Neutral citation: [2023] EWHC 875 (KB)
Case No**: SC-2021-APP-001272**

IN THE HIGH COURT OF JUSTICE
SENIOR COURT COSTS OFFICE
Transferred to the KING'S BENCH DIVISION for hearing only

Date: 17/04/2023

Before :

Judge Brown sitting as a Master of the KB

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Between :

ASCENSION ASSET MANAGEMENT LIMITED — **First Claimant**

-and-

GORIOLA OLUSINA DANIEL — **Second Claimant**

- and –

SKY SOLICITORS LIMITED — **Defendant**

- -
- -

Mr. Richard Wilcock (instructed by **Clarion Solicitors**) for the **Claimant**
Mr. Imran Benson instructed by and for the **Defendant**

Hearing dates:13-15 February 2023
Further written submissions: 22 March 2023
Draft circulated: 27 March 2023
Hand down delayed due to limited counsel availability

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Approved Judgment

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

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COSTS JUDGE BROWN

Judge Brown :

1. I am required to decide whether, in principle, fees are now payable to the Defendant solicitors by the Claimants, their former client, pursuant to two discounted conditional fee agreements (DCFA/s) following success in the claims to which they relate. It has arisen in an assessment sought by the Claimants of a statutory or statute bill delivered on or about 9 September 2021 for fees and disbursements of £201,480.48 (the fees amount to some £144,000 plus VAT). There are also issues arising on a claim by the Defendant for damages (which is pursued in the alternative to the claims made on the bill)[1] and an issue as to whether the fees now sought are subject to a cap.

(Although no issues of privilege arise between the parties some of the relevant matters occurred in the course of a mediation and are likely to be caught by privilege of a third party, see para. 6 below. I have, accordingly, omitted certain passages -marked by square brackets- from this judgement in public, albeit they are set out in the decision in private.)

The facts in broad overview

2. The First Claimant is a limited company involved in the business of purchasing and management of commercial and residential property. The Second Claimant, Mr Daniel, was a director and shareholder of the company.

3. The First Claimant instructed the Defendant to act on its behalf in February 2020 in respect a claim for rent arrears and forfeiture ('the Rent claim'). It did so on the basis of a DCFA ('the Rent DFCA') which provides that a payment was be made if the claim was lost ('losing fee') but at a much reduced amount from that might otherwise be payable (hence 'discounted'). The amount of the losing fee was capped at £10,000, in addition to any disbursements.

4. The First Claimant issued proceedings against various parties ('the 'Opponents') on 25 February 2020 in the Rent claim. The Opponents counterclaimed asserting ownership over a number of properties held by the Second Claimant, Mr Daniel. Further, on 7 May 2020 the Opponents issued proceedings against the first Claimant and Mr. Daniel, asserting a beneficial ownership of the First Claimant ('the Chancery Proceedings').

5. The separate cases were consolidated on 16 June 2020. Following consolidation, the Defendant and the Claimants agreed a further DFCA ('the Chancery DFCA') in respect of the Chancery proceedings. The losing fee for this DFCA was in agreed in the sum of £8,000 (inclusive of VAT) in addition to any disbursements.

6. A mediation took place by videolink on 3 March 2021 before a trial listed for 12 – 16 April 2021. Counsel was instructed on the Claimants' behalf. In the course of the mediation and after an initial exchange of offers, there were discussions, in particular, between Mr. Daniel and Counsel, following which it was proposed that an offer be made to the Opponents to resolve the disputes on the basis of a number of different proposals

[1] And for this reason I sat as Master of the King's Bench to avoid any issue as to my jurisdiction to deal with such a claim.

(which it is not necessary for me to recite) but which included the proposal that each party bear their own costs. Following this proposal, and whilst there is a dispute as to what was said at this point, it is common ground that Mr. Ijieze, who is a fee earner of the Defendant with conduct of the claims, raised the issue of his firms' fees. On the Claimants' case, as appears in Mr. Daniel's witness statement, Mr Ijieze said that his firm's costs were "*in the region of £30-£50,000*" and that Mr. Daniel "presumed" this included disbursements. Mr. Ijieze, in his witness statement, says that he said that "*up to that stage*" his firm's costs were "*not less than £50,000 plus VAT*". That factual dispute, as it was initially presented, concerning what was said about costs might be understood to have widened in the course of evidence (and I deal with this below). It appears however to be further common ground (and in any event I so find), that […]. It appears also to be clear, and I so find, that he did so in circumstances where he conveyed to Mr. Ijieze that the rent arrears (and other such recoveries) would be used to cover the Claimants' liability to the Defendant in costs.

7. In the early hours of 4 March 2021, a broad understanding of the way forward appears to have been reached. The deal anticipated was a complex one involving the transfer of property. The Defendant says that at this point the agreement was subject to contract and thus not binding. It was not entirely clear to me whether this was challenged by the Claimant at the hearing. In any event the Opponents in their correspondence after the mediation referred to the agreement reached at mediation as being '*subject to contact'*. Indeed Mr. Daniel refers in an email of 8 April 2021 to the agreement at mediation as "*provisional*". In any event it appears clear from the documentation and the way the parties appear to have proceeded, indeed the course of further negotiation after the mediation, that neither party considered that the mediation had created a binding agreement. It seems to me clear that there was indeed no such agreement at the mediation.

8. [….] It also appears that Mr. Daniel had concerns about proceeding with the proposed deal and counsel provided further advice on the merits of the claims. Significantly for these purposes, it was anticipated by the agreement that had been reached at mediation that the parties would bear their own costs.

9. On 22 March 2021, the day before a PTR (rescheduled it would appear because of the continuing negotiations), a deed of settlement was concluded in the substantive action. The deed recognised (inter alia) the First Claimant's interest in a number of properties and provided that a substantial sum be payable by way of rent (and, possibly other matters) in the sum of £170,379. It also provided that the parties were to bear their own costs.

10. A substantial amount of work, it seems to me, had been undertaken after the mediation and before a binding deal could be reached. Indeed, there was clearly some prospect that the matter might go to trial, and some work continued on the claim and in preparation for the trial. In this period there were further communications between the Claimants and the Defendant as to costs, in particular an email from the Defendant 15 March 2021 stating that their fees were now "*circa £75,000 plus VAT*".

The issues

11. After the deed was finalised, in an email of 8 April 2021, Mr. Daniel appears to have argued that the DFCA "[excluded] *the event of a mediation settlement*" (which he nevertheless described as "*the probable and preferred outcome*") and contended that in such

circumstances the Claimants were required to pay a "*capped fee"* only and I understand that to be a reference to a losing fee. That argument is not now pursued.

12. It is clear that the Rent Claim was successful and it was also accepted by Mr. Wilcock for the Claimants at the hearing that I should proceed on the basis that the Chancery claim was also successful[2], no point had been taken about this in the Statements of Case. There is also no dispute that disbursements are payable and that sums were payable in respect of orders for costs made in the course of proceedings ('interim orders'). My understanding is that a sum, which the Defendant has put at £31,559.70, has effectively been paid in respect of disbursements and fees.

13. It is however now said by the Claimants that by the terms of the DFCAs any liability to pay charges was limited to basic charges recovered from the Opponents and since the deed did not give rise to any enforceable order as to costs (and in fact had the effect of waiving previous interim orders for costs in the Claimants' favour which had not yet been assessed or paid) no further fees are payable. Further, and in the alternative, if further fees are payable then by reason of representations made in the course of the mediation, those fees should be capped at £50,000.

14. The Defendant denies both contentions saying that the Claimants' first case is based on a misconstruction of the DFCAs and that no such objection can properly be made at this stage to the payment of basic fees (even if the Defendant were wrong in its interpretation as to the proper meaning of the retainers). Although there were representations made in the mediation as to costs, they were not such as could justify any cap. Only if the DCFAs are to be construed as the Claimants contend is a claim is made for compensation by the Defendant (the basis of such a claim being that the Claimants were in breach of the terms of the DFCAs).

15. At an earlier hearing, directions were given for the setting out the parties' respective cases in Statements of Case. I address the issues arising in the manner in which the disputes were set out in the Statements of Case, and as subsequently refined or clarified at the outset of the hearing. They are as follows :

(1) Whether on the correct interpretation of the DCFAs, or by virtue of an implied term, the Defendant should be paid its basic charges for the work done. If not, whether the Claimants are estopped, by reason of any representation or otherwise, or barred by reason of any collateral contract or variation of the DFCAs, from relying upon the sub clause which they say prevents the Defendant from seeking its fees ('basic charges').

(2) If the effect of the DCFAs is that nothing further is payable as basic charges, were the Claimants in breach of their obligation to co-operate to recover basic charges and, if so, what loss is recoverable for this?

(3) Whether the Defendant is estopped from claiming more than £50,000 (including VAT and disbursements) by way of basic charges in circumstances where it is alleged

[2] To the extent that it makes any difference, there having been a substantial amount of overlap in the two claims.

that Mr Ijieze had, at the mediation, estimated or stated the Defendant's fees as between £30,000 and £50,000?

The relevant terms of the DFCAs

16. The Rent DFCA provides as follows:

Basic Charges	[the Defendant] *charges for the legal work carried out in connection with the Claim which* [the Defendant] *will seek to recover from the Opponent, if the Client wins.*
Claim	*Claim against the Opponent for recovery of rent and forfeiture of the lease*
Damages:	*Money that is awarded to the Client by a Court decision or that the Opponent agrees to pay the Client in settlement of the Claim.*
Interim Application	*An application for an order made in the course of proceedings which usually leads to an interim court hearing as opposed to the final trial.*

...

Loss	*The Court dismisses the Claim, without making any award for damages, or the Client withdraws or discontinues the Claim on* [the Defendant]*'s advice, with no agreement or order for payment of damages in favour of the client.*
Wins	*The Claim for recovery of rent and forfeiture is finally decided in favour of the Client whether by a Court decision or an agreement to pay the Client's damages.*

17. Under the heading '*Payment terms'* in section 3 is the following:

3.1 If the Client wins, the Client shall pay [the Defendant]*'s basic charges and any disbursements paid by* [the Defendant].

3.2 If the Client loses, the Client shall be liable to pay [the Defendant]*'s charges to be capped at* £10,000.00*, plus any disbursement SSL would have paid in the matter, PROVIDED that the Client should make payment in stages as follows:*

(a) £5,000.00 before the first hearing; and,

(b) additional £5,000.00 after the first hearing but before the start of trial preparation.

.....

3.6 If the Client succeeds on an interim hearing, then [the Defendant] shall be entitled to payment of their basic charges and disbursements related to that hearing at that point.

3.7 If the Client terminates this agreement before the claim is concluded, the Client shall pay [the Defendant]*'s basic charges and disbursements.*

18. Under the heading '*Basic Charges'* in section 4 the DFCA provides:

4.1 Basic charges cover work done from the date of this agreement until this agreement is terminated.

4.2 Basic charges are calculated at the rates specified in sub-clause 3 below by reference to the time spent on the matter

19. Under the heading '*The Client's Responsibilities'* in section 6 the DFCA provides:

The Client agrees:
6d to reasonably co-operate with [the Defendant].

20. Importantly, for the purpose of the argument, Section 7 provides as follows (my underlining):

Recovery of Costs

7.1 If the Client wins, the Client and [the Defendant] *shall co-operate to recover the basic charges and disbursements from the Opponent either by agreement or in court through assessment proceedings, if the amount of the legal costs is not agreed with the opponent.*

7.2 In recovering the legal costs from the Opponent, [the Defendant] *may settle the costs with the Opponents without instruction, agreement or approval of the Client, but in such case the Client shall not be liable to pay the difference of* [the Defendant] *basic chargeable fees and the amounts of the costs recovered from the Opponent.*

7.3 For the avoidance of doubt, if the Client wins, the Client is liable to pay:

(a) all [the Defendant's] *disbursements whether or not they are recovered from the Opponent, although full credit will be given for all amounts recovered from the Opponent; and*

(b) only [the Defendant's] *basic charges recovered from the Opponent.*

7.4 In the event that the Client receives a cheque from the Opponent, which is made payable to the Client, the Client agrees:

(a) to pay such cheque into a designated bank account of [the Defendant] .
(b) to pay [the Defendant] basic charges, any remaining disbursements and VAT out
of the proceeds of the cheque; and
(c) the balance of any such money shall be paid to the Client.

7.5 [the Defendant] shall be entitled to retain for their own benefit any interest that the Opponent pays on the charges.

21. Section 10 provides as follows (again, my underlining):

> *Termination*
>
> *10. 1 The Client may terminate this agreement by notice in writing at any time.*
>
> *10.2 [the Defendant] may terminate this agreement by notice in writing to the Client if the Client is in breach of his responsibilities as set out in clause 6 above or for* <u>any reasonable ground</u> *including change in prospects and merits of the Claim.*
>
> *10.3 If this agreement is terminated pursuant to sub-clauses 10.1 or 10.2 above,* [the Defendant] *may by notice in writing to the Client either:*
> *(a) require the Client to pay the basic charges and disbursements forthwith whether or not the Client subsequently wins; or*
> *(b) require the Client to pay the basic charges and disbursements forthwith,*
> *....*
> *10.5 [the Defendant] may terminate this agreement if the Client rejects* [the Defendant's] *advice regarding settlement of the Claim. In this event the Client shall pay* [the Defendant] *basic charges and disbursements forthwith.*

22. Neither party have suggested that there is any substantial difference between the Rent DFCA and the Chancery DFCA as to the issues which have arisen, and I have proceeded on this basis.

23. It is subclause 7.3 in particular which the Claimants say prevent the Defendant recovering any further fees and which lies at the heart of the dispute as to the proper interpretation of the retainers.

Evidence

24. In respect of the factual disputes arising, I heard oral evidence from three witnesses.

25. In seeking to resolve the differences between the parties (which are relatively narrow) I have had regard to the general guidance that has recently been given (substantially by way of summary) by Cotter J in *Muyepa v Ministry of Defence* [2022] EWHC 2648 at [10] to [22] and also that set out in *B-M* [2021] EWCA Civ 1371[3]. In *B-M* Peter Jackson LJ said as follows (at pp.23-5):

> "*No judge would consider it proper to reach a conclusion about a witness's credibility based solely on the way that he or she gives evidence, at least in any normal circumstances. The ordinary process of reasoning will draw the judge to consider a number of other matters, such as the consistency of the account with known facts, with previous accounts given by the witness, with other evidence, and with the overall probabilities. However, in a case where the facts are not likely to be primarily found in contemporaneous documents the assessment of credibility can quite properly include the impression made upon the court by the witness, with due allowance being made for the pressures that may arise from the process of giving evidence….*"

[3] See also Stewart J in *Kimathi & Ors v Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) in which he referred to the guidance of Mostyn J in *Carmarthenshire County Council v* Y [2017]. EWFC 36 See asl the summary also in the recent judgment of Dexter Dias QC, *Briggs v Drylined Homes* [2023] EWHC 382 (KB)

26. Ms. Bamigboye, who is Mr. Daniel's sister in law is a solicitor and assisted the Claimant with in house legal advice. She brought was on board by Mr. Daniel to assist in this case. She was plainly an honest witness. She was not present at the mediation but had had some involvement in the negotiation of the terms of the DFCA and in respect of costs after the mediation. Some of what she said was reported conversation. As seems to me to be understandable I do not think that she she had an entirely precise recollection of the detail of the sequence of events (she and Mr Daniel seem to have proceeded on the basis that that some fees were payable until fresh solicitors were instructed in or about later May 2021, although her account might suggest otherwise).

27. I consider Mr. Daniel to have been an unreliable witness.

28. Serious allegations were made by Mr. Daniel against Mr Ijieze and the Defendant which could not to my mind be reconciled with underlying documents and, in my judgment, were unfounded. It is not necessary to for me to set out all of these matters. He complained, for instance, that Ms Bamigboye was brought in to assist as the Defendant proved to be insufficiently resourced to deal with the claim but it appears he had made the decision to bring her in very much at the outset of the instructions. I reject also his contention that counsel instructed in the claims fell out with Mr. Ijieze; there were, it seems, understandable reasons why two of the barristers could not continue to assist and the third was severely criticised by Mr Daniel himself.

29. A similar point can be made about the allegation by Mr Daniel that he was not advised of the cost consequence of settlement on a drop hands basis; he plainly was (I deal with this matter further below). He appeared to criticise the Defendant for what he appeared to contend was inconsistency between the advice that in principle he could reject the proposals discussed at mediation and after and proceed to trial, and the advice given recommending settlement; there did not seem to me to be any inconsistency. It is also plain to me from the documentation that the allegation that he had been pressurised into settlement (see para. 18 of the Points of Claim) is unfounded. Quite apart from anything else that may be said, a WhatsApp message on 19 March 2021 from Mr. Ijieze to Mr. Daniel said as follows:

> "*Settlement is your choice and ur decision. U can walk away and go to trial if u wish, at least u now have a fair idea of the chances of success and risk in going to trial. It is the wish of ur legal team for you to settle. For me, your decision to settle should be freewill and u shld be happy with any compromise u reach*."

30. There were quite a number of such points. It seemed to me that the allegations against the Defendant by Mr Daniel were made casually at times and in my judgment without proper thought or consideration.

31. Mr Daniel's account in the course of giving evidence as to what was said about costs in the mediation to my mind differed from what he had said in his witness statement: in respect of fees he said in evidence that a sum of £20,000 was said to be payable, which he understood to be a losing fee. It seems to me that if this account were true it would have been set out in his witness statement- indeed I might have expected to see this appearing communications with Ms. Bambigboye reflecting this (when they did not). Similarly, he asserted in evidence that there were telephone conversations which he suggested would corroborate his account when, again, no mention was made of these in his witness statement.

32. Serious allegations had been made by the Opponents in the underlying litigation including an allegation that a lease was a sham. The proceedings were of great importance to Mr Daniel, not least for his reputation, and understandably provoked strong emotions. Plainly he found the mediation, and coming to terms with the effect of the proposed agreement, difficult and it provoked strong emotion; at least some of that emotion appears to me to have spilled over into his approach to this dispute.

33. Mr Daniel's account in evidence was at times put in a forceful manner, but I was left with the belief that much of his account was opportunistic and dictated more by what he perceived to be the exigencies of his case rather than a genuine attempt to recall what had happened. I do not think I can rely on his evidence except where he made admissions against his own interest, or his evidence was supported by documentary evidence.

34. In contrast, I have no hesitation in rejecting what seemed to me an attack on the credibility of Mr. Ijieze. He had previously practised as barrister in Nigeria and qualified as a solicitor in this jurisdiction in 2013 and, as I understand it, has been in practice as a solicitor -advocate since. I have considered all the points that Mr. Wilcock has made about his credibility. I listened closely to Mr. Ijieze when giving evidence (as I did with all the witnesses). If there was any diffidence in his answers to some of the questions it struck me in the circumstances as understandable; quite apart from anything else, it was not always clear what the relevance of the questions might be. It also strikes me as understandable that, for instance, Mr. Ijieze was concerned that the Claimants should try and to get a costs order in their favour as this might increase the pool of money from which the Defendant should be paid.

35. Mr. Ijieze had, it seems to me, an impressive understanding of the issues in the underlying litigation. Whilst there is more to be said about the drafting of the DCFAs, the Claimants' general attack on his handling of the claim, which seemed to me to be part of an attempt to devalue the work that was done and lower Mr Ijieze and the Defendant in the eyes of the court, was plainly misconceived. It appears that Mr. Ijieze's evident forensic skills were concentrated on doing the best he could for the Claimants; he plainly sought, to use the vernacular, to '*do right'* by Mr. Daniel. He offered him a discounted conditional fee agreements without any success fee when other solicitors might well, I suspect, have refused to do so - indeed my impression is that Mr Daniel was in a state of some desperation or upset when he came to seek help from the Defendant, as Mr. Ijieze put it, '*pleading*' the Defendant to offer him a CFA. Moreover, the litigation was plainly complex and demanding and it is clear that Mr. Ijieze worked hard on the case, working on Statements of Case long into the night (when it emerged that counsel could not help out) and indeed drafting witness statements which were complimented by counsel.

36. Mr. Ijieze was, in my judgment, a reliable witness. As with Ms. Bamigboye, that does not mean he could not have been mistaken in the detail of his recollection. He was however conscientious in his handling of the claim and in my judgment he brought this approach to his evidence.

Interpretation of the DCFAs

1.1.1 The different interpretations canvassed

37. The Claimants' case is that subclause 7.3 should properly be read as qualifying the obligation to pay basic charges in clause 3 and that such charges are payable only if there is an order or provision in the client's favour in a settlement agreement expressly providing for the payment of the client's basic charges ('V1').

38. Alternatively, the Defendant is entitled to be paid its basic charges if they have in fact been recovered from the opponent whether or not they are described in any agreement with the opponent as costs ('V2'): the Defendant solicitors say it is clear that the costs were in fact recovered albeit not expressly as costs in the deed but in the form of rent or other financial payment.

39. Alternatively, subclause 7 (3) when read in sequence with subclause 7.1 and 7.2 only applies where a costs order has been obtained in the underlying claim but not when no costs order has been obtained: on this interpretation there is no requirement to show that costs have in fact been recovered in the proceedings in order to demonstrate an entitlement on the part of the solicitors to be paid their basic charges. Read in this way it may or may not be that costs should not exceed the amount that is recovered from the opponent in any money claim.

40. There is, I suppose, a further possibility ('V4') that subclause 7.3 is to be read with subclause 7 (2) (where solicitors agrees costs without the client's instructions). But neither party advanced this interpretation.

1.1.2 The law

1.1.2.1 The underlying principles

41. The principles are well known. They have recently been authoritatively considered by Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at [10] and summarised by Lord Hamblen in *Sara v Hossein* [2023] UKSC 2, so far as was relevant to the fact of that case, as follows:

> *(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.*
>
> *(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.*
>
> *(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated.*

42. In *Wood* Lord Hodge said that ascertaining the objective meaning of the language which the parties have chosen to express their agreement, is "*not a literalist exercise focused solely on a parsing of the wording of the particular clause*". He went on to say,

"Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the fuelled of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements.

43. As is clear, the correct interpretation of a contract may not therefore follow the literal reading of each word: see the example relied upon by Mr Benson for the Defendant in *Sara* [21], [57]. As Mr. Benson pointed out, it is not necessary to set out exactly what words are needed in order to the reach the correct meaning of a contract even though such a meaning may involve substantial departure from the literal reading: see [*Sara* 46] and [49-57]).

44. By way of further illustration or exposition of the approach to be taken, Mr. Benson referred me to the passage in the speech of Lord Hoffmann in *Mannai v Eagle Star Insurance* [1997] WLR 945 in which he said that it is " *a matter of constant experience that people can convey their meaning unambiguously although they have used the wrong words" and example that he give at where an acquaintance might mistakenly (needs clarification) If one meets an acquaintance and he says "And how is Mary?" it may be obvious that he is referring to one's wife, even if she is in fact called Jane. One may even, to avoid embarrassment, answer "Very well, thank you" without drawing attentio*n *to his mistake. The message has been unambiguously received and understood*."

45. Subject to one point which Mr Wilcock made which I deal with below, I do not think these principles are seriously in dispute, nor their application to this case. However, in the context of the arguments that have been put by Mr. Wilcock it is perhaps helpful to have in mind the following general observations of Lord Leggatt in his (dissenting) judgement in *Barton v Morris* [2023] UKSC 3*:*

126. The idea of freedom of contract is that contractual obligations should be freely chosen. But that does not mean that the choice to be bound by an obligation must be expressly stated. If it did, there would be very little to the law of contract. A principal function of contract law is to provide a framework of rules which apply to contractual relationships unless the parties expressly opt out of them.

127. The essential reason why such rules are necessary is, to put the point colloquially, that life is too short to negotiate contract terms designed to cover every contingency that may occur. Even the most comprehensive and carefully drafted written contract cannot anticipate and provide expressly in advance for every possible contingency. And even where contingencies are foreseeable, commerce would be stultified if time and cost was routinely incurred in discussing and making provision for situations that are not thought likely to happen.

128. Establishing default rules serves to reduce the costs and inconvenience of negotiating terms and also to avoid unfair outcomes in cases where parties, whether through inertia, lack of opportunity or foresight, or deliberate choice, have not negotiated express terms to cover certain significant contingencies. Such default rules are generally optimal when they reflect prevailing social norms and expectations and therefore create rights and obligations which reasonable parties would be likely to agree between themselves.

46. One point of (possible) controversy which is appropriate to address at this stage is Mr. Wilcock's argument to the effect, at least as I had understood it, that it was not open to me to do anything other take anything other than what appears to be literal meaning to a conditional fee agreement because such agreements are required to be in writing; see 58 (3) of the Courts and Legal Services Act 1990. I accept and understand the point that regard should be given to policy which underlines such a requirement; it is intended to enhance certainty and understanding as to the obligations under the contract. However, to the extent that the argument goes further and requires a different approach from that which applies in relation to any contract in writing is not supported, as I understand it, by any authority and I reject it. It is difficult to see that the principles that apply in ascertaining the meaning of the words used should depend on whether there is a requirement that a contract be in writing as opposed to just in fact being in writing (because the parties considered it appropriate for it to be in writing) or indeed was oral. The corollary of this argument is that the court would be required to parse only the literal meaning of words used, and a party would be stuck with a plainly unworkable agreement where there was a requirement that agreement be in writing but not otherwise, a matter which would seem odd and indeed not sit with the approach of Lord Leggatt in *Barton*.

1.1.2.2 *Gavin Edmondson Solicitors Ltd v Haven* [2018] UKSC 21

47. In *Edmondson* various claimants had pursued claims under the RTA protocol. To avoid having to pay costs the insurers sought to settle their claim directly with claimants for damages in order to avoid having to pay their costs. The immediate concern of the Court was a claim by the solicitors for the claimants for an equitable lien for their own fees and disbursements against damages paid by the insurers. The Court of Appeal had held there was no contractual liability under the retainer for such costs[4]. Importantly, for these purposes, the retainers were in some respects similar to those here and included this provision in the client care letters:

> *For the avoidance of any doubt if you win your case I will be able to recover our disbursements, basic costs and the success fee from your opponent. You are responsible for our fees and expenses only to the extent that these are recovered from the losing side.*

48. The Court of Appeal had found that this was a term of the retainer and that it override the main body of the CFA which provided that the client was liable to pay all basic charges and, further, that the effect of this term was that if only damages were recovered no costs were payable. The Supreme Court disagreed on the question as to the liability created by the CFA. In the leading judgment Lord Briggs (with which other members of the court agreed) doubted that the contents of the client care letter had any contractual effect at all (a point which does not arise in this case). However on the assumption that it did, he held that the effect of it was merely to limit the recourse from which the solicitors could satisfy their liability for costs (under the main agreements with solicitors) to the amount of its recoveries from the defendant (i.e. damages).

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[4] The court decided nevertheless that the equitable jurisdiction to intervene could be extended to enable the court to recognise and then enforce an interest of the solicitors under the RTA Protocol in receiving its fixed costs and charges or, alternatively, an interest under an express provision in the retainers to sue in its client's names for recovery of those charges from insurers.

49. At [42] when referring to the client care letter, Lord Briggs said this:

> "*I consider that the language of that passage does three things. First, it asserts a right for [the solicitors] to recover its fees and charges from the defendant. That affirms the equitable lien, since there would otherwise be no basis upon which [the solicitors] could do so. Secondly it states in clear terms that such a recovery is the means by which [the solicitors] can give effect to a continuing responsibility of the client for those fees. Thirdly it limits [the solicitors'] recourse for the fees to the amount recovered from the defendant.*

50. Mr Benson argued that I was bound by the determination of the Supreme Court as to the meaning and effect of the terms of the retainer in this case (albeit that the issue arose in a different context and on an agreement that was structured differently): subclause 7.3 properly interpreted only limited the recourse of fees to the amount recovered in the same way that the client care letter had in that case. In any event he contended that the reasoning was at least highly persuasive even if there were, strictly speaking, some basis for distinguishing the facts of that case it was an insufficient basis for not following the outcome on this issue.

1.1.4 Discussion and findings

51. Turning first of all to V1, I agree with Mr. Benson that it is, at the very least, doubtful whether the literal meaning could be as the Claimants say: the DFCAs do not say in terms that the solicitors can only be paid basic charges if they are recovered from the opponent and are <u>expressly</u> described as basic charges, or indeed costs, in a settlement agreement or order. The words used in this subclause are *"recovered"* from the Opponents. Costs may well in fact be recovered in a literal sense in a lump sum payment even if that payment is not expressly labelled as costs.

52. In any event I agree with Mr. Benson that if V1 were correct, subclause 7.3 would lack business efficacy and be unworkable for, to my mind, obvious reasons.

53. It is plain that claims (particularly perhaps non- personal injury claims) can, and perhaps commonly, do settle without orders for costs. Parties, particularly perhaps those whose disputes arise in a commercial context, do not want the bother of having to pursue costs proceedings with the attendant further costs. Indeed, as here, there may be interim orders going either way, the working out of which would give rise to considerable further work and costs. Moreover, it may matter little whether the recovery of a sum of money is by way of damages, specific performance of an obligation to pay money or costs; and it is scarcely surprising that parties should 'trade off' costs and financial claims to agree one lump sum payment without having to specify whether any sum payable was by way of costs. But if V1 were correct then only if the sums recoverable in a compromise agreement were specifically described as costs would the client be liable to its solicitors for their fees; and if no mention is made of any costs recovery the client would avoid any liability for such fees (beyond those interim costs recovered) even if the claim clearly succeeded. And yet, curiously, on this interpretation it would seem that if the claims were lost there would be at least some liability for the losing fee.

54. Further, it is also plain that a client may decide not to take the solicitors' advice as to settlement (indeed in mediation the parties may talk directly to each other without any involvement of solicitors) At the risk of stating the obvious in general solicitors cannot dictate the terms of settlement: the solicitor merely advises and the client makes the decision. But it follows that if the Claimant were right the client could simply cut the solicitors out of its fee by agreeing an order for settlement of the claim which makes no express provision for costs. Indeed a client could in this process effectively give up an existing entitlement to costs under interim cost orders and agree to receive the sums due under such orders by way of damages (which is what Mr. Benson was saying would happen here if the Claimants were correct) or by way of set off against a costs order in favour of the opposing party.

55. It is not clear to me that the solicitors could in practice do anything to protect their interests in being paid their basic charges if V1 were correct. I had understood that Mr Wilcock did not resist in his oral submissions at the conclusion of the hearing the suggestion that there were practical difficulties in doing so. In his later supplementary submissions (which I had directed should be limited to another different issue) Mr. Willock however developed the argument that if the solicitors considered any settlement agreement in the underlying claim that did not expressly provide for their costs were in prospect they could terminate the DFCA and claim their costs on the grounds *inter alia* that the client had not reasonably co-operated with the Defendant or had rejected the solicitor's advice. Clause 10.2 of the DFCA, it is said is widely drawn and entitles the solicitors to terminate an agreement for "*any reasonable ground*" and, Clause 10.5 permits the solicitors to terminate when a client rejects the solicitor's advice.

56. I think however that Mr. Benson is right in his argument that the parties cannot have intended to structure their arrangements in this way. Mr. Wilcock accepted at the hearing that at the stage this litigation had reached, with an imminent trial, an attempt to terminate the agreement would be, at the very least, problematic having regard to the solicitor's professional obligations; indeed I thought I had understood him to accept at the hearing that they could not realistically terminate the retainers. In any event the settlement of claims by mediation or otherwise shortly before trial is plainly not an unusual event. It followed however that if V1 were right solicitors would have to keep providing services (and possibly also incurring disbursements) if there were a prospect of a successful settlement but that no fees would be payable, an outcome which struck me as potentially serious for a solicitors' firm (if not in some cases ruinous for a small firm) or if termination were possible terminate the retainers and quite possibly leave the client without representation at trial should settlement not in fact occur. That point illustrates just one of the problems. Indeed it would be difficult to see how any right to terminate might work in practice in a way that could adequately protect the solicitor's interest. Solicitors are not always expected to participate in settlement negotiations and may not know be on notice, or adequate notice, of what a client might be negotiating. There might be a continuing risk throughout a claim that the client could negotiate a deal which cut the solicitors out of costs and thereby defeat the obvious expectation that the solicitors get paid their basic charges in the event of success. In any event in my judgment the termination provisions do not provide an appropriate or practical mechanism by which the solicitors can secure their basic charges.

57. I should add, although it is not necessary for me to do so and indeed there was no real argument about this, it is, I think, at very least doubtful that the termination clauses themselves can be read as Mr Wilcock's argues. Indeed I have quite a number of concerns

about such a case. His interpretation does not appear to sit with the commercial realities: the *'trading off'* of one element of a formal claim against each another (viz. costs/damages) is part and parcel of mediation (settlement) in a commercial context and the effective prohibition of such an approach (by a solicitor's instruction/advice not to do so) does not fit with the expectations of mediation. Moreover if he were right it would be appear to oblige a client to act against its interests (and reject an otherwise reasonable settlement offer) in order to preserve the entitlement of the solicitors to be paid their basic charges. It is difficult to see that solicitors could terminate a CFA for failure to follow advice that might be unreasonable having regard to the client's interest and yet still be able claim its fees. Indeed I would have thought that refusal to accept advice that a client must negotiate on specific terms such as these is not unreasonable. Added to this are the possible conflicts (in the legal[5] and non-legal sense) that such a reading of the provisions might promote. In these circumstances it is not at all clear to me this would be a workable interpretation of the termination clauses and indeed it strikes me as highly questionable whether clause 10.5, if read in the way contended for, would be enforceable[6][7]. However in view of the conclusions set above in the previous paragraph it is not necessary to reach any formal conclusions or for me to invite further submissions on these points.

58. As the guidance I have cited above makes clear, when interpreting an agreement the quality of the drafting is relevant. The original template of the DCFAs appears to have been drafted for use in a personal injury case (see a requirement in clause 6 that a client consent to expert examination). It was Ms. Bambigboye, who, I understand, suggested some additional or revised terms of the DFCA and the original version of the agreements have been adapted to some extent in discussion with the parties. In these circumstances I am not satisfied that they are the standard terms of the solicitors or indeed solicitors in general. In any event I am satisfied no-one involved in the setting up of these retainers really or adequately addressed their minds to what would happen if the claim were to be resolved at mediation or otherwise settled. Both Mr. Ijieze and Mr Daniel were no doubt concentrating on the challenges of the litigation. Further, I am satisfied that had they turned their mind to it, they would have agreed, as a matter that was obvious, that if settlement had been reached in terms which meant the claims were a success but without any express order for costs in the Claimants' favour nevertheless the Defendant would have to be paid its basic charges. Indeed it was the Claimant who contended in his email of 8 April 2021 that the agreement had not catered for the possibility of settlement in mediation.

59. No imagination is required to reach this conclusion because it seems to me that it was on this basis that the parties proceeded in the mediation: no-one appears to have suggested that the Claimants did not have a liability under the proposed agreement notwithstanding subclause 7.3 and notwithstanding the provisional 'drop hands' agreement on costs. The absurdity of V1 is obvious. If it were right the client might, absent termination (on the Claimants' case), simply cut the solicitors out from payment of basic changes; indeed V1 would lead to the odd conclusion that the solicitors are liable to be worse off in the event of success than if the claim were lost. It is plainly unworkable as an interpretation even if the

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[5] See the comments of Coulson LJ in *Candey v Bosheh* [2022] EWCA Civ 1103 at [53] – as to which see below

[6] cf Section 62(4) of the Consumer Rights Act 1995 which provides that a term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. See schedule 2 of the Act and inter alia term 8.

[7] See too *Karis v EMW Law* [2020] 1 WLUK 19 In that case the clause corresponding to 10.5 in the CFA in that case did expressly provide that the advice had to be reasonable in order for solicitors sought to be able terminate an agreement in the event of rejection and claim their costs but it perhaps provides as an example of the difficulties that such approach would give rise to.

solicitors could terminate the retainer when such an agreement which did not include a costs order were in prospect.

60. Mr. Wilcock appeared to argue at one stage that I should not look at the commercial considerations because he suggested, at least as I understood his point, that this was not a contract made in commercial context. The DFCAs were, he appeared to contend, not commercial contracts and the commercial consequences are irrelevant. But quite apart from the fact that the contracts were made in a commercial context his point struck me as proceeding from a plain misunderstanding of the guidance which I have set out above: the need to consider commercial considerations, such as the practical workability, of a contract do not necessarily require both sides to be commercial entities or for a contract to be made in a strictly business context (as I think was his contention).

61. Mr. Wilcock relies on what he says is the ordinary and natural meaning of the provisions. This is plainly an important consideration but as the guidance makes clear contractual interpretation is not a literalist exercise. Even if I were to accept that the clear meaning derived by such process was as the Claimants contend (which, for the reasons set out above I do not) and there would have to be a express costs order or provisions for liability for basic charges to be payable, that would not be an end to the matter: as it was put, if the parties expressly referred to Mary, they could have meant Jane.

62. The Claimant's case essentially is, as I understand it and as it was perhaps put somewhat starkly by Mr Wilcock, that the Defendant is "*hamstrung*" by its own agreement which it had negotiated and that the court should not, as I understand him to say, save the solicitors from the consequences of a bad agreement in circumstances where the problem is of their own making. I took the substance of Mr Wilcock's point to be that the Defendant being solicitors, they should, in effect, be stuck with what they had negotiated; and that they should have known better than to enter into a contract such as this.

63. In *Candey v Bosheh* [2022] EWCA Civ 1103 the Court of Appeal held that there could not be implied into a conditional fee agreement an obligation of good faith on the part of a client. Mr Wilcock referred to the passage in the judgment of Coulson LJ where the learned judge was considering conflicts which might arise where terms are drafted in a CFA in such a way that the solicitor's costs recovery is dependent on the client recovering something in the proceedings ([53]). In this passage he said that "*such conflicts cannot be resolved by an implied duty owed by the client to consider the solicitor's natural interests rather than his own; it is for the solicitor to ensure that such conflicts do not arise in the first place*." Mr. Wilcock relied on this upon this for the proposition that it was for a solicitor to ensure that no conflict arises on the interpretation of the contract; and having failed to do so, the client's version should be preferred. In my view this is not what the judge was saying: the important point he was making was that the difficulties created by conflicts of the sort he was referring to (ie where the solicitors costs are dependent on the client recovering something) cannot be resolved by an implied duty of good faith; the conflicts to which the learned judge was referring were not disputes as to the meaning of the retainer.

64. Whilst solicitors can, of course, be expected to have an understanding of the significance of legal terms that a layman will not, and in general solicitors bear some burden in ensuring that a retainer is clear (see *Gray v Buss Martin* [1999] PNLR 882), I had difficulty seeing how the approach advocated by Mr. Wilcock could be reconciled with the principles that I am required to apply. There are no special principles of interpretation

applicable where solicitors are a contracting party. The relevant clauses were not offered by the solicitors as standard clauses; the agreement was negotiated. Indeed whether or not the *contra proferentum* rule applies, I still have to have regard to the relevant principles. Solicitors may be presumed to have greater knowledge and experience in respect of these types of agreement, but that is just part of the circumstances to which I should have regard. In this case the Claimants had the benefit of assistance from Ms Bambigboye who had legal training and experience (albeit I think in a different area of law) and in any event Mr. Daniel was himself an experienced businessman.

65. I acknowledge that the suggestion that something may have gone wrong with the wording of a funding arrangement is a substantial matter requiring a close consideration. But in circumstances where the parties and solicitors are doing their utmost in difficult and demanding circumstances it strikes me as possible that even solicitors can, when considering their funding arrangements, fail to cater for every eventuality.

66. Mr Wilcock said that that subclause 7.3 had been drawn from section 3 dealing with payment terms. He also said that the original drafting of the agreement included a clause that made clear (for the avoidance of doubt) that the Claimants would be liable to the solicitors for any shortfall in a costs recovery from the Opponents (removal, as I understood his case, indicating that the parties must have intended that there is no such liability). Both matters were said to support his case as to the way in which the retainers were to be interpreted. Quite apart from any evidential difficulties associated with these assertions, at least one of the further difficulties is that I am required to disregard pre-contractual negotiations when considering the meaning of a contract (see *inter alia Wood*, [10]; see too the Entire Agreement clause in retainers). Moreover I am not sure that it necessarily helps the Claimants where the subclause may have been in circumstances where the parties have chosen to locate the term under the heading '*Recovery of Costs'* (my underlining).

67. Nor do I accept Mr. Wilcock's argument that the Defendant solicitors must have understood that subclause 7.3 would have precluded the payment of basic charges if no costs order or costs recovery was provided for in the settlement (and this is why they insisted, it is said, that the Claimant only settle on terms that the opponent pay costs). I deal with this matter further below in a different contact, but whatever concerns Mr. Ijieze and the Defendant may have had as to the terms of the agreement cannot determine the proper meaning of the contract. Indeed it made sense (even if V1 were acknowledged as incorrect) that the Claimants should press for and obtain a costs order in their favour and that they should be encouraged to do so.

68. Mr. Wilcock also relied on a comment apparently by Mr. Ijieze in a Word 'Comment' box alongside clause 10.3 of the revised Chancery DCFA. This clause provides for payment of basic charges in the event of termination (by the client, on notice, see subclause 10.1) and the comment next it was that this clause, ie 10.3, was "*protecting ourselves against unreasonable termination*". It was not clear to me how this might have shown that the Defendant foresaw, prior to entering into the CFA, that the Claimants would seek to avoid paying fees if there were no termination and that clause 10 (generally) protects against this (as Mr. Wilcock contended). The obvious intention of subclause 10.3 is to anticipate a situation where the client seeks to terminate on notice; it provides protection to the solicitors by providing for payment of their basic charges: the client might otherwise terminate and thereby escape liability for paying basic charges by the termination. It seems to me obvious why the Defendant would not accede to the request on behalf of the Claimants to

limit the costs in 10.3 to a losing fee and it is this request which prompted the comment relied upon. This view of the comment does not assist the Claimants. I do not think in any event that this point assists the Claimants, not least because I am not entitled to have regard to pre-contractual negotiations; nor would it outweigh the concerns that I have raised as to the commercial consequences of the relevant clauses if the comment were read in the way that the Claimants contend.

69. Turning then to V2, the difficulty with this interpretation, to my mind, is that it appears to require an enquiry of some forensic difficulty into what has in fact been recovered by way of costs, however it might be described. This is particularly so where the parties might not have turned their minds to any issue as to how a lump sum payment may be made up. Indeed there may also be difficulties associated with the such interpretation particularly where the claim/defence is in respect of for non-money relief so that no money is to be paid over.

70. V3 is, to my mind, consistent with the analysis in *Edmondson*. It seems to me that the Supreme Court's analysis of the function and effect of the provisions in the client care letter in the case support the conclusion that subclause 7.3 should relate to the recovery of costs where a costs order is made and cannot, as the terms of the client care letter could not in *Edmondson*, be used as means of 'cutting out' the solicitors from payment; an interpretation of a unding arrangement which permitted the client to do so was rejected. I have fully in mind Mr. Wilcock's point that there is a difference between the facts of that case and this case. The wording of the main CFA was different (it expressly provided that the amount of costs was not limited to damages) and in this case, unlike that case, the clause creating that liability of for costs (section 3) and subclause 7.3, which Mr Wilcock says, limits the quantum of costs are in the same document (the DCFA). It does not matter however that I might not be strictly bound by this decision*;* it is plain to me that the reasoning does however assist in the proper interpretation of the retainers with which I am concerned.

71. It strikes me as significant in considering the facts of this case that sub clause 7.3 is in a section dealing with the recovery of costs in and not the liability for basic charges. It is also, I think, notable, and as I pointed out in the course of the argument, that subclause 7.3 is to be read in sequence with subclauses 7.1 and 7.2 which both proceed on the assumption that a costs order has been made in the client's favour and deal with the situation that arises when a claim is made against the Opponent (*inter partes*) for costs pursuant to such an order. Further, the term 'Basic Charges' does not state expressly that a costs order is required in order for there to be a 'win' (albeit it refers the solicitors "seeking" to recover costs in the event of a 'win') nor does the definition of 'win'.

72. Considering subclause 7.3 in this context and noting that there is no express requirement for a costs order to be made in order to trigger a liability for basic charges, either within section 3 which sets out the primary obligations as to payment, or indeed in the definition of 'win' where it might be expected to be seen (if it were to have the effect contended for by the Claimants) it seems to me that subclause 7.3 should be read as applying where a costs order had been made and to the extent that a costs order is made, so that in these circumstances the clause only limits the quantum of costs such that the solicitor/client cost liability mirrors the *inter partes* costs recovery, but not when no order at all has been made.

73. The Claimants' interpretation, were it to be correct, would in effect re-define the term 'win' and is to be weighed against the commercial considerations I have set out above.

74. Mr. Wilcock argued that the problem with all the interpretations save V1 was that they expose the client to a claim for costs which might equal (or, I suppose, exceed) the sums recovered by way of damages or otherwise. But in circumstances where a claim has been 'won' it might ordinarily be assumed that a party could agree a costs order in their favour. If instead the client choses to receive a financial payment in another form that party cannot be surprised that the solicitor should maintain its claim for costs whether strictly out of that sum or up to the limit of that sum or indeed otherwise. That the client could not simply cut the solicitor out of their costs was material to the approach of the Supreme Court in *Edmundson*; moreover the concern that Mr. Wilcock raised did not deter the Court in that case from reaching a conclusion which might have the effect on the claimants that all their damages be used to pay of costs. The client can scarcely be ignorant of his liability to his solicitor for basic charges and it seems to me to be entirely natural that when entering into a 'drop hands' costs agreement there should be a discussion about the client's liability to solicitors in advance of entry into a settlement agreement (as the Defendant proposed here). In short the client can be expected to consider, and perhaps address, this matter before a final agreement with opponent.

75. I agree with Mr. Benson that reference to terminology such as 'CFA Lite' is not helpful: the term 'lite' implying perhaps that solicitor's liability to pay legal representative's fees and expenses only to the extent that sums are recovered in respect of the relevant proceedings, whether by way of costs or otherwise. Indeed neither side, at least initially, relied upon such an approach. The meaning of words used in a contract are ascertained by using the principles set out above against the background knowledge which would reasonably have been available to the parties, not just one side which is relevant; and it is not clear to me that any such terminology could properly be deployed by Mr. Wilcock in support of the Claimant's interpretation.

76. The reasoning in *Edmondson* might also suggest that a restriction on the amount of basic charges payable to the financial sums recovered should apply here. However it does not, as I understand it, appear to matter whether there is such a restriction in this case as it is common ground the further fees sought do not exceed the financial recovery and in absence of detailed argument on this point I do not think I should do so. I have some difficulty seeing how a financial restrictions could apply in a case in which financial relief (which is perhaps the case in the DFCA or indeed that such would be inferred on the fact of this case (cf Edmondson). If it were to matter I could however address it.

77. It does not matter for current purposes whether it is V3 that applies or V4: on either interpretation the Defendant is entitled to be paid its reasonable basic charges. The only effective difference between V3 and V4 would arise in a situation where a costs order has been made in the clients' favour – which is not the situation here. As I indicate above neither parties contend for V4 and I was (understandably) not addressed in any detail on it by Mr. Benson. The fact that the obligations or provisions in subclauses 7.3 and 7.2 were set out in separate clause would appear to weigh against this interpretation which reads 7.3 as complimentary to 7.2 (indeed on Mr. Wilcock's argument V4 would make 7.3 otiose).

78. I should perhaps also say that at the end of his submissions and without having raised the point either in the Statement of Case or in the skeleton argument (he was then relying

upon) Mr Wilcock suggested that if V1 were not correct then there would an unenforceable contract for a share of the 'spoils' of the litigation, in effect an unlawful contingency fee agreement (see Chitty 18-098 and 18-099). Not only was it too late to raise such a point in this preliminary issue hearing the point seemed to me to me, in any event, to be misconceived. By V2 or V3 the parties are contracting for payment of solicitors' base fees on a conditional basis but not for a share of any damages. An arrangement whereby costs are in effect paid out of damages (something obviously quite different for a contingency fee agreement) is entirely common place, particularly after the LASPO reforms (which ended the recovery of additional liabilities from defendants in most litigation). In any event not only does V3 not necessarily contain the restriction that basic changes could not exceed damages but there could nothing objectionable about that if it were the case. Not only did such a restriction not seem to trouble the Supreme Court in *Edmondson* such restrictions are entirely common place in CFA's, indeed the Conditional Fee Agreements Order 2013 restricted the payment of success fees by reference to damages recovered.

79. It appeared at one stage to be common ground that nobody would have entered into the contract knowing that it had the meaning set out V1. Even Mr Wilcock, as I recall from his written submissions, appeared at one stage to accept that it would be absurd for the solicitors to have done so. His arguments in his supplementary submissions appear to have evolved somewhat since then. I have considered all his arguments, even if I have not expressly referred to them. I am not persuaded by any of them. Even if there might be refinements as between say V3 and V4 the agreement must have been that where an agreement is reached through mediation which gives rise to a win, basic charges are payable. Applying a unitary and iterative process, it seems to me, be clear for the reasons that I have set out above that V3 is the correct reading and that the Defendant is entitled to be paid its basic charges.

80. It seems to me that the Claimants would have succeeded only if they are correct about V1. It was contended as I understand it, that the sums recovered (essentially by way of rent arrears) would in fact be used to pay debts other that those by way of costs, and such a recovery could not be treated as recovery of costs (indeed as Mr. Wilcock pointed out clause 3.26 (a) of the deed which obliges the First Claimant to discharge sums due pursuant to a mortgage). In the event it is not necessary for me to decide this as I do not consider V2 to be correct. However it seems to me clear from the conduct of Mr Daniel at mediation and from what happened afterwards that the sums recovered were, in the contemplation of both parties and mutually understand the other to understand, to be used to pay the Defendant's costs and if I were necessary to do so I should find that the basis charges sought have been recovered.

1.2 Implication of a term

81. In *Marks and Spencer plc v BNP Paribas Securities Services Trust Co* (Jersey) Ltd [2015] UKSC 72, [2016] AC 742, the Court distinguished the process of interpreting a contact from the process of implication, and if I wrong in my conclusions above it would be necessary to consider whether a terms should be implied to the same effect.

1.2.2. Principles to apply

82. In *Candey v Bosheh* [2022] EWCA Civ 1103 Coulson LJ formulated the applicable principles in this way:

(a) The term must be reasonable and equitable; and

(b) The term must be necessary to give business efficacy to the contract (in other words, does the contract lack commercial or practical coherence without the term?); or

(c) The term must be so obvious that it 'went without saying'; in other words, if pointed out to the parties that it was missing, they would say "of course, so and so will happen; we did not trouble to say that; it is too clear": see Reigate v Union Manufacturing Co. (Ramsbottom) Limited [1918] 1 KB 592 at 605 ; and

(d) The term must be capable of clear expression and be formulated with sufficient precision: see Shell UK Limited v Lostock Garage Limited [1976] 1 WLR 1187 at 1204; and

(e) The term must not be inconsistent with, much less contradict, an express term: see Marks and Spencer PLC v BNP

83. It is plain there are no special rules in respect of agreement which must be in writing (not least because *Candey* in which the above principle were set out involved an issue as to whether terms could be implied into a conditional fee agreement and no mention is made of such a qualification). Subject to this point there is no dispute about these principles and no dispute of course that there can be any implied duty of good faith on the part of the client.

Discussion and findings

84. I think the requirements set out above are satisfied. If I were wrong to interpret the retainers as I have, I would have reached the conclusion that such a term to the same effect as V3 is implicit in the DFCAs.

85. Such a term would be reasonable and equitable and it would avoid the absurd and unfair consequences of V1. It is to my mind an entirely safe assumption that such a term would have been agreed had the issue been raised before the contact was finalised and, moreover, that it is so obvious that it 'went without saying' that sub clause 7.3 was to be read as consistent with basic changes being payable in the event of a 'win' and that this subclause applied only if and to the extent that an order or provision for costs is made in the client's favour. It would be necessary to give business efficacy to the retainers and plainly in my view capable of clear expression and be formulated with sufficient precision.

86. Mr Wilcock argued that such a term would be inconsistent with and contrary to the express terms of the contract. In *Barton* the Court was concerned with the terms of a contract between the seller of a property and the introducer of a purchaser of the property; the introducer would receive a payment of £1.2m if the property were bought for £6.5million. It was held that introducer's fee substantially exceeded reasonable remuneration for the work to be done and the Court, by a majority, declined to read in a requirement to pay a fee when the property was sold for less than £6.5m.

87. Lady Justice Rose (who gave the leading judgment) said that: "*..., an agreement whereby someone contracts for a higher than normal payment on the fulfilment of a condition and is prepared to take the commensurate risk of getting nothing if the condition is not fulfilled is not a bizarre or uncommercial contract.*"

88. She went on to say at [37]:

> "*What would be strange, in my judgment, would be for* [the seller of the property] *to agree to what would become a one-way bet for* [the introducer]*; that he should receive a fee of almost three times the reasonable fee if the sale price were £6.5 million or more and still receive the full reasonable fee of £435,000 if the sale price were something less than that. I do not see what benefit there would be for them in concluding such an agreement*."

89. It is in this context that a finding was made that the implied term proposed would be inconsistent with express terms of the contract. However that situation is to be contrasted with the situation here where more natural understanding of the contract as a whole is that the solicitors would get paid if the claims succeeded. A clause cannot I think be said to be inconsistent and/or contradict the express terms merely because if without it there would be no such term: it is obvious that will always be the case where a terms has to be implied. In my view the a term to the effect of V3 would not be contrary to the express terms of the contract but arise by implication from them.

1.3 Estoppel, variation, collateral contract.

90. I do not consider I need to deal with these issues either. However in case I am wrong about the above, I should perhaps state my view, at least on the issue of estoppel by convention. I assume for this purpose that V1 is the correct interpretation, that no terms can be implied to the effect set out above, and that subclause 7.3 is a bar to any entitlement for any further fees by the terms of the retainers.

1.3.2 The law

91. The essential requirements for an estoppel by convention are not in dispute. They were set out by Akenhead J in *Mears Limited v Shoreline* [2015] EWHC 1396 (TCC) as follows:

> (a) *An estoppel by convention can arise when parties to a contract act on an assumed state of facts or law. A concluded agreement is not required but a concluded agreement can be a "convention".*
>
> *(b) The assumption must be shared by them or at least it must be an assumption made by one party and acquiesced in by the other. The assumption must be communicated between the parties in question.*
>
> *(c) At least the party claiming the benefit of the convention must have relied upon the common assumption, albeit it will almost invariably the case that both parties will have relied upon it. There is nothing prescriptive in the use of "reliance" in this context: acting upon or being influenced by would do equally well.*

(d) A key element of an effective estoppel by convention will be unconscionability or unjustness on the part of the person said to be estopped to assert the true legal or factual position. I am not convinced that "detrimental reliance" represents an exhaustive or limiting requirement of estoppel by convention although it will almost invariably be the case that where there is detrimental reliance by the party claiming the benefit of the convention it will be unconscionable and unjust on the other party to seek to go behind the convention. In my view, it is enough that the party claiming benefit of the convention has been materially influenced by the convention; in that context, Goff J at first instance in the Texas Bank case described that this is what is needed and Lord Denning talks in these terms.

(e) Whilst estoppel cannot be used as a sword as opposed to a shield, analysis is required to ascertain whether it is being used as a sword. In this context, the position of the party claiming the benefit of the estoppel as claimant or indeed as defendant is not determinative or does not even raise some sort of presumption one way or the other. While a party cannot in terms found a cause of action on an estoppel, it may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on the estoppel, it would necessarily have failed.

(f) The estoppel by convention can come to an end and will not apply to future dealings once the common assumption is revealed to be erroneous.

92. In *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39 at [49-50] Lord Burrows (with whom the other Justices agreed) cited with approval the following passage of Briggs J (as he then was) in *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch); [2010] 1 All ER 174:

"(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.

(ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

(iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

(iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

(v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

93. As appears from *Tinkler* (and Chitty, 6-116), however, in respect of the requirement at (i) in *Benchdollar*, "*something must be shown to have 'crossed the line' sufficient to manifest an assent to the assumption*" and this principle set out *in Benchdollar* are to be read subject to this further requirement.

Discussion and findings

94. It seems to me to clear that the parties proceeded on the assumption that subclause 7.3 could not be relied upon to deny the Defendant solicitors their basic charges. It was because of such assumption, and consistent with such an assumption, that Mr. Daniel reacted as I have described above (see in particular, [6] above) [….].

95. It seems to me that there are further matters confirming such a common assumption. As I have noted above on 15 March 2021 (and before the deed was entered into) Mr Ijieze emailed Mr Daniel about costs saying in terms,

> *As earlier advised,* [the Defendants'] *costs to date are circa £75,000.00*
> *[Counsel's] costs are estimated at £8,000.00*
>
> *I reiterate my advice to you to try to compromise the Sky and Joss' costs first, since the settlement terms would include a term for parties to bear their own costs*.

96. Mr. Daniel replied at 17.49 to say:

> *Thanks for your email, contents of which are duly noted. In particular, I note that these are fee estimates and subject to negotiation once itemised.*
>
> *As discussed, the estimates for* [the Defendants'] *fees are significantly higher than expected. As agreed, the matter of costs is an important consideration in reaching a settlement but should not distract from the matters at hand, as they only become an issue if settlement is reached which is far from certain.*
>
> *Once it is clear that settlement is a real prospect, I agree that the next step will be to speak with [counsel] and [you/the Defendant] about a compromise payment to reflect where things stand and are likely to end up.*

97. This prompted Mr. Ijieze to email back at 19.02 the following:

> *The contents of your email below are noted. However, we disagree with your assertion that*:
>
> *"As discussed, the estimates for* [the Defendants'] *fees are significantly higher than expected".*
>
> *The assertion is not correct. It ignores the complexity of the case and the time we spent on the case for over 13 months. You know from the costs budget and the order of HHJ Gerald dated 30 October 2020 that* [the Defendants'] *approved budgeted costs to trial are circa £90,000.00 Plus VAT.*

About three quarter of the expected works have been carried out to date. Compared to the costs of the others lawyers in the case, our costs are reasonable and proportionate.

Of course, we are happy to discuss our costs with you. Please be advised that our stated estimated fee of £75,000.00 is Plus VAT.

98. On 17 March there was a further email from Mr. Randhawa, director of the \defendant solicitors, to Mr. Daniel in which he said as follows:

Further to our telephone conversation, yesterday and today, regarding our professional fees and disbursements payable by you, in the event of the settlement of the matter pursuant to mediation whereby you agreed for parties to bear their own costs.

I note your wish to defer discussion on this subject to a later stage. However, for the avoidance of any doubt, I would like to notify you that in the event of the settlement reached with the provision for parties to bear their own costs, you shall be liable to pay our fees in addition to the disbursements. Our fees will be assessed by the Court, if not agreed between you and us, though we do not wish this to be the case.

We have informed you that our fees incurred (on standard basis) thus far are in the region of £75,000 plus vat. We have also notified you that the Counsel's fees are additional and fall in the region of £8,000.

It is important that you keep these figures in your mind before making a final decision on the settlement with the provision for parties to bear their own costs.

99. If Mr Daniel believed that the Claimants did not have a liability to pay their solicitors' basic charges I think he would have said so in the communications that I have seen with the Defendant. It might also be said that it would have clearly set out in the email communications with Ms. Bambigboye which have been produced.

100. I accept Mr. Ijieze's evidence on this point. Mr. Ijieze understood, and in my judgment reasonably so, that subject to any objections as to quantum the Claimants would pay basic charges and that they also understood that they were to pay the basic charges, accepting their liability to do so. That understanding and assumption is perhaps also consistent with and necessary to the explain an earlier WhatsApp message on 4 March (referring to obligations to pay inter alia solicitor's costs). Moreover, when it appeared that a substantial sum would be payable by way of rent arrears (and the evidence suggests that this was after the mediation) Mr. Daniel cannot have been in any doubt that that the Rent claim at least had succeeded.

101. Mr Wilcock says that there was no such assumption because prior to the mediation Mr. Ijieze spent some time making clear that settlement should be pursued on the basis that a cost order is made in the Claimants' favour and that he must have must have understood that without a costs order the Defendant would not have been able to seek payment of its basic charges. I do not accept that this was the case. Even if Mr Ijieze had doubts about how the retainer might be read there was here an assumption or 'convention' that the basic

charge would be payable. To my mind, Mr. Ijieze was clearly assured by the stance taken by Mr. Daniel. Indeed as appears to be common ground, if read it in the way the Claimants says the contract would have absurd effects; it does not take much to proceed on the basis that V1 cannot be correct. In any event Mr. Ijieze proceeded on an understandable assumption that it was not the way the retainers were to be read and he considered that he had a legitimate claim to basic charges even if there were no express costs provision in the Claimant's favour in the proposed agreement with the Opponent. The communications by conduct or otherwise plainly 'crossed the line' and conveyed to Mr. Ijieze and the Defendant an understanding that the Claimants expected the Defendant to rely upon when undertaking further work. Had Mr. Daniel thought that no basic charges were payable he would have said so.

102. Mr. Ijieze said that he would have terminated the DCFA had that the Claimants said that would not pay basis charges in the event of a win. That seems scarcely surprising; why should he continue to work if the Defendant was not going to be paid? He did not need to threaten any such course of action because both he and the Defendant understood that the Claimants would pay the basic charges and, more particularly, Mr Ijieze understood that the Claimant had such understanding from the communications and conduct, including Mr. Daniel's failure to say otherwise.

103. I have had no hesitation in rejecting the account of Mr. Daniel as to the discussions at mediation, in particular his evidence that the fees mentioned were £20,000 (leaving I think disbursements of £30,000) and that he understood that such fees were payable as a losing fee. I also did not believe and did not accept his evidence to the effect that there were telephone calls or other such communications to that effect. Quite apart from the reasons which I have already set out for reaching this conclusion I agree with Mr Benson, that this evidence is difficult to reconcile with the contemporaneous expressions of gratitude (which can be seen in the WhatsApp exchanges).

104. Nor do I accept that the assertions made after the deed was entered into really help. Particular reliance is placed by the Claimant on the email of 8 April. In the email, as I have set out above, Mr. Daniel appears to contend that the recovery of sum fell into a special category that were not covered by the DFCA- and that only a losing fee was payable. At that stage the Claimants had achieved resolution in the litigation and no longer needed the Defendant to assist with the litigation. In the course of the mediation the Defendant's assistance was still required and I think it is clear there would have been no discussion of a losing fee only.

105. On the basis of V2 or V3 there was no need for the Defendant to terminate the agreement in order to get paid. But on the assumption that V1 is correct and, further, there were a right to terminate for failure to seek settlement which provides a costs recovery (which I, at the very least, doubt) then there would appear to be detriment in a forbearance from any step seeking to terminate the DFCAs. To my mind such considerations tend to show that V1 cannot be correct (to permit termination in the circumstances might be said be unworkable) but I emphasise that I have assumed against myself on that point.

106. In any event the guidance I have cited above suggests that there is no need for specific reliance giving rise to a known and defined detriment and there can be reliance in a more general sense; the requirement is satisfied where benefit is conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert

the true legal (or factual) position. I have no doubt that Mr Ijieze and the Defendant relied upon the communications that the basic charges were in principle to be paid and that the Defendant continued working on the claim and thereby conferred a substantial benefit on the Claimants. Had the Claimant said or otherwise communicated, that no further fees would have been paid, it is difficult to see that they would not have been worse off.

107. I also consider that it would be unconscionable to allow the Claimants to rely upon subclause 7.3 as defeating the claim for basic charges. Mr. Wilcock did not accept this. It seems to me clear the conduct of the Claimants led Mr. Ijieze to believe that he would be paid for the work he did and that Claimant has taken considerable benefit for the work done in respect of claims (which carried a significant risk). The test of unconscionability is plainly an objective test, not one determined by the conscience of the party attacking the estoppel. By an objective standard I have no doubt that to allow the Claimant to rely upon the subclause in this way would be unconscionable.

108. It seems also seem clear that the estoppel is not being used a 'sword' but a shield against the assertion that the Claimants can rely upon subclause 7.3 construed in accordance with V1. The claim for basic charges may succeed because of the estoppel but that does not, in my view, mean that the estoppel is itself creating a cause of action for basic charges; that cause of action arises from the DCFAs.

109. In short I would accept that the Claimants are estopped on this basis. It is not necessary I think to consider whether the Claimants' conduct could amount to an estoppel by representation, whether there may have been a collateral contract or variation, or whether the same might be defeated by the requirement that a conditional fee agreement be in writing.

2. Breach of term of co-operation

110. In view of my findings set out above it is not necessary for me to address this issue either (as it was a point pursued in the alternative to the Defendant's case on the points I have already addressed) but some consideration of this aspect of the dispute, to my mind, might supports my conclusion as to the proper meaning of the contract.

111. In the absence of any implied of duty falling on the Claimants of good faith it is difficult to see how there can have been a failure to co-operate their part. There can it seems be no general obligation on a client to reach an agreement with an opponent that secures payment of a solicitor's fees or costs. Indeed it is difficult to see that there can be failure reasonably to co-operate of solicitors asking the client to do something which was may not be in their best interests. I have not been taken through the Rent claims or Chancery claims in any detail but it is clear that there were risks with then, as Mr. Ijieze explained and as it clear from the documentation I have read. As far as I can tell however the course taken was in accordance with the advice which the Claimants received, not least from counsel. The costs orders and the potential for a costs order in the Claimants' favour was I would infer part of 'the mix' when considering a deal and appears may well have led to the Opponents conceding a substantial amount in respect of rent arrears.

112. In such circumstances I would be bound to reject the Defendant's case on this point.

3. Cap on fees/costs of £50,000 by an estoppel

113. The parties disagree as to the nature and effect of representations made as to the defendant's fees and disbursements in the course of the mediation and as to whether there was any material reliance upon them.

3.1 The law

114. It is not, I think, necessary for me to set out the relevant principles in any detail in order to deal with this. It is plain that in order for an estoppel to arise:

(1) there must be a promise or an assurance or representation (in the nature of a promise) which is intended to affect the legal relationship between the parties and which indicates that the promisor will not insist on their strict legal rights (*Chitty* 6-098);

(2) the representation must be clear or unequivocal (*Chitty* 6-099); and

(3) it must also be "inequitable" for the promisor to go back on the promise; the promisee must have acted in reliance on the promise so that they can no longer be restored to the position in which they were before they took such action; if the promisee can be restored to that position, it will not be inequitable for the promisor to go back on the promise. (*Chitty* 6-103)

Discussion and findings

115. I think it is clear that if solicitors had represented that its fees were no more than a particular figure and in reliance upon that representation a client were to have entered into an agreement with opponents in litigation on a 'drop hands' basis, or one which did not provide for costs in their favour, this could amount to an estoppel preventing the solicitors from claiming a sum in excess of that which they had said was payable. The client may be taken to have acted to their detriment by relying upon the representation and agreeing to payment of a particular sum by the opponent, making it inequitable for the solicitors to claim any higher sum. That was not however the case here.

116. I did not have the benefit of any attendance note on this issue. There had however been a very significant amount of correspondence as to the Defendant's fees and disbursements prior to and in the run up to the mediation. In a letter sent on 2 March, the day before the mediation, Mr. Ijieze wrote to the Opponents about unrecovered interim costs which alone were over £33,000 plus VAT (over £40,000 inclusive of VAT; Mr. Daniel was provided with a copy of this letter on the same date. He was informed of other costs including counsel's fees (which for the mediation alone were £5,000 plus VAT) and would have been aware that other work had been done by the solicitors progressing the litigation and in preparation for the mediation. The consolidated claims had been costs budgeted and the costs budgets were sent to Mr. Daniel on 10 October 2021. Having provided Mr. Daniel with such information he would have understood that a substantial amount of costs was payable by the Claimants. It was perhaps important to remind him of the Claimants' liability to pay costs before entering into any binding agreement but Mr. Ijieze was, it strikes me, likely to have proceeded on the assumption that Mr. Daniel had a pretty good idea of the amount of costs involved and any reference to a figure was likely to have been in passing. Against this background and in circumstances where the primary focus was on a complex negotiation with the Opponents involving a number of different elements with a number different matters being discussed in different online rooms, it is to my mind understandable that any such figure was not written down. Moreover to my mind it is inherently unlikely that Mr. Ijieze would have thought costs were limited to £50,000 and, to my mind, unlikely that he would have made any such representation.

117. When the issue of the defendant's costs was raised in the mediation by Mr. Ijieze, he was not offering an estimate of the costs which was to be relied upon. The discussion appears to have taken place at relatively early stage of the negotiations. It seems to me clear that that any representation as to costs or the fees of solicitors made in the mediation could in any event only have been in respect of costs incurred up to that point; and thus be a broad approximation. The Defendant was charging on the basis of a hourly rate. That was known to the Clamant. Nobody knew at the initial stages of this mediation how much time would reasonably be required to complete the work that was necessary to for a deal to be reach. Whatever words were used by Mr Ijieze it seems unlikely that they could have suggested to Mr. Daniel there was likely be a cap on fees and any indication as to the outstanding amount was in broad terms which would have made it clear that the costs might well exceed £50,000 (consistent perhaps seems with the WhatsApp message of 13 March from Mr. Ijieze). Whilst the information provided does suggest that Mr Daniel sought to recover by way of rent arrears a figure of reflecting the figure Mr. Ijieze had referred to, I think he did so at his own risk knowing that he might owe his solicitors more than this; such a risk being considered reasonable in the context of the risk of not achieving a settlement before trial.

118. On this point I have in mind that Mr Daniel is supported in his account by Ms. Bambigboye who says that Mr. Daniel told him that Mr. Ijieze said that costs were £30,000 to £50,000. If Ms. Bambigboye correctly recounts the detail of what she was told by Mr. Daniel then Mr. Daniel was inaccurate in his account of what was said in mediation. It is to my mind unlikely Mr. Ijieze would have suggested that his costs could be as low as £30,000 or that Mr. Daniel would have thought that. Indeed it is perhaps of significance that in his email of 8 April Mr. Daniel described having been told [in mediation] that costs would be "*in the region of £50,000 (including disbursements)*" – not £30,000 to £50,000 and this representation seems inconsistent with a clear or unequivocal representation that the costs would not exceed £50,000. In my judgment there was no clear or unequivocal representation to that effect.

119. Nor, even if were wrong about this, am I satisfied that Mr. Daniels relied upon any such representation or that if he did, he did so to his detriment. Even if Mr Daniel had not specifically turned his mind to the precise figures in the various emails that were sent to him about costs he would have had some idea of the costs that were liable to exceed £50,000 (not least because of his ongoing liability for interim costs which had been awarded to the Claimants but not paid) and I reject his evidence that he had not considered such information. In any event any agreement, such as it was, at mediation, was subject to contract. As I have noted above Mr Daniel was informed by email on 15 March that the fees were some £75,000 plus VAT. It is perhaps surprising that when he received this email he did not specifically refer to the representation that is now alleged to have been made. But he plainly knew at this stage (if he did not know before this) before entering into the deed that the Defendant would be seeking over £50,000 in basic charges.

120. Some time shortly before the sending of the first email in the chain I have set out above on 15 March it appears there was some discussion between Ms. Bambigboye and Mr. Ijieze about costs. Ms. Bambigboye said that Mr. Ijieze had accepted that he had made a mistake and should not have told Mr. Daniel that his costs were some £30- £50,000 because their fees were between £50,000 and £60,000 something. I accept that Mr Ijieze would have been aware that the impression he might have given at the mediation was the fees could have been as low as £50,000 and that this would have required some correction. Further, I accept that he was likely to have made it clear that he was correcting any such misapprehension. But he was not correcting a mistaken indication that the costs could not exceed £50,000, so I do not think this assists the Claimants.

121. Accordingly, and for all these various reasons I must reject the Claimants' case that there should be a cap of £50,000 as alleged.

122. I cannot however leave this issue without raising some concerns as to how the claim for costs appears to have increased so substantially from the figures that were put in in the emails of 15

March. I raised myself the issue as to whether even if there were no estoppel, a representation given as to costs may have an effect on reasonableness of the costs (per the guidance in *Mastercigars Direct Ltd v Withers LLP* [2007] EWHC 2733 *(Ch)* and [2009] EWHC 651 (Ch*)* (see [102]). In the earlier of these two judgments Morgan J explained at [99] that an estimate of costs may be a useful 'yardstick' by which the reasonableness of the costs may be measured: if there is no satisfactory explanation for any departure from any estimate something less than an estoppel may suffice in terms of reliance for the purpose of deciding whether any departure from an estimate may be reasonable[8]. The following passage of the later judgment has recently cited with apparent approval by Vos MR in the context of non-contentious costs (*Belsner v Cam Legal Service* **[**2022] EWCA Civ 1387, [96]):

> " *...even if the solicitor has spent a reasonable time on reasonable items of work and the charging rate is reasonable, the resulting figure may exceed what it is reasonable in all the circumstances to expect the client to pay and, to the extent that the figure does exceed what is reasonable to expect the client to pay, the excess is not recoverable...*[102]

123. I was not sure Mr Benson was correct to suggest that the guidance given in *Mastercigars* only applied where an estimate of costs was provided in advance of the work to be undertaken and not here. However I consider that further arguments and indeed consideration of the detail as to what happened is appropriate. On the face of what I have seen however there seems some basis for thinking that costs indications of the sort given at least on 15 March might be a yardstick against which to measure reasonableness. However, I leave all such matters for further consideration if the parties cannot now resolve their remaining differences.

[8] See too *Harrison v Eversheds* [2017] EWHC 2594 (QB) where Slade J addressed the issue of reliance short of estoppel