under a private retainer but which are covered by the terms of DBA must fail (There is, it seems, no problem assuming a private retainer for work not covered by the DBA).

138. However, even if I am wrong about that, it seems to me that the other grounds advanced by Mr Marven are correct. In my judgment the solicitors were in error in asserting that their obligations under the DBA had come to an end and had misrepresented the terms of the DBA inducing the Defendants to enter a new agreement. If they had done so innocently, it would seem that there must have been a mutual misunderstanding as to whether the DBA had come to an end. It thus seems to me that if the Second Defendant and/or the Fourth Defendant accepted what they were told in the 16 February 2022 letters, any contract of retainer thereby formed was void or alternatively voidable. If they were merely voidable on the grounds of mistake, it would be open to the Defendants to avoid any retainer formed on the basis of the 16 February 2022 letters. I agree that reasonableness would require the Defendants to avoid any such retainer: there is no reasonable basis for a Defendant to subscribe to a further retainer imposing a further liability for the post-judgment period, in circumstances where his DBA already covered that period but he was wrongly informed that it did not.

139. I should add that whilst there was force in the argument of Mr. Marven as to the state of mind of LLP, it is not necessary for me to make such findings in order to decide this point. But it seems to me that it must have been obvious that work on consequential matters was covered by the DBA. If LLP's suggestion was that a new retainer was necessary for work on these matters it was an unreasonable one to make. They were, it might be understood, under a fiduciary duty, when advising on the terms of the retainer, to advise otherwise. If they wished to vary the agreement to provide for payment by way of an additional amount over and above the amount payable under the DBA for work that was covered, it would require the solicitors to offer far more explanation than was provided here and any variation would be liable to be set aside on equitable principles (on the grounds of non-disclosure). Since I have no evidence that this was done, it would follow that any attempt to create a further retainer or vary the DBA would be ineffective on this ground as well. It is not however necessary to go this far.

140. For all these reasons, I think that the claim based on a private retainer in respect of the work which was, in my judgment, plainly covered by the DBA must fail.

141. Mr. Marven argued, as I had understood it, in his skeleton argument submitted before the hearing in November that it would follow from the findings that I have gone on to make that I must assess Parts 15 and 16 of the Second Defendant's Bill and Parts 2 and 3 of the Fourth Defendant's Bill at nil. Mr Marven has also suggested, I think, that this was not, properly understood, a matter disputed at the hearing. However before the hand down of judgment the Defendants did clearly contend that such a determination was not the necessary outcome of my findings. In the circumstances I make no determination on this point. Argument as to whether this is the necessary corollary of my findings in the circumstances of this case and any related issues, has been reserved for consideration on another date.

142. That just leaves me to thank counsel for their very considerable assistance in dealing with a large number of issues.